REPORT

OF THE

COMMISSION OF INQUIRY

Consisting of

SHRI G. K. MITTER

Retired Judge of Supreme Court of India

Appointed as per Notification No. 44-E.C., dated the 22nd February 1973 by the Home Department of the Government of Orissa.

HOME DEPARTMENT

To

THE CHIEF SECRETARY TO GOVERNMENT OF ORISSA, BHUBANESWAR.

Sir.

I was appointed Commission of Inquiry as per notification No. 44-EC., dated the 22nd February 1973, read with G. O. No. 212-EC., dated the 12th May 1973, issued by the Home Department of the Government of Orissa. I enclose herewith my Report covering 320 pages excluding annexure. I have initialled beside the corrections made and the last line of each page.

I also enclose two unsigned spare copies in a separate cover.

G. K. MITTER
29-8-74

(Justice G. K. Mitter)

CHAPTER I

Introduction

On the 22nd February 1973 the Government of Orissa published a notification under Section 3 of the Commission of Inquiry Act, 1952 the full text of which is as follows :

HOME DEPARTMENT

NOTIFICATION

The 22nd February 1973

No. 44-E. C.—Whereas there has been persistent public criticism and criticism in the State Legislative Assembly with regard to the orders of the Government of Orissa granting rebate to Kendu Leaf purchasers and agents in the year 1970 and orders issued in 1971 renewing the agreements in favour of existing Kendu Leaf agents and purchasers on existing terms and conditions for the year 1972 without holding any public auction or without calling for fresh tenders ; and

Whereas during 1970, Shri R. N. Singh Deo was the Chief Minister and Shri Haraprasad Mohapatra was the Minister of Forest and criticism has been made that they abused their official position and power in issuing orders granting rebate in favour of some selected Kendu Leaf purchasers and agents ;

Whereas Shri Ainthu Sahu was the Minister of Forest in 1971 and allegations have been levelled that in gross abuse of his powers, he played an active role in formulating, finalising and executing the Government decisions regarding the renewal of agreements in favour of existing Kendu Leaf agents and purchasers for the year 1972 ; and

Whereas the State Government are of opinion that it is necessary to appoint a Commission of Inquiry for the purpose of making an inquiry into the above matters, which are definite matters of public importance.

Now, therefore, the State Government in exercise of the powers conferred under Section 3 of the Commission of Inquiry Act, 1952, do hereby appoint a Commission of Inquiry, consisting of Shri G. K. Mitter, Retired Judge of the Supreme Court of India, to inquire into, determine and report in respect of the following matters, namely :

1. (*a*) Whether the orders made by Government in 1970 granting rebate to purchasers and agents of Kendu Leaves, the implementation of which were subsequently kept in abeyance, were proper, lawful, *bona fide* and justified in the circumstances and whether the orders were in public interest ;

   (*b*) Whether the aforesaid orders would have resulted in loss of revenue, if implemented ;

   (*c*) Whether the procedure followed in granting the rebate was correct and proper.

2. (*a*) whether the renewal of agreements in 1971 in favour of the existing purchasers and agents for the year 1972 on existing terms and conditions without calling for fresh tenders and without giving any opportunity to intending traders to give their offers, was lawful, proper, *bona fide* and in public interest ;

   (*b*) Whether the State suffered any loss in revenue on account of renewal of agreements in the aforesaid manner ;

   (*c*) Whether the procedure followed for grant of renewal of agreements in favour of the existing purchasers and agents was correct and proper ;

   (*d*) Whether any undue favour or advantage was shown or given or received by any person or persons.

3. Whether the Ministers named earlier and/or any other person or persons committed any illegality, irregularity, impropriety and/or abused his or their official position and power in respect of grant of rebate to certain Kendu Leaf purchasers and agents in 1970 and/or in respect of grant of renewal of agreements in favour of all existing agents and purchasers for the year 1972 and whether by their acts or conduct or otherwise, they have put the State to financial loss and if so, the extent of their misdemeanour and responsibility.

WHEREAS the Government are of opinion that having regard to the nature of the inquiry to be made and other circumstances of the case, provisions of sub-section (2), sub-section (3), sub-section (4) and sub-section (5) of Section 5 of the Act should be made applicable to the Commission of Enquiry, Government direct that the aforesaid provisions shall apply to the Commission.

The Commission of Enquiry may also perform such other functions as are necessary and/or incidental to the inquiry.

The Commission shall make its report to the State Government within one year of this order.

The Commission shall have its headquarters at Bhubaneswar and may also visit such places as may be necessary in furtherance of the inquiry.

By order of the Governor

P. MISRA

Secretary to Government of Orissa

Pursuant to the notification I assumed office on the 16th May 1973 and directed the issue of notices (Annexure I) to all persons named in the said notification, the Government of Orissa through Home Department and to all other persons, offices, Departments, organisations acquainted with or concerned directly or indirectly or interested in the facts pertaining to the points under inquiry by public notice to appear before the Commission at Orissa Legislative Assembly Secretariat Compound on the 6th June 1973 either in person or through Counsel or authorised representatives when procedure of the Commission would be settled and such further directions as may be deemed necessary, be issued. No. person was to be allowed to take part in the proceedings in default of appearance on the said date except for good cause shown to the satisfaction of the Commission. The notification was directed to be published in the *Orissa Gazette* and in the Oriya dailies, e.g., "The Samaj", "The Matrubhumi", "The Prajatantra" and "The Swarajya" and in English Newspapers, e.g., "The Hindustan Standard", "The Statesman" and "The Amrit Bazar Patrika". The said notices were duly published as directed.

The State Government had, however, made certain amendments in the terms of reference to the Commission by notification dated the 4th June 1973. Incorporating the amendments introduced by the order of June 4, 1973 the notification of the Government constituting the Commission of Inquiry reads as follows :

GOVERNMENT OF ORISSA

HOME DEPARTMENT

NOTIFICATION

Dated, Bhubaneswar the 22nd February, 1973

No. 44-E. C.—(as amended by Home Department Notification No. 278-E. C., dated the 4th June 1973).

Whereas there has been persistent public criticism and criticism in the State Legislative Assembly with regard to the orders of the Government of Orissa granting rebate, concessions and exemptions to Kendu Leaf purchasers and agents during the period from the 1st April 1970 to the 31st March 1972 and orders issued in 1971 renewing the agreements in favour of existing Kendu Leaf agents and purchasers on existing terms and conditions for the year 1972 without holding any public auction or without calling for fresh tenders ; and

Whereas during 1970, Shri R. N. Singh Deo was the Chief Minister and Shri Haraprasad Mohapatra was the Minister of Forest and criticism has been made that they abused their official position and power in issuing orders granting rebate, concessions and exemptions in favour of some selected Kendu Leaf purchasers and agents ;

Whereas Shri Ainthu Sahu was the Minister of Forest in 1971 and 1972 and allegations have been levelled that in gross abuse of his powers, he played an active role in formulating, finalising and executing the Government decisions regarding the renewal of agreements in favour of existing Kendu Leaf agents and purchasers for the year 1972; and issued orders granting concessions and/or exemptions in favour of certain agents and purchasers ;

Whereas the State Government are of opinion that it is necessary to appoint a Commission of Inquiry for the purpose of making an inquiry into the above matters, which are definite matters of public importance.

Now, therefore, the State Government in exercise of the powers conferred under Section 3 of the Commission of Inquiry Act, 1952 do hereby appoint a Commission of Inquiry, consisting of Shri G. K. Mitter, retired Judge of the Supreme Court of India, to inquire into, determine and report in respect of the following matters, namely :

1. (*a*) Whether the orders made by Government during the period from 1st April 1970 to 31st March 1972 granting rebate, concession and exemptions in favour of certain Kendu Leaf agents and purchasers, including orders which were subsequently revoked, were proper, lawful, *bona fide* and justified in the circumstances and whether the orders were in public interest ;

   (*b*) Whether the aforesaid orders have resulted and/or would have resulted if implemented, in loss of revenue ;

   (*c*) Whether the procedure followed in granting the rebate, concessions and exemptions was lawful, correct and proper.

2. (*a*) Whether the renewal of agreements in 1971 in favour of the existing purchasers and agents for the year 1972 on existing terms and conditions without calling for fresh tenders and without giving any opportunity to intending traders to give their offers, was lawful, proper, bona fide and in public interest ;

   (*b*) Whether the State suffered any loss in revenue on account of renewal of agreements in the aforesaid manner ;

   (*c*) Whether the procedure followed for grant of renewal of agreements in favour of the existing purchasers and agents was lawful, correct and proper.

3. Whether the Ministers named earlier and/or any other public servant committed any illegality, irregularity, impropriety and/or abused his or their official position and power in respect of grant of rebate, concession and exemptions to certain Kendu Leaf

purchasers and agents during the period from the 1st of April, 1970 to the 31st March 1972 and/or in respect of grant of renewal of agreements in favour of all existing agents and purchasers for the year, 1972 and whether by their acts or conduct or otherwise, they have put the State to financial loss and if so, the extent of their misdemeanour and responsibility.

4. Whether any Minister or any public servant received any ilegal gratification and/or derived any pecuniary or other benefits in connection with the Kendu Leaf transactions of the period from the 1st April 1970 to the 31st March 1972.

Whereas the Government are of opinion that having regard to the nature of the inquiry to be made and other circumstances of the case, provisions of sub-section (2) sub-section (3), sub-section (4) and sub-section (5) of Section 5 of the Act should be made applicable to the Commission of Inquiry, Government direct that the aforesaid provisions shall apply to the Commission.

The Commission of Inquiry may also perform such other functions as are necessary and/or incidental to the inquiry.

The Commission shall make its report to the State Government within one year of this order.

The Commission shall have its headquarters at Bhubaneswar and may also visit such places as may be necessary in furtherance of the inquiry.

By order of the Governor

P. MISRA

Secretary to Government

CHAPTER II

Power of the Commission

As the inquiry is to be made under the Commission of Inquiry Act, 1952 and the rules framed thereunder it will be useful to scrutinise the same to define the powers of the Commission and the manner in which a Commission may execute the work entrusted to it. The most important provision is Section 3.

The relevant portion of Section 3(1) reads as follows :

> " The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People, or as the case may be, the Legislative Assembly of the State, by notification in the official gazette appoint a Commission of Inquiry for the purpose of making an enquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make an enquiry and perform the functions accordingly."

Under Section 4 the Commission shall have the powers of a Civil Court while, trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters namely :

(a) Summoning and enforcing the attendance of any person from any part of India and examining him on oath.

(b) Requiring the discovery and production of any document.

(c) Receiving evidence on affidavits.

(d) Requisitioning any public record or copy thereof from any court or office.

(*e*) Issuing Commissions for the examination of witnesses and documents.

(*f*) Any other matter which may be prescribed.

Section 5 lays down the additional powers with which the Commission may be vested.

Under Section 8 the Commission shall subject to any rules that may be made in this behalf, have powers to regulate its own procedure including the fixing of places and times of its sitting and deciding whether to sit in public or in private.

Under Section 12 (1) the appropriate Government may by notification in the official gazette make rules to carry out the purposes of this Act. Under sub-section (2) such rules may, without prejudice to the generality of the foregoing power provide for all or any of the following matters, namely :

(*a*) The term of office and the conditions of service of the members of the Commission.

(*b*) The manner in which enquiries may be held under this Act and procedure to be followed by the Commission in respect of the proceedings before it.

(*c*) The powers of Civil Court which may be vested in the Commision.

(*d*) Any other matter which has to be, or may be prescribed.

Rules were promulgated by Government of Orissa under Section 12 of the Act in November, 1967. Under Rule 7 the Commission shall as soon as may be after its appointment :

(*a*) Issue notice to every person who in its opinion should be given an opportunity of being heard in the enquiry to furnish to the Commission a statement relating to such matters as may be specified in a notice ;

(*b*) Issue a notification to be published in such manner as it may deem fit, inviting all persons acquainted with the subject-matter of the enquiry to furnish to the Commission a statement relating to such matters as may be specifide in the notice. Under sub-rule (2) every statement furnished under sub-rule (1) shall be accompanied by an affidavit in support of the facts set out in the statement sworn by the person furnishing the statement. Under sub-rule (3) every person

furnishing a statement under sub-rule (1) shall also furnish to the Commission along with the statement a list of documents, if any, on which he proposes to rely and forward to the Commission wherever practicable the originals or true copies of such of the documents as may be in his possession or power and shall state the name and address of the person from whom the remaining documents may be obtained. Under Rule 8 the Commission must examine all the statements furnished to it under Rule 7 and if after such examination the Commission considers it necessary to record evidence, it shall first record the evidence, if any, produced by the State Government and may thereafter record in such order as it may deem fit :

(a) The evidence of any person who has furnished a statement under Rule 7 and whose evidence the Commission, having regard to the statement considers relevant for the purpose of the enquiry;

(b) The evidence of any other person whose evidence in the opinion of the Commission in relevant to the enquiry.

Under Rule 10 the State Government, every person referred to in Rule 9 and with the permission of the Commission any other person whose evidence is recorded under Rule 8 :

(a) may cross-examine a witness other than a witness produced by it or him;

(b) may address the Court; and

(c) may be represented before the Commission by a legal practitioner or, with the consent of the Commission, by any other person.

Under Rule 11 the State Government may by a separate notification direct that all or any of the provisions of sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) of Section 5 of the Act shall apply to the Commission. Under Rule 12 the Commission shall have the power to regulate its own procedure in respect of any matter for which no provision is made in these rules.

The Notification of the 22nd February 1973 together with the amendment thereof by Notification dated the 4th June 1973 contained all the powers which the Commission of Inquiry was

vested with this case. At the first sitting on June 6, 1973 the Commission indicated that the parties would have to file their affidavits relating to the matters under Inquiry and indicate the documents on which they were relying, disclosing the same. The Commission did not indicate that it would record any oral evidence and no doubt if a case for examination of a witness had been made out at any stage or it appeared to the Commission that any part of the subject-matter of the Inquiry could not be properly disposed of without recording the oral evidence of any particular person it would have done so.

The affidavits on behalf of the State were all filed by one Shri A. K. Mohapatra, the Under-Secretary of the Forest Department of the Government of Orissa in 1973 who was not personally concerned with the facts of the case forming the subject-matter of the Inquiry. His affidavits were all based on the official records of the Forest Department of the Government. Almost all the documents came into existence when the named persons were Ministers of the State. Various files of the said Department and the judgements of the Supreme Court of India interpreting the K. L. Act and Rules were also quoted from in the said affidavits. In the counter-affidavits filed by the Ministers and the two public servants against whom affidavits were filed by the State Government, they did not make out a case with regard to any particular person to show that the truth or otherwise of a matter under inquiry could not be found out except by examining any person orally. The Government produced all the relevant documents in its possession and disclosed whatever documents were asked for by the respondents except the report of Shri I. C. Misra, Probe Committee and a few old files relating to several units of Kendu Leaves of previous years which the learned Advocate-General said they were unable to trace. The report of the Probe Committee was not considered by the Commission to be a relevant document as the Commission could not allow itself to be influenced thereby although it was alleged that the said Probe Committee had been constituted to examine some aspects of matters which were also the subject-matter of the enquiry before the Commission in asmuch as it is the duty of the Commission to examine all facts placed before it and come to its own conclusion uninfluenced by any finding of any other body. Apart therefrom it appeared that the said report was never accepted by the Government and no decision was ever shown to have been taken that Government officers or Ministers were to shape their conduct according to the said report or in any way guide themselves by it.

CHAPTER III

Preliminary directions regarding procedure, orders and proceedings before the commencement of the hearing.

At the first sitting of the Commission of June 6, 1973 the Advocate-General of Orissa appeared for the State along with three other Advocates. Other learned Advocates appeared for the first three respondents. One Shri A. C. Sharma, a Kendu Leaf purchaser filed his Memo. of appearance and was present in person.

After hearing the learned Advocates of the parties the Commission directed as follows :

(1) The Office of the Commission will be open on all State Government working days from 10-30 A.M. to 4-30 P.M. with half an hour's break at 1 P.M.

(2) The sitings will be open to the public and will be held on days notified and continue from day-to-day at the hours mentioned above.

(3) Parties will file their affidavits and copies of documents, in quadruplicate. The affidavits shall specify (1) which of the paragraphs are based upon the personal knowledge of the deponent, (2) which are derived from documents and (3) which are based upon information received. All such documents must be specified and the source of information on which averments are based, must be disclosed in the affidavit of the deponent.

(4) The State will file their affidavits in support of its case within a month from today mentioning the documents on which they rely after serving copies thereof on the respondent's Counsel. The respondents will be at liberty to ask for inspection within a week thereafter

of all such documents. In case objection is raised by the State to inspection of any of these documents by the respondents, the latter will be at liberty to file a petition before the Commission within 10 days of such objection. The affidavit of the State in opposition to the petition is to be filed within 10 days of the petition. The matter will be heard by the Commission on a date to be fixed. If there be no objection to inspection of documents by the respondents their counter-affidavits will be filed within 3 weeks after the inspection. In case of a petition being filed for inspection of documents by the respondents the latter will file their counter-affidavits within a month after the disposal of the petition.

In case the State makes allegations in the affidavits against public servants other than the three named Ministers, the Commission will issue notice to them forthwith and allow them to take copies of the State's affidavits. Such public servants will have the right to inspect documents similar to that given to the Ministers and to move petitions in case of refusal to offer inspection as mentioned above in the case of the Ministers. Such public servants will be entitled to file counter-affidavits within three weeks after receiving notice from the Commission or within a longer time as may be fixed by the Commission on application made for extension of time.

In view of the amendment in the terms of reference to Commission by the Government notification dated June 4, 1973, the Secretary was directed to issue further notification incorporating the amendment in the Commission notification dated the 16th May 1973 and get the same published in the Oriya language in the *Samaj*, the *Prajatantra*, the *Matrubhumi* and the *Swarajya* and in the English language in the *Hindusthan Standard*, the *Amrit Bazar Patrika* and the *Statesman*.

On the 3rd July, 1973 one Shri Pabitra Mohan Pradhan, an ex-Minister of the State of Orissa filed a petition expressing his desire to intervene and intention to file an affidavit within 10 days. On July 4, 1973 the Advocate-General on behalf of the State filed a petition asking for time till the 31st July 1973 to file the State's affidavits. This was objected to by the respondents. The Commission allowed the State time to file affidavits by the 23rd July, 1973 against the three originally

named respondents and also against Shri S. Sundararajan, Shri Arjun Satpaathy, who had for sometime acted as the Secretary and Under-Secretary of the Forest Department. On July 23, 1973 the State Government filed five affidavits against the said persons and also filed lists of documents relied upon by the State. A sealed trunk said to contain the relevant documents was deposited at the office of the Commission and a memorandum was filed on behalf of the State stating that the State had no objection to inspection of the documents by the respondents. Shri Pabitra Mohan Pradhan also filed his affidavit on that day.

As the State Government filed affidavits making allegations against two public servants namely Shri S. Sundararajan and Shri Arjun Satpathy notices were issued to them and in response thereto they entered appearance on the 25th of July 1973, the 30th July 1973, respectively and received copies of affidavits filed against them.

Shri Arjun Satpathy commenced inspection of the documents on the 3rd August 1973 and finished it on the 18th August 1973. Shri Sundararajan commenced inspection on the 6th August 1973 and finished it on the 8th August 1973 after his prayer, dated the 28th July 1973 for production of certain documents not disclosed by the Government and other than those not relied upon by the State was rejected.

The first three respondents were not prompt either in commencing the inspection or in bringing the same to a close. They started inspection only on 10th August 1973. On the 17th August 1973 they filed a memorandum containing a list of documents for disclosure by the State with a prayer that they would recommence inspection only after the orders of the Commission was passed on their memorandum. The Commission passed orders on the 19th August, 1973 directing the disclosure of all documents referred to in the State's affidavits and directed that the application for inspection of other documents would be dealt with and decided after the said respondents filed their counter-affidavits. The respondents were directed to file their counter-affidavits by the 4th September 1973 in place of the original date fixed for the purpose. The State Government filed a number of documents of which discover had been ordered on the 23rd August 1973.

The first three respondents filed a writ petition before the High Court of Orissa on August 28, 1973 and prayed *inter alia,* for quashing certain orders of the Commission regarding discovery and inspection and for directing the State to disclose

various documents of which discovery had not been directed by the Commission and to allow them at least six weeks' time to file their counter-affidavits after the completion of inspection by them. On September 4, 1973 the High Court made an interim order granting stay of the order of the Commission regarding filing of counter-affidavits before the Commission by September 4, but this was not to preclude the applicants from continuing inspection of the State's documents. On the 11th September 1973 when the writ application came up for hearing before the High Court, the same was withdrawn by the applicants. The High Court observed that inasmuch as the date for filing counter-affidavits had already gone by the petitioners would be at liberty to make applications before the Commission for further extension of time.

An application to that effect was filed by the said three respondents on the 12th September 1973 and was disposed of at a sitting of the Commission on the 22nd September 1973 by extension of time for filing counter-affidavits till 22nd October 1973 and direction on the State to file rejoinders to the counter-affidavits by the 10th of November, 1973. So far as discovery of documents by the State was concerned it was noted that the State had disclosed all the documents with the exception of the report of Shri I. C. Mishra, Probe Committee which according to the Commission the State was not required to discover. In the meanwhile, Shri S. Sundararajan filed his counter-affidavit on the 4th September 1973 and Shri Arjun Satpathy was allowed to file the same on the 7th September 1973, the delay in filing the same being condoned. The first three Respondents filed their counter-affidavits on the 22nd October 1973.

On the 5th November 1973, the first three respondents again filed a petition asking for direction on the State Government to produce documents listed in Annexures 1—3 to the memorandum for their inspection, basing their claim *inter alia,* on an earlier observation of the Commission that documents not mentioned in the State's affidavits may be ordered to be discovered after the filing of the counter-affidavits. This observation had been made inasmuch as the Commission could only examine their relevance by looking at the counter-affidavits filed. This was disposed of on the 17th November 1973 after hearing Counsel on both sides by the Commission directing the State to disclose documents forming items 5 and 25 of Annexure 1 and item 11 of Annexure 2 to the petition, dated the 5th November 1973 after Counsel for the

despondents furnished particulars with regard thereto which they were required to do by the 20th November 1973. The disclosure by Government was to be made by the 27th November 1973. The production of the report of Shri I. C. Mishra, Probe Committee, was not ordered as not being material. On the 16th November 1973 the respondents filed a petition stating that due to nonavailability of certain documents in the costody of the State they had not been able to give proper replies in their counter-affidavits and that they should have eight weeks time to file supplementary counter-affidavits after the State disclosed the documents asked for. On the 17th November 1973, the Commsision directed the State to file rejoinder by the 23rd November 1973.

At its sitting on the 17th November 1973, the Commission rejected the prayer for filing supplementary counter-affidavits and notified that the hearing would begin on the 17th December 1973 and continue till the 24th December 1973 in the first spell. The order rejecting the above prayer though made on the 17th November 1973 was by some mischance not recorded on that date. This was rectified by an order of the 28th November 1973.

On the 3rd December 1973 the three ex-Minister respondents filed an application for oral examination of on less than fifteen persons on the ground that the subject-matter of enquiry could not be properly disposed of without the evidence of the said persons. Of these the first three were—(1) Dr. B. N. Misra, ex-Legal Remembrancer of the State, who was said to have examined the question of renewal of agreements in 1971 and given his opinion regarding the same on the 10th September 1971, the 19th October 1971 and the 6th December 1971, (2) Shri R. C. Misra, ex-Advocate-General of the State, who had also given his opinion on the same matter on the 12th September 1971 and (3) Shri Niren Dey, Attorney-General of India, who was said to have been consulted by Dr. B. N. Misra in October, 1971. The other persons proposed to be examined included, (4) Shri Biswanath Das, ex-Chief Minister, who was said to have passed final orders of renewal of the agreements in favour of agents and purchasers on the 29th August 1971, (5) Shri I. C. Mishra, Retired District Judge, who had submitted his report on the Kendu Leaves Committee appointed by the Government, (6) Shri Murari Prasad Mishra, ex-Forest Minister of the State and (7) Shri Anirudha Das, Retired Secretary of the Orissa Government. Besides the above, some ex-Divisional Forest Officers of Bolangir, Rairakhol, Deogarh and Khariar Divisions

were also proposed to be examined. Lastly, three agents of units 82-A, 82-B, 82-C and 54 and purchasers of units 6, 47, 48-A and 82-A were cited as witnesses.

On the same date another application was presented to the Commission for a direction on the State Government to produce 9 files of documents in their custody. A third application was presented on the 5th December 1973 by the respondent Shri Ainthu Sahu alone for oral examination of Shri D. N. Choudhury, Chief Conservator of Forests of the State of Orissa on the ground that he would be able to speak about the trend of discussions at a meeting attended by him on the 4th August 1971 and disclose the facts which were within his personal knowledge relating to the minutes of the said meeting in the Chamber of the Minister, Forest in the Assembly Building attended by a large number of persons when certain policy decisions were said to have been arrived at. The State filed an objection to the petitions with regard to the summoning of witnesses on the ground that they would not be material witnesses and their evidence would not be relevant in determining the issues raised in the enquiry. As regards Dr. B. N. Misra and Shri R. C. Mishra it was said that they had given their opinions in writing and the same had already been disclosed. So far as the Attorney-General of India was concerned, it was said that he had declined to express any opinion unless permitted by the Government of India in the Ministry of Law to do so as would be apparent from the file notings of Dr. B. N. Misra himself. It was also said that Shri Niren Dey did not give any opinion in the matter. As regards Shri Biswanath Das, ex-Chief Minister, it was said that his order passed on the 29th August 1971 was also on record. So far as Shri I. C. Misra was concerned it was said that the report of the Committee headed by him had not been accepted by the Government and that in any event an application for production of the said report had already been disallowed by the Commission. As regards Shri Murari Prasad Mishra it was said that he had passed some orders in 1969 which were also on record. Shri Anirudha Das was said not to have been connected with the Forest Department during the relevant period in any capacity and that there was no reference to him in any of the Government affidavits or in the affidavits of the respondents on on the issues arising in the case. The ex-D. F. Os. of Bolangir, Rairakhole, Deogarh and Khariar were also said not to be material witnesses and the reports submitted by them were on record disclosed by the State and had been duly inspected by the respondents. So far as the agents and purchasers of the units

mentioned were concerned their applications were also said to be on record ; it was said that the same had been produced by the State and the State was prepared to file a paper book containing the necessary applications and as such their oral testimony was not necessary.

With regard to the discovery of the further documents asked for, the Advocate-General stated that the State had already disclosed all the files barring a few mentioned in the memorandum of the respondents which were available with the Government and the remaining would be produced as soon as found.

With regard to the application by Shri Ainthu Sahu for the examination of Shri D. N. Choudhury it was said that he was not a material witness and his oral testimony would not be relevant inasmuch as the decision arrived at in the meeting held in the Chamber of the Minister Shri Ainthu Sahu on the 4th August 1971 had been recorded in the Government file and quoted *in extenso* in the State's affidavit, it was also said that the minutes of the proceedings had been placed before the Minister Shri Ainthu Sahu on the 10th August 1971 and his order bearing the said date had been quoted in the Government affidavits.

The Commission directed the hearing of these petitions on the 17th December 1973 before the commencement of the hearing of the enquiry.

On the 14th December 1973 the three first named respondents filed a writ petition before the Calcutta High Court praying for various orders namely :

(1) Directing the State of Orissa to produce files and documents referred to paragraph 23 of the petition (files of several Kendu Leave units and the report of Shri I. C. Misra Committee) ;

(2) Directing the State to produce the report of Shri I. C. Misra, Probe Committee ; and

(3) (a) Disposing of the application of the petitioners for summoning witnesses as per copy forming annexure to the petition.

(b) A writ of/or in the nature of Mandamus commanding the Commission of Inquiry not to proceed further with the enquiry until the documents mentioned above had been produced and the witnesses named had been summoned ;

(c) A writ of/or in the nature of Cartiorari commanding the Commission to certify and to transmit the records of the proceedings of the enquiry before the High Court of Calcutta so that conscionable justice may be administered therein by quashing *inter alia*, the orders of the Commission, dated the 17th November 1973 and the 1st December 1973.

The High Court did not pass any interim order and directed the petitioners to serve copies of the application on the respondents fixing the date for hearing on the 21st December 1973.

The hearing of the Commission was not taken up on the 17th December 1973 in view of the pendency of the writ petition before the Calcutta High Court. The Commission directed that if no orders of injunction restraining the proceedings from being proceeded with was passed by the Calcutta High Court on the 21st December 1973 the Commission would proceed with the matters which had been fixed for hearing on the 17th December 1973 within a week, i.e., the 24th December 1973.

The High Court of Calcutta passed no order of stay or injunction on the 21st December 1973.

On the 24th December 1973 the Commission disposed of the pending applications. The Counsel for the Ministers pressed for examination of five persons only, out of the fifteen persons mentioned in the application dated the 3rd December 1973. After hearing Counsel of both sides this was rejected. A similar application of Shri Ainthu Sahu dated the 5th December 1973 was also rejected. There was another application filed by Shri S. Sundararajan to summon the first two named witnesses of ex-Ministers' respondents, and third Assistant Financial Adviser of the Forest Department. This was also rejected. It is necessary to note that the respondents failed to make out any proper ground for doing so. They also made a bald statement that their evidence would be material. The State's objection to the examination of the named persons have already been noted. The respondents failed to show how the evidence of Dr. B. N. Misra or Shri R. C. Misra or Shri B. N. Das was at all necessary inasmuch as their views had already been quoted in the Government affidavits and their was no ambiguity therein which called for explanation. So far as the Attorney-General of India was concerned it was Dr. Misra's statement that he had not

given any written opinion but had indicated his views orally on Dr. Misra stating the facts of the case to him. Shri Niren Dey, the Attorney-General of India, had been approched long after the orders which were the subject matter of the enquiry, had been made by Shri Ainthu Sahu and his view could only support the view of the Legal Remembrancer or the Advocate-General or go against them. In any event such view would be *ex post facto* and could not have influenced Shri Ainthu Sahu when he passed a general order for renewal of all agreements. So far as the Chief Conservator of Forests was concerned the minutes of the meeting of 4th August 1971 did not impute anything to him and the State's complaints was substantially based on the views of Shri S. Sundararajan, the Secretary and the action of the Minister Shri Ainthu Sahu directed thereafter.

With regards to the application of the respondents for further discovery it was stated that out of nine documents, five had already been disclosed. The Advocate-General stated that others were not traceable and he undertook to file an affidavit to that effect before the next date of hearing. The Commission directed the Advocate-General to hand over copies of the draft issues to be proposed by him to the respondents within three days from the date of the order. The Commission directed that the issues would be settled on the 7th January 1974 and the hearing would proceed after such settlement. At a sitting on the 7th January 1974, five separate sets of issues regarding the five respondents were settled. They are as follows :

SHRI R. N. SINGH DEO

1. (a) Were the orders in the appended schedule made by the Minister lawful ?

   (b) Did they affect the revenues of the State ?

   (c) Was it necessary to consult the Finance Department prior to the making of the said orders or obtain the approval of the Cabinet thereto ?

   (d) Were the said orders not in accordance with the agreements executed by the purchasers and Agents ?

   (e) Were the grants of rebates and concessions provided for in the K. L. Act & Rules ?

   (f) Were the orders made without examination of legal aspect by the Legal Advisers of the State ?

2. Were the said orders proper or made *bona fide* or justified in the circumstances of the cases ?

3. (a) Did the said orders result in loss of Government revenue ?

   (b) Was any loss caused to Government even after revocation of the orders on the 6th January 1971 ?

   (c) Would the said orders have resulted, if implemented, in loss of revenue ?

4. Was the procedure followed in the matter of grants of rebate, concessions and exemptions lawful, correct and proper ?

5. Did the Minister abuse his power or commit any illegality, irregularity or impropriety in respect of grant and concession approved by him as Chief Minister by his order the 19th November 1970 and in regard to the renewal of the agreements by his order dated the 25th August 1971 when acting as Minister, Political and Services Department.

SCHEDULE OF ORDERS

(a) Order dated the 19th November 1970 granting rebate in purchase price in favour of purchasers of Units 6, 6-A, 47, 47-A, 48-A, 54 and 54-A and concessions to the agents of the said units.

(b) Order dated the 19th November 1970 granting concessions to purchasers of Units 1, 82-A, 82-B and 82-C.

(c) Order dated the 19th November 1970 allowing concessions to the agent of Unit 55-A.

SHRI H. P. MOHAPATRA

1. (a) Were the orders in the appended schedule made by the Minister lawful ?

   (b) Did they affect the revenues of the State ?

   (c) Was it necessary to consult the Finance Department prior to the making of the said orders or obtain the approval of the Cabinet thereto ?

(d) Were the said orders not in accordance with the agreements executed by the Purchasers and Agents ?

(e) Were the grants of rebates and concessions provided for in the K. L. Act & Rules ?

(f) Were the orders made without examination of the legal aspects ?

2. Were the said orders proper or made *bona fide* or justified in the circumstances of the case ? Were they in accordance with past precedents ?

3. (a) Did the said orders result in loss of Government revenue ?

(b) Was any loss caused to Government even after the order of revocation dated the 6th January 1971 ?

(c) Would the said orders have resulted, if implemented in loss of revenue ?

4. Was the procedure followed in the matter of grants of rebate, concessions and exemptions lawful, correct and proper ?

5. Did the Minister abuse his power in respect of the grants, concessions etc., by his orders, dated the 6th November 1970, the 7th November 1970 and the 6th April 1970 ?

SCHEDULE OF ORDERS

(a) Order dated the 6th November 1970 granting rebate in purchase price in favour of purchasers of Units 6, 6-A, 47, 47-A, 48-A, 54 and 54-A and concessions to the agents of the said units.

(b) Order dated the 7th November 1970 granting concessions to purchasers of Units No. 1, 82-A, 82-B and 82-C.

(c) Order dated the 7th November 1970 allowing concessions to agent of Unit 55-A.

(d) Order dated the 7th April 1970 reducing original stipulation for procuring in Unit No. 104.

SHRI A. SAHU

1. (a) Was the procedure followed in renewing the agreements for the year 1972 legal or proper ?

(b) Was the opinion of Law Department taken regarding the rights of the agents and purchasers prior to such renewal ?

(c) Was it necessary to consult the Finance Department in regard thereto ?

(d) Were renewals of agreements granted to purchasers of units with adverse remarks against them ?

(e) Were the orders of renewal made on existing terms and conditions without fresh tender and without giving any opportunity to intending traders ?

2. Were the orders for renewal made *bona fide* and/or in public interest ?

3. Did Shri Sahu as Minister of Forest abuse his official power and position in the matter of renewal of the said agreements ?

4. Did the orders relating to renewal of agreements with agents and purchasers cause any loss of revenue ?

5. (a) Were the orders of Shri Sahu as Forest Minister granting concessions and exemptions in favour of agents of Units 82-A, 82-B, 82-C, 70, 70-A, 68-A, 64, 66 and 53-A between August, 1971 and February, 1972 lawful or proper ?

(b) Were they made *bona fide* and/or in public interest ?

6. (a) Were the orders made between August, 1971 and February, 1972, waiving the realisation of interest from purchasers of Units 1, 82-A, 82-B, 82-C, 6, 6-A, 47, 47-A, 48-A, 54 and 54-A lawful or proper ?

(b) Were they made *bona fide* and/or in public interest ?

7. Did the orders granting concessions to agents and purchasers cause any loss of revenue ?

8. Was the procedure followed in granting such concessions lawful or proper ?

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SHRI S. SUNDARARAJAN

1. (a) Was the procedure followed in renewing agreements for the year 1972 legal or proper ?

(b) Was the opinion of Law Department taken regarding the rights of the agents and purchasers prior to such renewal ?

(c) Was it necessary to consult the Finance Department in regard thereto ?

(d) Did Shri S. Sundararajan make any recommendation in August and September, 1971 for renewal of the agreements on existing terms and conditions ? If so, was the same legal, proper, *bona fide* and in public interest ?

2. Did the recommendation, if any, accepted by Government cause any loss of revenue ?

3. Did Shri Sundararajan abuse his legal position and power in making the said recommendations ?

4. (a) Were the recommendations by Shri Sundararajan made between August, 1971 and February, 1972 for granting concessions to agents of Units 68-A, 64, 66 and 53-A and exemptions in favour of agents of Units 82-A, 82-B, 82-C, 70, 70-A, 68-A, 64, 66 and 53-A lawful and *bona fide* or in public interest ?

(b) Was the procedure followed in regard to the above lawful and proper ?

5. Were the recommendations made in February, 1972 for waiving realisation of interest from purchasers of Units 1, 82-A, 82-B, 82-C, 6, 6-A, 47, 47-A, 48-A, 54 and 54-A lawful and *bona fide* or in public interest ?

6. Did the said recommendations for grant of concessions and exemptions cause any loss of revenue ?

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SHRI A. SATPATHY

1. Did Shri A. Satpathy in making recommendations for granting rebate in purchase price in favour of purchasers of Unit Nos. 1, 82-A, 82-B, 82-C, 6, 6-A, 47, 47-A, 48-A, 54 and 54-A and for granting concessions and exemptions in favour of agents of Units 6, 6-A, 47, 47-A, 48-A, 54, 54-A, 82-A, 82-B, 82-C, 68-A, 64, 66 and 53-A in between the 1st April 1970 and the 31st March 1972, commit any illegality or impropriety and/or abuse his official position ?

2. Whether the procedure followed in the matter of grant of rebates, concessions and exemptions was lawful, correct and proper ?

3. Whether in making recommendations for renewal of agreements of the existing agents and purchasers for the year 1972, Shri A. Satpathy committed any illegality, impropriety and/or abused his official power or position ? Did he recommend renewal on existing terms and conditions ?

4. Whether in recommending waiver of realisation of interest from the purchaser of Units 1, 82-A, 82-B, 82-C, 6, 6-A, 47, 47-A, 48-A, 54 and 54-A, Shri A. Satpathy committed any illegality, impropriety and/or abuse his official power or position ?

5. Whether the recommendations mentioned above put the State to financial loss and if so, what is the extent thereof ?

CHAPTER IV

Preliminary objections raised at the hearing

Shri R. Mohanty, Counsel for Shri R. N. Singh Deo and Shri H. P. Mohapatra argued that the subject-matter of inquiry was not one of definite public importance. Shri Mohanty referred to the English Act (Tribunals of Inquiry) (Evidence) Act, 1921 on which the Indian Act was modelled and submitted that in England the Act was set in motion only in times of national crisis of confidence. He also referred to Administrative Law by Wade pp. 252-3 and on the basis thereof submitted that as the object of a Commission should be to find out and lay down certain principles for the guidance of the Government the acts attributed to the ex-Ministers having been committed about three years back and the trade itself having been nationalised in the meanwhile the findings of the Commission would be of no assistance to any future Government. Counsel urged further that as it had been averred by the Government that the rebates granted by orders of Shri Singh Deo had been revoked and the State had recovered from the purchasers the benefits which they had received thereby there was no purpose behind raking up the past. Besides the orders it was argued applied only to a few out of 180 units into which the Kendu Leaf areas were divided and as such their impact, if any, on the trade as a whole was only marginal and the inquiry could not be described as a definite matter of public importance.

Shri Mohanty submitted that there was really no case for his client to answar inasmuch as (1) the affidavit of the State did not particularise the acts of his client which were *mala fide* and (2) no one had affirmed an affidavit in rejoinder to the counter-affidavit filed by his client to controvert the assertions made by his client.

There is no substance in either limb of the submission. On the first point it is only necessary to point out that the gravamen of the State's charge against his client and others was

that they they had acted wrongfully and illegally as mentioned in varous paragraphs and in particular paragraphs 19 to 19(e) of the affidavit which are common to the cases of Shri Singh Deo and Shri Mohapatra and are dealt with more fully later. The second point can be disposed of on the basis that the State's charges are set out in great detail in their affidavit filed in the first instance basing the complaints on the original records and it was for Shri Singh Deo to meet or explain away the same and the State was only called upon to controvert, if at all, such statements in the counter-affidavits which needed a rebuttal. As the case of the State is not based upon any oral statement of any body the question of controverting any statement in the counter-affidavit by way of rejoinder to show that the statements in the original affidavit ought to be accepted in preference to the contradictory statement in the counter-affidavit, does not arise. The State's case as laid in the affidavit sought to be supported by the official records of transactions which took place when Shri Singh Deo was the Chief Minister and Shri Mohapatra was the Forest Minister must be judged on its intrinse merit if not explained away by the counter-affidavit.

On behalf of Shri A. Sahu, it was stressed particularly that as the Kendu Leaf Trade had been nationalised in 1973 the inquiry ceased to have any importance at all.

Two decisions of the Supreme Court of India have put the matter beyond any controversy so far as the propriety of appointing a Commission of Inquiry in a given case are concerned. In [Shri R. K. Dalmia—V—Shri Justice S. R. Tendolkar and others (1959 S. C. R. 279)] it had been argued on behalf of the appellant that "the act and conduct of individual persons could never be matters of public importance". In that case the notification under the Act showed that inquiries were to be made into the acts and conduct of some members of the Dalmia family and their associates with regard to allegations of gross irregularities in the management of several Companies causing loss to the investing public. In rejecting the contention of the appellants the Court gave illustrations of what might constitute matters of definite public importance, e. g., villagers cutting bunds for taking water to their fields in dry season which might cause floods during the rainy season, failure of a big bank resulting in the loss of life savings of a multitude of men as also the conduct of a person in charge and management thereof, the *modus operandi* of dacoits and thus notorious for their cruel depredation and

observed that their was "no warrant for the proposition that a definite matter of public importance must mean only some matter inviting public benefit or advantage in the abstract, e. g., public health, sanitation or the like or some public evil or prejudice, e. g., floods, famine, pestilence or the like." It was said "quite conceivably the conduct of an individual person or Company..... may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well being as to make such conduct a definite matter of public importance calling for a full inquiry."

In State of J. & K.—*V*—Baksi Ghulam Muhumed (AIR. 1967 S. C. 122) it was argued on behalf of the respondent that there was no matter of public importance to be inquired into as (1) at the date of the notification the respondent did not hold any office, (2) there was no evidence of public agitation in respect of his conduct, and (3) the object of the inquiry was to collect evidence for prosecution of the respondent. The Court rejected all the pleas observing *inter alia,* "what is to be inquired into in any case are necessarily past acts and it is because they have already affected the public well-being or their effect might do so, that they became matters of public importance. It is irrelevant whether the person who committed those acts is still in power to be able to repeat them. The inquiry need not be into his capacity to do again what he has already done and it may well be into what he has done.....His (the Minister's) resignation from office cannot change that character. A Minister of course, holds a public office. His acts are necessarily public acts if they arise out of his office. If they are grave enough they would be matters of public importance"....."It is of public importance that public men failing in their duty should be called upon to face the consequences. It is certainly a matter of public importance that lapses on the part of a Minister be exposed. The cleanliness of public life in which the public should be vitally interested, must be a matter of public importance. The people are entitled to know whether they have entrusted their affairs to a worthy man". The Court added "We are unable to agree that a matter cannot be of public importance unless there is public agitation ever it. The public may not be aware of the gravity of the situation. They may not know the facts." Further, "whether a matter is one of public importance or not has to be decided essentially from its intrinsic nature. If a matter is intrinsically of public importance it does not cease to be so because the public did not agitate ever it."

On behalf of Shri A. Sahu it was further submitted that there had been debates in the Legislative Assembly from time to time and a statement was made by his client on the floor of the Assembly on January 10, 1972 to which no exception was taken and therefore, it should be held that so far as the acts and conduct of his client were concerned, the matter had been laid to rest in the Assembly and a succeeding Government could not rip up the past. The Commission finds itself unable to take the above view. The Commission was not informed about the facts which were placed before the members of the Assembly, the nature of the discussions which had taken place or what conclusion was arrived at. In any event even if the majority of the members of the Assembly present were satisfied with the explanation given by the Minister in 1972 there is nothing to prevent a succeeding Government to delve into the past and order an inquiry when the charge against him is that he acted unlawfully. It is only when a Minister's wiew is adopted by the Council of Ministers and action follows such adoption that a Minister cannot be singled out for an inquiry for the action is one for which the whole Council is responsible.

A further point was urged, namely that the notification was vague in that there was a reference to what would have been the loss of revenue if the order of the Chief Minister Shri Singh Deo granting rebates and concessions had been implemented. It was said that as the State's affidavit shows that the parties who had received benefits under the said orders had been made to repay amounts representing benefits received by them the reference was purely of academic interest. This again is without any substance as the realisations were made by orders of a succeeding Government which meant that the loss caused by the acts of Shri Singh Deo had not been sought to be made good during his regime. Moreover, this does not take away from the plea that Shri Singh Deo's order had caused loss. Besides the entire amount of loss sustained by the State under the impugned orders was not made good. According to the State's affidavit the loss caused to the State by the orders of Shri Singh Deo and Shri Mohapatra exceeded Rs. 40 lakhs while similar orders of Shri Sahu caused loss exceeding Rs. 6 lakhs. Of the sum of Rs. 40 lakhs the major part exceeding Rs. 36 lakhs was recovered while the loss alleged to have been caused by Shri Sahu's orders was never made good.

Counsel for Shri A. Sahu also raised a point about the validity of the amending notification of the 4th June 1973. It was argued that as the notification of February, 1973 was made at a time when the State Legislative Assembly was functioning and the said notification had been placed before the Assembly, it was imperative that after the general election of 1974, the amending notification made at a time when the Assembly stood dissolved, i.e., in June, 1973 should have been placed before the new Assembly which met in March, 1974. This has no merit. As the notification of February, 1973 was amended by an order of the Governor in June, 1973 and the Commission was functioning in pursuance of the amended notification there was no need to place the amending notification before the new Assembly. It was open to the Government of Orissa, if it was so minded to withdraw the notification after the General Election but no such step was mooted or taken.

Two more preliminary points raised on behalf of Shri A. Sahu may be noted. These were :

(1) There was discrimination practised against Shri A. Sahu in that the notification was not directed against Shri Biswanath Das, who was the Chief Minister of Orissa in September, 1971 when the orders for renewal of agreements was made although he had approved of the policy relating thereto whereas in the earlier case of Shri Mohapatra, the Forest Minister, the then Chief Minister Shri Singh Deo was also impleaded in the notification inasmuch as he had approved of the grant of rebates and concessions. This point can be disposed of after the facts have been examined and will be dealt with later in detail. Suffice it to say that even if there was such discrimination the matter should have been the subject-matter of a petition under Article 226 of the Constitution to a High Court and the Commission cannot grant any relief on that basis.

2) The setting up of the Commission of Inquiry is not *bona fide* but is politically motivated with the object of destroying the fair name of the respondents.. This point can be disposed on the basis of the judgement of the Supreme Court in Bakshi Ghulam Mohammed's case. When the allegations

are that by their improper acts certain Ministers have caused heavy losses to Government a succeeding Government is entitled to have the matter inquired into to find out whether the allegations are true. If the inquiry which follows shows that the acts of the Ministers were improper or unlawful they cannot raise the plea that their image before the public will be tarnished by the inquiry. So far as the Commission is concerned, it can only record whether the allegations made and the facts proved establish that there was some matter of definite public importance which required to be inquired into. How the inquiry will affect anybody whose conduct is to be enquired into is not a matter for the consideration of the Commission. Reference may also be made to the decision of the Supreme Court in K. B. Sahay and others—*V*—Commission of Inquiry and others A. I. R. 1969 S. C. 258 where it was observed "When a Ministry goes out of office, its successor may consider any glaring charges and may, if justified, order an inquiry. Otherwise, each Ministry will become a law unto itself and the corrupt conduct of the Ministers will remain beyond scrutiny."

CHAPTER V

Principles to be followed by the Commission in the investigation into the acts and conduct of the persons arrayed as respondents before it and the standard of proof.

Inquiries under the Commission of Inquiry Act have been so common and so widespread that there is no dearth of dicta of learned judges functioning as the Commission of Inquiry regarding the way in which a Commission is to proceed and how it should arrive at its conclusion. In his report on the inquiry in the case of Sardar Pratap Singh Kairon (a Chief Minister who was in office at the time of the inquiry), Shri S. R. Das (a former Chief Justice of India) laid down two cardinal principles which should govern all such inquiries, namely—

(1) an individual must be presumed to be innocent until the contrary is proved beyond reasonable doubt by dependable evidence fully given and publicly ascertained or by the irresistible probabilities of the case; and.

(2) no individual shall be condemned on suspicion however strong.

Counsel for the respondents referred to reports of various other Commissions like that of Justice Mudholkar, Justice Mulla and Justice Velu Pillai. The Commission does not feel it necessary to examine the principles formulated in those reports as the facts in those cases do not afford a close parallel to the facts before it.

Counsel for Shri Sahu relied particularly on Chapter 5 of the Report of Mr. Justice H. R. Khanna who constituted the Commission of Inquiry into the conduct of a number of Ministers of the State of Orissa. It is necessary at the outset to bear in

mind the nature of the enquiry in connection wherewith Mr. Justice Khanna made his observations. The notification in that case showed that not less than fifteen Ministers were charged with having committed various acts of malfeasance, misfeasance, misappropriation, fraud, negligence, favouritism, nepotism, etc. and abuse of their official position for securing pecuniary and other benefits for themselves.

Mr. Justice Khanna observed that the approach in an inquiry like this, has necessarily to be that it is the State Government upon whom should lie the onus to prove and to substantiate the charges that it has levelled against the respondents. In order to come to the conclusion as to whether the charges have or have not been proved, the Commission would have regard to the documentary evidence, supplemented as it is by affidavits and the other material on record, taken in the context of all the surrounding circumstances. The quantum of proof in order to carry conviction has necessarily to be the same as is required in a case in a Court of Law."

His Lordship observed that another guiding principle which should not be lost sight of is "that the Commission would not impugn the acts of the respondents which were within their competence and were not vitiated by *mala fide* intention or actuated by ulterior motive. The Ministers in order to carry on day to day administration have to take a large number of decisions. The Commission would not go into the question as to whether those decisions are right or wrong. It is only concerned with the question as to whether those decisions were *male fide* or made with ulterior motive or of personal gain. As long as the decisions of the respondents pertain to matters which lay within their jurisdiction and are not shown to be *mala fide* or motivated by extraneous consideration, those decisions would be immune and not liable to be assailed in the proceedings. The proper forum for criticising the Ministers is the legislature or the Press or the public platform. Some of the Ministers have indeed to pay a heavy price for their mistakes even though they were committed in good faith and were the result of error of judgement. This Commission is not concerned with such mistakes. What it is concerned with is whether a particular act or ommission of the respondents was the result of a *mala fide* intention or oblique motive."

Further "a Minister in a given situation to put the thing a little differently can act in a variety of ways. A number of possible lines of action are open to him and he may choose one of them according to the best of his judgement. In respect of some of the decisions it may be difficult for a Minister after lapse of some time to give full facts constituting the justification of the decision. All that he may say is that he acted according to the best of his judgement and his explanation in this respect would have to be accepted unless it is shown that there was some bias, personal interest or other ulterior reason which motivated his decision. In such a contingency his decision would be vitiated by *mala fide*. Except for such a contingency, the Commission would not go behind the decision of the Minister and question its correctness. The Commission does not act as a Court of appeal or a super body to express opinion and pass verdict on the correctness of the various decisions of the respondents."

The various tests laid down in these reports show that much will depend on the nature of the charges levelled against the Ministers. It is beyond doubt that if a Minister acts within the bounds of law, i.e., within his jurisdiction his acts cannot be said to be *mala fide* unless it is demonstrated that he acted in a particular way because of some improper motive, bias, etc. If a Minister was acting within his jurisdiction good faith will be presumed and it will be for anyone who challenges the same to bring forward such facts as will irrestibly lead to an inference of bad faith.

Broadly speaking the principles to be followed on the facts as presented before this Commission in addition to those formulated by Shri S. R. Das in the Kairon case are as follows :—

(1) If a Minister is charged with having committed acts of nepotism or favouritism or having made personal benefit for himself or allowed others to reap such benefit there must be unimpeachable evidence to show that his conduct was so tainted as to establish that illicit gain for himself or his friends or relatives or associate was the motive which impelled him to take that particular line of action before the charge can be held to be proved. In the last mentioned class of cases the charges would be analogous to criminal charges and would have to be dealt with accordingly. In other words, the benefit of any doubt would go to the person charged and the conclusion as to guilt

arrived at on the principle that the evidence pointed to one conclusion only, namely, that the person charged with improper conduct had acted in the way indicated. The matter could not be determined on a balance of probabilities.

(2) When the question is one of good faith behind an action or want of it the circumstances relating to any event must be considered as a whole and only when the inescapable conclusion therefrom is that the person charged could only have acted in the way indicated with an improper motive would be Commission record such a finding.

(3) If a situation calls for action to be taken by a Minister and more than one course may be adopted he cannot be blammed merely because the course adopted by him ultimately turns out to be without benefit to the State.

(4) Apart altogether from the above a Minister may act unlawfully as for instance when he exercises jurisdiction where he has none or adopts a procedure not warranted by law or in exercising his jurisdiction takes into consideration matters which are irrelevant or extraneous to the point at issue. Such acts would be *ultra vires* and would in legal parlance be described as *mala fide* or constituting abuse of power. This question, however, cannot be dealt with in the abstract and as the acts of the Ministers in these cases are all described as unlawful, *mala fide* and in abuse of power the Commission will have to examine in detail the facts alleged and proved and examine whether the acts were done in transgression of law or e.g. whether they violated any specific provision of law or were taken in defiance of the Rules of business promulgated under Article 166 of the Constitution. If their acts fall within the above classification it will be no defence on their part to say that they were guided by principles which businessmen would follow or were motivated by considerations of ultimate benefit to the State.

CHAPTER VI

The course of Hearing

The arguments commenced on the 8th of January 1974. The Advocate-General of the State placed the case of the State from day to day from 8th of January to the 18th of January 1974. He also filed a large number of Government files, bearing on the Kendu leaf trade on the 8th and the 9th of January 1974. The hearing was adjourned after 18th of January 1974 to 5th of February 1974 and was directed to continue from day to day except Saturdays, Sundays and public holidays declared by the Government of Orissa. On the 29th January 1974, a petition was filed on behalf of the first three respondents for adjournment of the hearing till the second week of March 1974 on *inter alia* the following grounds :

(a) The petitioners were candidates at the impending election to the State Legislative Assembly and their constituencies were situate at long distances from Bhubaneswar.

(b) The petitioner Shri R. N. Singh Deo was the Leader of the Swatantra Party in Orissa and had to tour extensively throughout the State.

(c) Their personal presence before the Commission was necessary as they had called for production of a number of files, the relevance thereof and the impact of the same on the enquiry could only be explained to the Counsel by the petitioners themselves.

(d) Without the petitioner's presence at the hearing it would not be possible for their Counsel to argue the case properly.

(e) The petitioner Shri Ainthu Sahu was suffering from a fracture of his leg and was unable to undertake a long journey from where he was.

(f) The entire briefs of the Counsel in the cases had been taken to Calcutta and left with Counsel there in connection with the writ petition pending in the High Court of Calcutta.

On the 31st of January 1974, the Commission gave a direction that the hearing would be resumed on the 25th of February 1974 instead of on the 5th of February in view of the grounds urged in the petition of these respondents. On the 18th of February, the first three respondents filed another petition for adjournment of the hearing until after the second week of March, *inter alia* on the ground that the dates of polling in the State had been altered to 22nd February, 24th February and 26th February as a result whereof the petitioners could not return to Bhubaneswar before the first week of March and as already mentioned their presence at Bhubaneswar was necessary to explain to their lawyers the inter relation of the various facts. The Commission communicated its decision to the parties on the 23rd of February intimating that no further adjournment would be allowed. According to the Commission, the Advocate-General of the State would take another day or more for his argument, thereafter the intervener would address the Commission and Counsel for the two public servants Shri Sundararajan and Shri Satpathy would be called upon to address the Commission before Counsel for the ex-Ministers would be required to start their argument before the 28th of February.

On the 23rd February, the first 3 respondents filed a petition wherein they stated that the Advocate-General would be submitting his resignation on the 27th February 1974 and inasmuch as the polling dates in the State were already fixed for three days, i.e., 22nd, 24th and 26th February 1974 and counting of ballots was to begin on the 27th February, it was necessary that the hearing should be postponed till sometime after the second week of March 1974. On the 25th February 1974 there was a sitting of the Commission. The Advocate-General stated that as he was going to resign before the formation of the new Ministry he was not in a position to continue his arguments on that date. The further hearing of the argument was therefore, adjourned and the Commission informed the parties present that the date of recommencement of the hearing would be fixed later and communicated to the parties concerned and if possible, such a date would be fixed on 2nd March 1974. The Commission intimated to the parties through its Secretary on the 7th March 1974 that the hearing would commence on the 25th March and

continue from day to day till the 7th April 1974 unless concluded earlier. On the 25th March, the respondents—Ex-Ministers submitted a petition to the effect that there was going to be an important session of the Orissa Legislative Assembly which was then in session and as they were members of the State Assembly, their presence was required thereat and the further hearing by the Commission should be postponed till the 2nd week of April 1974. They also stated that they were in some difficulty as relevant documents and briefs of Counsel were with the Advocates of the Calcutta High Court in connection with the appeal from the order in their writ petition which was likely to be heard in the month of April. It may be noted that the Calcutta High Court disposed of the writ petition on the 7th January 1974 rejecting the same but briefly indicating the reasons for doing so. The respondents had preferred an appeal to a division of bench of the Calcutta High Court for a stay order and an Appeal Bench of the Calcutta High Court had given certain directions with regard to the disposal of the appeal. The only order concerning the Commission was that its report would not be published until after the disposal of the appeal.

On the 25th March 1974, the Commission disposed of the petition moved on behalf of the first three respondents for adjournment of the hearing till the 2nd April 1974, directing that the hearing would be resumed on the 27th March and would continue till 29th March and would recommence on the 2nd April and it would continue till the 6th April 1974 and thereafter it would be resumed on 18th April.

The hearing was resumed on 28th of March and continued on the 29th March and taken up again on the 2nd April and continued from day to day till the 6th April. On the last mentioned date, the hearing was adjourned to the 6th of May 1974. The sittings of the Commission so far had taken place first in a room of the Legislative Assembly Building and thereafter in the Red Cross Bhawan, Bhubaneswar. The hearing was taken up on the 7th May 1974 at Puri. Again an application was submitted on behalf of the first three respondents that their Counsel would not be available till after the closing of the High Court, i.e., the 9th May. The Commission directed that Counsel for the first three respondents would not be called upon to commence arguments before the 13th of May. The hearing went on day to day from the 7th to the 10th of May Counsel for Shri Sundararajan and Shri A. Satpathy arguing on behalf of their clients. On the 13th of May 1974, Shri S. C. Ray, Counsel

for Shri Ainthu Sahu commenced his argument and concluded the same on the 15th May. As Shri R. Mohanty, Advocate, who was to have commenced argument on behalf of Shri R. N. Singh Deo could not be present on the 16th May 1974, he was permitted to take up his argument on the day following. On the 16th of May 1974, Shri A. K. Jagdev Mohapatra argued the matter on behalf of Shri Hara Prasad Mohapatra for half the day. Shri Ranjit Mohanty opened his argument on behalf of Shri R. N. Singh Deo on the 17th May 1974 and concluded the same on the 18th May 1974. The Advocate-General started his reply on the 20th May and concluded the same on the 21st May 1974.

Under the original notification the Commission was to submit its report by the 22nd February 1974 but in view of the above happenings it was further extended by the State Government, on the first occasion till the 22nd May 1974 and again till the 31st August 1974.

CHAPTER VII

History of the Kendu Leaf Trade in Orissa and earlier legislation on the subject.

In order to appreciate the charges levelled against the respondents and dispose of the issues framed by the Commission it will be necessary to start with a brief review of the history of the Kendu Leaf Trade in the State of Orissa, the State entering the trade, the passing of the Kendu Leaf Act and framing of Rules thereunder as also three decisions of the Supreme Court of India interpreting the Act and Rules and defining the functions of the State Government thereunder.

Kendu plants grow naturally in some parts of the State of Orissa mostly in its western districts. If left to nature, the plants grow to a good height but in order to ensure a good supply of leaves used mostly for the manufacture of Bidis to serve as wrappers for tobacco, they are not allowed to reach a height of more than 5 to 6 ft. They are coppiced every year in February and March and the leaves are plucked by hand in two seasons—once in April and May and for a second time in October and November, known, respectively as the Baisakhi and the Kartiki collections. Most of the Kendu plant growing areas are situated in the former princely States of Orissa and the quality of the Kendu leaves from the ex-State areas is generally superior to that found elsewhere.

From the report of the Forest Enquiry Committee of Orissa made in 1959, it appears that in the pre-merger days (i.e., merger of the princely States with India), Kendu leaf contracts were given out in the ex-State areas on long term basis to contractors who had the right to collect the same from all over the ex-State, no distinction was made between private land and Government land as the tenants had no right to forest-produce on their own holdings. Kendu leaves were not sold anywhere in the old State areas, except in Sambalpur, Angul and Khondmals. Even in such areas the leaves from the Government lands only were settled with contractors. With the merger of the ex-State areas when people were given a right over the trees on their own land, it was reported that many petty traders came forward to trade in

Kendu leaves. They had neither the experience nor the necessary knowledge nor the means for proper processing of the leaves. It had been roughly estimated that a sum of Rs. 50 to Rs. 60 per bag of leaves (weighing approximately one quintal) would have to be invested for payment of royalty, collection charges, processing and despatch of the leaves to the trading centre. So processed the leaves might fetch an average price of Rs. 80 to Rs. 100 per bag depending upon the quality of the leaves. For a lease whose value was Rs. 1 lakh, the lessee was to invest about Rs. 3 lakhs. The petty traders who could hardly invest such huge capital indulged in unnecessary competition which led to the collection of immature leaves thereby affecting the quality of the leaves. This presented a serious threat to the flourishing trade as the quality of leaves from some areas in Orissa had a reputation of their own in the trade. Besides, this unrestricted procedure led to smuggling from Government forest as it was not possible to distinguish between the leaves collected from Government lands and private lands. In order, therefore, to regulate the trade, the Government of Orissa declared Kendu leaf as an essential article and promulgated the Kendu Leaves (Control and Distribution) Order, 1949 in pursuance of the power conferred by Section 3 of the Orissa Essential Articles Control and Requisitioning (Temporary) Act, 1947. The main purpose behind the Kendu Leaves Control Order was to see that the trade in Kendu leaves survived and that the quality of the leaves did not go down. In order to ensure that the tenants got the full value of the leaves collected from their land, Government decided that there should be two different rates for plucking—one from Government land and the other from private land, the rate for the latter being higher by about 25 per cent. The only restriction imposed on the tenants was that they would sell their leaves to the licensee.

The report also shows that the Kendu Leaves Control Order then in force worked fairly well from the point of view of revenue. In 1949, the revenue from this source was Rs. 13,79,670, in 1954 Rs. 28,06,989 and in 1957 Rs. 68,01,628, excluding ex-Zamindary areas. Further, it was roughly estimated that on the whole about 50 per cent of the leaves came from private lands and the rest from Government Reserved Forests and Protected Forests including Communal Lands. In order, therefore, to benefit tenants the report recommended that Government should give a grant of 50 per cent of the revenue derived from Kendu leaves in a particular area to the Grama Panchayats for development work. This was in addition to the fixing of a higher purchase rate for the leaves of the tenants' holdings.

After considering respectively the merits of (1) Free Trade, (2) State Trading, (3) Working through State Trading Corporation and (4) Working through Co-operatives, the Committee made several recommendations. In brief they were as follows :

"(a) The Kendu Leaf Control should continue. The current sale units should be made smaller but should be of as large size as may be proved to be economic units.

(b) The rate of payment for collection of leaves from Government land and the purchase rate of leaves from tenants' holdings should be fixed by the District Forest Advisory Committee after taking into consideration the market rate and other local factors.

(c) * * *

(d) The purchase rates should be fixed as soon as possible before the collecting season and these rates should be given wide publicity in the locality.

(e) Adequate supervisory staff should be appointed to see that the pluckers did get the rates fixed by the Advisory Committee."

The order of 1949 was followed by the Orissa Kendu Leaf Control Order, 1960 under the same provision of the Orissa Act of 1947. The licences were continued under this order, but some other provisions were made such as the fixing of the minimum price of the leaves for each district.

With the change in the Government of Orissa monopoly purchase in favour of the licencees was changed over to controlled competition. When the Congress Government came back to power it was faced with the problem namely that the controlled competition introduced had led to a loss in Government revenue. That is why, in pursuance of the recommendations made by the Taxation Enquiry Committee of 1959, the present Act of 1961 was passed with the object of creating a State monopoly in the Trade of Kendu Leaves.

The Orissa Kendu Leaf (Control of Trade) Act 28 of 1961 received the assent of the President on the 28th December 1961 and was first published in the Extraordinary issue of the *Orissa Gazette,* dated the 3rd January 1962. The Act has the title "The Orissa Kendu Leaf (Control of Trade) Act, 1961" and is described as an Act to provide for control of trade in Kendu leaves. The object of the Act was to provide for regulation of trade in Kendu leaves by creation of a State monopoly therein.

CHAPTER VIII

The Act of 1961 and the Rules

The main provisions of the Act may now be noted. Under Section 3(1) no person other than—

(a) The Government;

(b) An officer of Government authorised in that behalf;

or

(c) An agent in respect of the unit in which the leaves have grown

shall purchase or transport Kendu leaves. Under the definition Section 2 an "agent" means an "agent appointed under Section 3". Under sub-section 2(a) of Section 3 "a grower of Kendu leaves" (which mean "any person who owns lands on which Kendu plants grow or who is in possession of such lands under a lease or otherwise") may transport his leaves from any place within the unit wherein such leaves have grown to any other place in that unit;" "Provided that a registered grower" (which expression means "a grower of Kendu leaves who has registered himself under Section 9") may also transport his leaves from any place within the unit wherein such leaves have grown to any other place outside the unit for the purpose of sale to the Government or any agent in respect of the unit authorised to purchase the same from him; and

(b) Leaves purchased from Government or any officer or agent specified in the sub-section by any person for manufacture of Bidis within the State or by any person for sale outside the State may be transported by such person outside the unit under a permit to be issued in that behalf by such authority and in such manner as may be prescribed and the permit so issued shall be subject to such conditions as may be prescribed".

Under sub-section (3) of Section 3 "any person desiring to sell Kendu leaves may sell them to the aforesaid Government officer or agent at any depot situated within the said unit". Under Section 4(1) the Government had to fix the price at which Kendu leaves shall be purchased by them or any officer or agent from growers of Kendu leaves after consultation with the Advisory Committee constituted under sub-section (2) of the Section. Government had also to publish the same in the prescribed manner not later than the 31st January of that year and the price so fixed was not to be altered during such year. According to the proviso to this sub-section different prices may be fixed for different units having regard to—

(a) Price fixed under any law during the preceding 3 years in respect of the area comprised in the unit;

(b) quality of leaves grown in the unit;

(c) transport facilities available in the unit;

(d) the cost of transport; and

(e) general level of wages for unskilled labour prevalent in the unit.

Under sub-section (2) of Section 4 Government had to constitute an Advisory Committee for the State consisting of not less than six members as may be notified by Government from time to time of which not more than 1/3rd of the members was to be from amongst persons who were growers of Kendu leaves Under Section 5 Government may devide each district into such number of units as they deem fit.

Under Section 6 "In each unit there shall be such number of depots as Government may direct to be set up at such places as may be convenient for the transaction of business and the price list of Kendu leaves and the hours of business shall be prominently displayed on the notice-board kept for the purpose at every such depot".

Under Section 7(1) "The Government or their authorised officer or agent shall be bound to purchase at the price fixed under Section 4, Kendu leaves which are offered to them for sale at the depot during the hours of business":

"Provided that it shall be open to Government or any officer or agent not to purchase any leaves which in their opinion are not fit for the purpose of manufacture of Bidis". Under sub-section (2) of Section 7 "any person aggrieved by the rejection of his leaves by the Government or by an authorised officer or agent under the proviso to sub-section (1), may, within 15 days therefrom, refer the matter to the Divisional Forest Officer, or such other officer as may be empowered by the Government in this behalf, having jurisdiction over the unit in which the leaves have grown". Under sub-section 2(a) "any person, to whom price is paid at a rate lower than the rate fixed under Section 4 for Kendu leave sold by him to the Government or their authorised officer or agent, may refer the matter to the aforesaid officer within 15 days from the date of such payment".

Under sub-section 2(b) on receipt of reference under sub-section (2), the Divisional Forest Officer or such other officer as the case may be, shall hold an enquiry on the spot or at the head-quarters in the prescribed manner and after hearing the parties concerned or their authorised agent shall pass such orders as he deems fit and in case he finds the rejection of the leaves to be improper, he may—

(i) if he considers the leaves in question still suitable for the manufacture of Bidis, direct the Government or the authorised officer or agent, as the case may be, to purchase the same and also to pay to the person aggrieved such further compensation not exceeding twenty per centum of the price of the leaves payable to him, as he may deem fit ;

(ii) .....

Under Section 8, Government was empowered, 'for the purpose of purchase of and trade in Kendu leaves on their behalf, to appoint agents in respect of different units and any such agent may be appointed in respect of more than one unit. Under Section 9 it was obligatory on the part of' every grower of Kendu leaves, if the quantity of leaves grown by him was likely to exceed 350 quintals, to get himself registered in the prescribed manner on payment of such fees as might be prescribed and he was also to maintain accounts and submit returns in such form and manner as may be prescribed. Under Section 10 Kendu leaves purchased by Government or by the officers or agents under the Act were to be sold or otherwise disposed of in such

manner as Government might direct. Section 11 deals with the application of net profits derived by Government from the trade of Kendu leaves under the Act. An amount not being less than 50 per cent of such net profits was to be paid to the Samitis or Grama Panchayats. Under Section 13 any police officer not below the rank of an Assistant Sub-Inspector and any other person authorised by Government, may with a view to securing compliance with the provisions of the Act or the rules made thereunder or to satisfying himself that the said provision have been complied with—

(a) Stop and search any person, boat vehicle or receptacle, used or intended to be used for the transport of Kendu leaves;

(b) Enter and search any place;

(c) Seize Kendu leaves in respect of which he suspects that any provision of this Act or the rules made thereunder has been, is being or is about to be contravened along with the receptacle containing such leaves, or the vehicles or boats used in carrying such leaves.

Under Section 17 no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or the rules made thereunder.

Section 18 enabled the Government to make rules for carrying out all or any of the purchases of the Act.

Under Section 19 "on the coming into force of this Act in any district the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1955" was to "stand repealed in so far as it relates to Kendu leaves in respect of such district".

Notice may now be taken of the relevant rules framed under the powers conferred by Section 18 of the Orissa Kendu Leaves (Control of Trade) Act of 1961 as in force at the time when the subject-matter of the enquiry cropped up. Under Rule 3 "prices fixed under sub-section (1) of Section 4 shall be published in the official gazette and a copy thereof in Oriya daily newspapers of the State". Rule 5 provided for the registration of growers of Kendu leaves on the basis of applications filed before the Divisional Forest Officer within whose jurisdiction the land on which the Kendu plants grow is situated. Under Rule 5-A every registered grower had to maintain a register of daily accounts of Kendu leaves showing correctly the details

mentioned therein which included the opening stock on each day, the quantity disposed of, the manner of disposal and places where the balance stock had been stored with quantities thereof. He had also to submit before the Divisional Forest Officer granting the registration certificate not later than the fifteenth day of each month, a return showing correctly the opening stock on the 1st of the month, the quantity collected during the month, the quantity disposed of and the manner of disposal. Under Rule 5-E(1) Kendu leaves collected by purchase or otherwise by the Government direct or through their officers or agents, were ordinarily to be sold by entering into a contract in advance for which tenders were to be invited. This was subject to a proviso that the Government may without inviting tender sell the leaves of one or more units directly to the Orissa Forest Corporation Ltd. on such terms and conditions as may be decided by Government. Sub-rules 2, 3 and 4 of Rule 5-B provided for the publication of tender notice in the official gazette, the places where tender forms were to be had and the manner of submission of tenders for the units. Under sub-rule 5 every tender shall be accompanied by a treasury chalan showing cash deposit being an amount specified in the tender notice to be deposited as earnest money. Under sub-rule 6 a tenderer had to produce a certificate of solvency for at least one-fourth of the total annual purchase price according to the rate quoted by him, granted by a Revenue Officer not below the rank of a Subdivisional Officer at the time of the opening of the tenders. Sub-rule 7 of Rule 5-B enabled the Government to accept or reject all or any of the tenders so received for any unit without assigning any reason therefor. This was, however, not unqualified and in rejecting a tender Government was to take into consideration among other grounds the following :

(1) inadequacy of price offered,
(2) speculative offer,
(3) past conduct of parties in the trade,
(4) transport facilities at the command of the officer,
(5) solvency of the offerer and
(6) his experience in the trade.

Under sub-rule 8 "if the tenders received for a unit are not considered acceptable, the Government may select as purchaser or party of persons or parties on such terms and conditions as may be mutually agreed upon and such selection need not be limited to persons who have submitted tenders for such unit or units. All the rules applicable to a successful tenderer shall

apply *mutatis mutandis* to persons or parties selected as purchasers under this sub-rule". Under sub-rule 9 "notwithstanding anything contained in the foregoing provisions Government may sell or otherwise dispose of Kendu leaves collected by purchase or otherwise by Government or by their officers or agents in such manner as Government may deem proper". Under sub-rule 10 "any person or party who is selected as purchaser for the particular unit is bound to purchase the entire quantity of Kendu leaves procured or likely to be procured from such unit or such lesser quantity out of it as may be offered to him by the Government, their officers or agents in such unit, on such terms and conditions as may be specified in the agreement to be executed by such purchaser under sub-rule 11".

Under sub-rule 11 the purchaser bound himself to execute an agreement in Form H within fifteen days from the date of receipt of order relating to his selection as purchaser, failing which the said order of selection was liable to be cancelled and on such cancellation the amount deposited as earnest money was to be forfeited. Further on such cancellation Government might dispose of the Kendu leaves of the unit under sub-rule 9 of Rule 5-B. In addition, the purchaser, whose selection as such had been cancelled was to bear the loss, if any, suffered by Government in the disposal of Kendu leaves of the unit and this loss was to be recoverable from him as arrears of land revenue. Sub-rule 12 laid down the manner of calculation of the amount of security by way of guarantee for proper compliance with the terms and conditions of the agreement and the provisions of the Act by a purchaser or purchasers selected for a particular unit. Under sub-rule 13, the purchaser was to take delivery of the Kendu leaves from such depots or stores as are intimated by the Divisional Forest Officer in writing from time to time during the currency of the purchaser's agreement.

Sub-rule 14 of Rule 5-B is the only provision regarding rebates which might be allowed to a purchaser. It lays down that "if the purchaser during the currency of the agreement establishes a Bidi Factory in order to provide employment to the residents of the State of Orissa and pays a minimum excise duty of Rs. 3,000 per annum on the Bidis manufactured by him he shall be entitled to a rebate of 2 per cent of the annual purchase price paid by him during the corresponding year". Sub-rule 15 laid down the conditions under which a purchaser might be given a renewal of his contract. The text of it as follows :

> " If the purchaser during the currency of the agreement has duly observed and performed all the terms

and conditions to the satisfaction of the Government and the Government are satisfied that the purchaser has been prompt in taking delivery of leaves and making payments therefor, the Government may grant to the purchaser renewal of his contract for such period not exceeding one year at a time and subject to such terms and conditions as may be mutually agreed upon".

Rule 7 deals with the appointment of the agents under Section 8. Under this rule in order to appoint an agent or agents for a unit or units under sub-section (1) of Section 8, it was obligatory on Government to publish a notice in the official gazette and in such other manner as they may think fit, giving terms and conditions of agency and inviting applications for such appointment. Sub-rule 2 of the Rule 7 provides for the form in which the application for agency is to be made and the authority to whom it is to be submitted. Under sub-rule 3 every such application has to be accompanied by a treasury chalan, and the applicant has also to furnish simultaneously a certificate of solvency for a sum calculated at the rate of Rs. 10 per bag for the stipulated number of bags for the respective units. Under sub-rule 4 of Rule 7 Government may accept or reject any application without assigning any reason therefor. Under sub-rule 5 Government may call for fresh applications if in its opinion it was not possible to select suitable agents for the purpose out of the persons who had applied for the appointment as agents and Government might appoint a person or party as agent who in their opinion was suitable for the work. Under sub-rule 6 a person or party so appointed had to execute an agreement in Form G within fifteen days of the receipt of the order of appointment failing which the appointment was liable to be cancelled. Under sub-rule 7(a) the agent so appointed for a particular unit had, before the signing of the agreement, to deposit as security for the proper execution and performance of the agency in accordance with the terms and conditions of the agreement and the provisions of the Act and the rules a sum which was to be calculated in the manner set forth. Under sub-rule 8 of Rule 7 the agent was to maintain such registers and accounts as might from time to time be directed by Government. He was also to submit to the Divisional Forest Officer such returns and at such intervals as might from time to time be directed by Government. Sub-rule 10 of Rule 7 laid down

the conditions under which a renewal of agency might be granted by the Government. The text is as follows :

> " 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 Government and if the Government are satisfied that he has done his best to collect the maximum quantity of leaves from the unit, the Government may grant to the agent renewal of his agency for such period not exceeding one year at a time and subject to such terms and conditions as may be mutually agreed upon."

It will be noted that under the Rules agreements for appointment of agents and purchasers had to be in Forms G and H, respectively. Clause 1 of Form G shows that Government was appointing a named person as their agents to do the acts as mentioned for and on their behalf under the terms and conditions laid down. The appointment was to be in force for the period mentioned unless earlier determined by Government in accordance with the terms and conditions of the agreement or in accordance with the law for the time being in force : Provided that if the agent had given to the Government fifteen days' notice in writing prior to the expiry of the term reserved therein, expressing a desire to renew the agency and had duly observed and performed all the terms and conditions thereof to the satisfaction of the Government and if the Government were satisfied that he had done his best to collect the maximum quantity of leaves from the unit, Government might grant to the agent renewal of his agency for such period not exceeding one year at a time and subject to such terms and conditions as may be mutually agreed upon. Clause 2 contains the following terms and conditions :

(a) The agent shall purchase Kendu leaves from the growers and he shall collect Kendu leaves from the Government lands and forests, from within the entire area notified as Unit Number..... in the district .....which is more fulyy described in the schedule annexed for and on behalf of the Government.

(b) The agent shall process the Kendu leaves so obtained by him and he shall store the same after packing them in bags. Each such bag shall contain one quintal including the weight of the container of processed leaves fit for manufacture of Bidis.

(c) The Agent shall purchase Kendu leaves from the growers at the price as shall be fixed by Government under Section 4(1) of the Act.

(d) The agent shall pay such collection charges to the persons engaged for collecting the leaves from the Government forests and lands as may be specified in writing by the Government.

(e) The agent shall during the period of his agency under this agreement obtain by purchase and collection in the minimum.....numbers of bags of processed leaves each weighing one quintal inclusive of the weight of the container.

Under sub-clause (f) of Clause 2, the agent shall deliver such quantities of processed Kendu leaves to such persons and at such time as shall be directed from time to time by Divisional/ District Forest Officer of.....Division/District. Unless otherwise notified, the agent shall keep ready for delivery leaves in four equal instalments on the following dates :

30th June
31st August
31st October
31st December
} OF EACH YEAR.

Under sub-clause (g), the agent shall be paid by the Government Rs..... per bag of processed leaves towards cost incurred for purchase, collection, processing, storage, transports, packing and other handling charges. Under sub-clause (h) the agent shall be entitled to a remuneration at the rate of Rs..... for each bag of processed leaves that he secures by collection or purchase from out of the minimum number of bags he hereby undertakes to collect. For each of the excess bags of processed leaves over and above the minimum number of bags he undertakes to collect under this agreement, he shall get remuneration at the rate of Rs..... per bag. Under sub-clause (i) if the agent does not secure through purchase and collection the minimum number of bags hereinbefore agreed to, he shall be liable to pay to the Government by way of compensation at the rate of Rs..... per bag of shortage. Under sub-clause (j) the agent shall be paid the cost and remuneration of the bags of processed leaves from time to time, as and when the same shall

be demanded from him for being taken delivery of by the Government. The agent shall claim no lien over the properties in the Kendu leaves at any time. Under sub-clause (k) the agent shall open depots and storage godowns at such centres within the unit as may be directed by the Divisional Forect Officer. Under sub-clause (1) the agent shall not without a transit permit issued by him permit the movement of any Kendu leaves from the collection depot to the storage godowns or from one storage godown to another within the unit. He shall not also without the permission of the Divisional Forest Officer move any Kendu leaves from any place within the Unit to a place outside the Unit. Under sub-clause (m) the agent shall not pollard the Kendu trees between the 16th day of April and 15th day of August of each year. He shall pluck the Kendu leaves by hand and no axe or other instrument shall be used in the process of collection. Under sub-clause (p) the agent shall maintain such registers and accounts as may, from time to time, he directed by Government. Under sub-clause (v) if the agent is guilty of breach of any of the terms and conditions of this agreement, it shall be open to Government to terminate the agreement by giving him 15 days' notice. Clause 5 of the agreement laid down that in case any dispute arises in the matter of interpretation of any of the terms of this agreement or with respect to any matter arising from out of the subject-matter of this contract, the said dispute shall be referred to the Chief Secretary or any other Secretary to the Government of Orissa appointed for the purpose by the Government. The decision of the dispute by the said person shall be final and binding on the parties.

Form H, the specimen agreement between the Government and the purchaser begins as follows :

"Whereas Government proposed/invited tenders to enter into a contract in advance for the sale of Kendu leaves to be gathered from the area notified as unit ..... and whereas the purchaser had given an offer to purchase Kendu leaves from a certain Unit in the district of ..... under the terms and conditions described in the schedule and the Government had accepted the said offer. The terms and conditions are as follows :

Under Clause 1 the agreement was to commence from a specified date and was to remain in force till.....unless earlier determined under the terms hereinafter appearing :

Provided that if the purchaser has given to the Government 15 days' notice in writing prior to the expiration of the term reserved herein expressing the desire to renew the agreement and shall have duly observed and performed all the terms and conditions hereof to the satisfaction of Government and Government are satisfied that the purchaser has been prompt in taking delivery of leaves and making payments thereof, the Government may grant to the purchaser renewal of this agreement for such period not exceeding one year at a time and subject to such terms and conditions as may be mutually agreed upon. Under Clause 2 the Government agreed to sell and the purchaser agreed to purchase the entire quantity of Kendu leaves procured by the Government from the area notified as at a consideration of Rs.....per bag for the first ..... bags and at a consideration of Rs..... per bag for the rest of the bags. Each such bag shall contain one quintal of processed Kendu leaves including the container. Under Clause 3 the Government was to sell the aforesaid goods only to the purchaser during the period of the agreement unless the agreement was terminated earlier in accordance with the contract or any law for the time being in force and subject to the condition that such Kendu leaves would not be less than..... number of bags to be delivered in four instalments as provided in Clause 5. Under Clause 4 the agreement was always to be subject to the provisions of the Orissa Kendu Leaves (Control of Trade) Act, 1961 and the rules and notifications made thereunder. Under Clause 5 "subject to any variation that may be made by Government the Kendu leaves shall be offered for delivery to the purchaser in the following four instalments. The quantity to be purchased in each of the first three instalments being not more than.....bags.

Instalments		Due dates	
1st instalment	..	30th June	of each year
2nd instalment	..	31st August	
3rd instalment	..	31st October	
4th instalment	..	31st December	

Under Clause 6 the Divisional Forest Officer was to cause a notice to be served on the purchaser at least 15 days prior to the date of the instalment calling upon the purchaser to deposit the purchase price by a specified date. Under Clause 7 in case the purchaser does not deposit the price of the Kendu leaves within

the due dates as provided in Clause 6, the purchaser shall be liable to pay the amount payable along with 6 per cent interest per annum by way of compensation on the aforesaid sums from the date of default till the date of realisation of the same, irrespective of the fact as to whether he has taken delivery of the goods or not. Under Clause 8 in case Government was not able to deliver to the purchaser the minimum number of bags provided in Clause 3 hereof, by the date of expiration of the agreement, the purchaser shall be entitled to compensation at the rate of Rs..... per bag of short supply. Clause 9 contains a provision entitling a purchaser to a rebate of 2 per cent of the annual purchase price paid by him during the corresponding year in case of his establishing during the currency of the agreement a Bidi Factory in order to provide employment to the residents of the State of Orissa and paying a minimum excise duty of Rs. 3,000 per annum on the Bidis manufactured by him. Clause 11 provided that if the purchaser was guilty of any breach of the terms and conditions of this agreement it was to be open to Government to terminate this agreement by giving him 15 days' notice. Further on such termination the purchaser was to be liable to pay the difference between the price payable by him and the price that would be obtained by selling the goods in the market if the same was less than the amount payable by the purchaser. Clause 12 provides for payment by the purchaser a security deposit for the due performance of the terms and conditions of the agreement. Under Clause 14 any dispute arising in the matter of the interpretation of any of the terms of this agreement with respect to any matter arising from out of the subject-matter of this contract had to be referred to the Chief Secretary or any other Secretary to the Government of Orissa appointed for the purpose by the Government. The decision of the dispute by the said person was to be final and binding on the parties.

CHAPTER IX

The Supreme Court Judgements

The validity of the Orissa Kendu Leaves (Control of Trades) Act, 1961 came up for consideration by the Supreme Court of India for the first time in writ petition No. 73 of 1962 filed in that Court. Akadasi Padhan and others—*V*—The State of Orissa (A. I. R. 1963) S. C. 1047. It was contended on behalf of the petitioner Akadasi Padhan that the creation of a State monopoly in respect of purchase of Kendu leaves contravened the fundamental rights of the petitioner under Article 19(1) (f) and (g). One of the main points raised by the petition was about the fixation of purchase price which had been provided by Section 4 of the Act, whereas it was contended on behalf of the petitioner that the fixation of purchase price was not essential for creation of a monopoly, on behalf of the State it was argued that the monopoly could not function without such fixation. The Court took the view that it was clear that the object of fixing the price was to help the growers to realise a fair price and the fixation of prices prescribed by Section 4 was reasonable and in the interest of the general public both under Article 19(5) and Article 19(6). It was argued on behalf of the petitioners that the Act was bad because it sought to create a monopoly in favour of individual citizens described by the Act as agents. The Court took the view "that when the State carries on any trade, business or industry, it must 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. 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 businesses 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". Referring to the manner in which the business was done the Court said "In such a case it may not be expedient for the State always to appoint Government servants to operate the State monopoly, and agency would be more convenient, appropriate and expedient. Thus considered, it is only persons who can be called agents in the strict and narrow sense to whom the working of the State monopoly can be legitimately left by the State. If the agent acquires a personal interest in the working of the monopoly, ceases to be accountable to the principal at every stage, is not able to bind the principal by his acts, or if there are any other terms of the agency which indicate that the trade or business is not carried on solely on behalf of the State but at least partially on behalf of the individual concerned, that would fall outside Article 19(6)(ii).

Another point which was taken on behalf of the petitioner was that although under the rules framed under the Act the forms for an application which had to be made by a person applying for agency was prescribed, no form had been prescribed for the agreement which the State Government entered into with the agent. The Court opined that "the agreement is apparently entered into on an *ad hoc* basis and that clearly is unreasonable. In our opinion, if the State Government intends that for carrying on the State monopoly authorised by the Act, agents must be appointed, it must take care to appoint agents on such terms and conditions as would justify the conclusion that the relationship between them and the State Government is that of agent and principal ; and if such a result is intended to be achieved, it is necessary that the principal terms and conditions of the agency agreement must be prescribed by the rules. Then it would be open to the citizens to examine the said terms and conditions and challenge their validity if they contravene any provisions of the Constitution, or are inconsistent with the provisions of the Act itself". The Court was satisfied that Rules 7(5) as then in force was bad because it left it to the sweet will and pleasure of the officer concerned to fix any terms and conditions on an *ad hoc* basis. According to the Court "agency which is 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. All that such agents would be entitled to, would be remuneration for their work as agents".

The Court held that the agreement produced before it was invalid inasmuch as it was wholly inconsistent with the requirements of Section 3(1) (*c*) of the Act.

The decision in Rasbihari Panda—*V*—The State of Orissa A. I. R. 1969 Supreme Court 1081 shows that the Government of Orissa had made some changes in the machinery for inmplementation of the State monopoly after the decision in Akadasi Padhan's case by *inter alia* providing for appointment of agents who were to collect and purchase the Kendu leaves for the Government and entering into agreements with other persons for sale to them on the basis of invitation of tenders. A number of persons filed writ petitions in the Orissa High Court challenging the Scheme of trading in Kendu leaves adopted by the Government on the plea that the State of Orissa had merely resorted to a device of introducing purchasers who were mere associates or nominees of the so called agents and that the position remained practically the same as in the days before the judgment in Akadasi Padhan's case. As the High Court refused to interfere the petitioner went up in appeal to the Supreme Court. The facts leading to the filing of the writ petitions and the points raised therein were :

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

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

During the years 1966 and 1967 the prices of Kendu leaves had ruled very high, and when sales were effected on behalf of the Government of Orissa in certain cases by public auction, prices considerably in excess of those at which tenders were accepted were realised. Early in 1968 letters were addressed to certain traders intimating that it had been decided by the

Government of Orissa to renew "leases of Kendu leaf units" held by them for the year 1968 if they accepted the terms set out therein. Under this scheme the Government offered to those licensees who in their view had worked satisfactorily in the previous year and had paid the amounts due from them regularly to continue their licences with the added provision that the agents with whom they had been working in 1967 would also work during 1968.....

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

It was urged on behalf of the petitioners that in seeking to enter into agreements for advance purchase contracts for Kendu leaves by private negotiations the State Government sought to support their party interests in preference to public benefit envisaged by the State monopoly, and that the so called State monopoly trade in Kendu leaves "was a colourable device to make it appear constitutional and permissible under Article 19(6) (*ii*) of the Constitution", whereas in truth, it was intended to benefit only the supporters of the Party in power, and the scheme on that account "was a fraud on the constitution". The new scheme, it was said, was devised for the purpose of increasing the party funds to the detriment of public revenue, and on that account the act of the State Government was "*mala fide* and unconstitutional".

"On behalf of the State it was submitted that till 1967 no rate was fixed for dried and processed leaves in the hands of the growers, but when the new Ministry assumed office in 1967 the minimum price fixed was at Rs. 35 per bag of processed leaves in the hands of the growers, which was later raised to Rs. 45 per bag, and the remuneration payable to pluckers was also raised by Government orders ....." that the scheme of making

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

The Supreme Court did not accept the view of the High Court that "the Government acted as any prudent businessman would do, for the purpose of getting the maximum revenue—not profits—from the trade in Kendu leaves", and that "Government's direction in exercise of the power or discretion, conferred on them under Section 10", "will depend on their subjective satisfaction, upon consideration of a number of factors which may vary from year to year. Such direction of the State Government as to the particular manner of sale or disposal in a particular year as dependent on the subjective satisfaction of the Government as aforesaid, is not justifiable. There is also nothing on record to show lack of *bona fides* on the part of the State Government in adopting the manner it did private negotiations—in the matter of sale of Kendu leaves in 1968 ; nor have we been shown any materials to hold that its action was capricious or arbitrary or in excess of jurisdiction".

The Court held the Section 10 of the Act being a counterpart of Section 3, if the monopoly of purchasing Kendu leaves by Section 3 was valid (as found in Akadasi Padhan's case) in so far as it was intended to be so administered only for the benefit of the State the sale or disposal of Kendu leaves by the Government must also be in the public interest and not to serve the private interest of any persons or class of persons. The Court observed "it is true that it is for the Government, having regard to all the circumstances, to act as a prudent businessman wound, and to sell or otherwise dispose of Kendu leaves purchased under the

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

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

The Court strongly criticised the action of the Government in offering to the old contractors the option to purchase Kendu leaves for the year 1968, instead of inviting tenders. It was observed that the reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government was not of any significance. The Court observed "from the affidavit filed by the State Government it appears that the price fetched at public auctions before and after January 1968 were much higher than the prices at which Kendu leaves were offered to the old contractors. The Government realised that the scheme of offering to enter into contracts with the old licences and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade. The Government then decided to invite offers for advance purchases of Kendu leaves but restricted the invitation to those individuals who had carried out the contracts in the previous year without default and to the satisfaction of the Government. By the new scheme instead of the Government making an offer, the existing contractors were given the exclusive right to make offers to purchase Kendu leaves. But in so far as the right to make tenders for the purchase of Kendu leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection.

The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in Kendu leaves and also new entrants into that business. It was *ex facie* discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business".

The Supreme Court did not accept the view of the learned Judges of the High Court that the exercise of the discretion by Government had not been shown to be arbitrary, or that their action was not shown to be lacking in *bona fides* inasmuch as the Government was not shown to have considered the prevailing prices of Kendu leaves about the time offers were made, the estimated crop of Kendu leaves, the conditions in the market and the likelihood of offerers at higher prices carrying out their obligations, and whether it was in the interest of the State to invite tenders in the open market from all persons whether they had or had not taken contracts in the previous year. According to the Supreme Court if the Government was anxious to ensure due performance by those who submitted tenders for purchase of Kendu leaves, it was open to Government to devise adequate safeguards in that behalf. According to the Court a plea that the Government action was *bona fide* could be accepted only if such action was shown to be valid in law and the objection was that the Government had erred in the exercise of its discretion.

As during the pendency of the proceedings before the Supreme Court, the entire year for which the contracts were given had expired and persons to whom the contracts were given were not before it the Court found itself unable to declare that the contracts which had been entered into by the Government for the sale of Kendu leaves for the year 1968 were unlawful. The Court accepted the suggestion of the applicants that tenders for the purchase of the next season's crop of leaves should be invited from all persons interested in the trade and in accepting the tenders, the State Government would act in the interest of the general public and not of any class of traders so that in the next year the State might get the entire benefit of the monopoly in the trade in Kendu leaves and no disproportionate share thereof might be diverted to private agencies.

The last judgment of the Supreme Court was rendered on 21st January 1971, Trilochan Misra—*V*—The State of Orissa (A. I. R. 1971) S. C. 733. This case arose out of a petition filed under Article 32 of the Constitution praying for declaration that the

revised policy of the State of Orissa under the Orissa Kendu Leaves (Control of Trade) Amendment Act, 1969 and the Rules framed were arbitrary, discriminatory and *mala fide* and for a writ or direction in the nature of a mandamus quashing the appointment of respondents 2 to 108 as purchasers. The petitioners claimed to be growers of the Kendu leaves as also traders and businessmen dealing primarily in such leaves. One of the petitioners prayed that although his tender was the highest for the appointment of purchasers for the year 1969 the unit was settled in favour of another person who had offered a rate below that offered by the petitioner. His grievance was that he was refused the appointment because he was not willing or able to pay contribution to the political fund of the Swatantra Party. His complaint also was that after judgment in Akadasi Padhan's case the profit which could go to the agents was greatly reduced and they could have little interest in the scheme which had resulted in the purchasers getting their own men appointed as agents and the pretended dichotomy between agents and purchasers was a mere eye-wash. He also submitted that no principle was followed in accepting the tenders. Some times the claim of the highest bidders were ignored to accommodate favourites of authorities, in some cases areas were settled with persons who had never submitted any tender for the area and a settlement was made with a non-tenderer at a lower rate. Before the Court the points raised were as follows :

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

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

(3) The appointment of purchasers who were not the highest tenders was also arbitrary and *mala fide*. Rule 5-B(7) which allowed the Government to accept or reject all or any of the tenders without assigning any reason thereof was gravely objectionable in that it had permitted Government to make discrimination in favour of men of their choice and allowed the extraction of money for party funds.

The Court was not satisfied that there was any legitimate grievance put forward against the amendment of the Act and promulgation of the new rules set forth in the judgment.

Further the Court could not take the view that appointment of agents who were nominees or relations of the purchasers *per se* was invalid.

With regard to the grievance that in some cases persons whose bids were lower than the higher tenders were accepted the Court found that persons who had made the lower bids had been asked to raise their bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because Government preferred one tenderer to another, no complaint could be entertained. The Court observed that Government certainly had a right to enter into a contract with a person well-known to it and specially one who had faithfully performed his contracts in the past in preference to undesirable or unsuitable or untried persons and Government was not bound to accept the highest tender and might accept a lower one in case it thought that the person offering the lower tender was on an overall consideration to be preferred to the higher tenderer.

The Court scrutinised the manner of settlement of the 180 units in which the Kendu leaf areas were divided for the period 1969 to 1971. 3 units out of these were reserved for the Orissa Forest Corporation and the remaining 177 units were settled at the highest prices offered. 139 out of 167 were settled in favour of persons who actually made the highest tenders. 29 units were settled at the highest prices offered but in favour of other tenderers on considerations such as past experience, clean past records, etc., and one unit was settled by negotiation at a price higher than the highest tender received. The Court was satisfied with the manner in which units were disposed of as disclosed by the counter-affidavits of the State which demolished suggestions of fraudulent preference of one tenderer to another.

Trilochan Mishra's case is important inasmuch as the Supreme Court found nothing wrong in the manner in which the 180 units of Kendu leaf areas had been settled for the period 1969 to 1971 and the present inquiry relates in part to the action of some Ministers during this period and of another in renewing agreements with agents and purchasers before the expiry of the above three-year period.

CHAPTER X

The effect of the Act on the trade

It is clear that the State of Orissa was trying to control t Kendu Leaf Trade at least from the year 1949 by the prom gation of the Kendu Leaves (Control and Distribution) Ord 1949, a similar Control Order of 1960 following the same up by t Kendu Leaves (Control of Trade) Act, 1961 and the rules fram thereunder. That such control had greatly augmented t finances of the State will be apparent from the following tal given in paragraph 40 of the affidavit of the State in the case Shri Ainthu Sahu.

Financial year		Net income Rs. P.
1961-62	...	38,17,799·00
1962-63	...	1,00,75,357·00
1963-64	...	92,74,675·00
1964-65	...	85,82,038·00
1965-66	...	80,64,722·00
1966-67	...	99,15,647·00
1967-68	...	1,22,08,483·00
1968-69	...	1,63,49,205·00
1969-70	...	2,48,65,567·00
1970-71	...	2,40,70,410·00
1971-72	...	2,83,16,543·00

CHAPTER XI

The policy adopted by Government of Orissa in 1969 and agreements entered into in that year and their effect.

A day before the delivery of the judgement in Rash Bihari Panda's case, i.e., on the 15th January 1969, there was a meeting of the Cabinet of the Government of Orissa where the Kendu Leaf policy for 1969 was settled. Shri R. N. Singh Deo, the first respondent herein was then the Chief Minister. The Memorandum accepted by the Cabinet regarding the Kendu leaf policy shows :

(*i*) The Kendu leaf policy as determined for the year 1969 would safeguard the State revenue and the interest of the pluckers and growers as well as of the trade.

(*ii*) State trading in Kendu leaf should continue.

(*iii*) That in order to benefit the growers of Kendu leaves by competition among purchasers the Orissa Forest Corporation Ltd., would be allowed to function as an additional agent in all the units and the registered growers might sell their leaves to purchasers of their choice by transporting the same on a valid permit and in such cases the rate for processed bags of leaves which had to be fixed on mutual agreement between the parties would not be less than the rates fixed by the Government on the advice of the Kendu Leaf Advisory Committee for the relevant unit.

(*iv*) Provision would be made for a penal compensation on the igent for not paying pluckers and growers according to the prescribed rate.

(*v*) The settlement of purchasers would be by way of inviting open tenders for three years with a provision for renewal after three years for such period as Government may decide from time to time. The Government would reserve the right of acceptance or rejection of all the tenders Government would also reserve such number of units as might be decided by them for appointing the Orissa Forest Corporation as purchaser.

(*vi*) The Kendu leaf units would be reconstituted so as to ensure that in no case the maximum production capacity of a unit exceeded 3,000 bags as far as practicable keeping in view the natural boundaries of the unit.

(*vii*) The number of bags to be stipulated for a unit would be the average of actual number of bags produced in 1966, 1967 and the stipulated number of bags for 1968 or the stipulated number of bags for 1968 whichever was higher.

(*viii*) Necessary amendments would be introduced in the Kendu Leaf Act and Rules.

In pursuance of the policy decision, mentioned above there was a reconstitution of the Kendu leaf units, the number going up from 144 to 180. Out of these units only Units Nos. 2, 2-A and 2-B were settled with the Orissa Forest Corporation Ltd., by negotiation and the rest were put to tender and settled with the parties on advance contract basis for a term of three years for the years 1969, 1970 and 1971. Government also appointed agents for all these units on the basis of the applications submitted for the purpose. The agents and purchasers so appointed executed agreements to function as such for the entire period of three years on terms and conditions stipulated therein.

As has been noted already, Forms G and H of the agreements with purchasers and agents contained clauses to the effect that if the agent or the purchaser had during the currency of the agreement duly observed and performed all the terms and conditions of the agreement to the satisfaction of Government and Government were satisfied that the agent or purchaser, as the case may be, had collected the maximum quantity of leaves/or been prompt in taking delivery of leaves and making payment therefor Government might grant to the agent or purchaser a renewal

of the contract for such period not exceeding one year at a time and subject to such terms and conditions as may be mutually agreed upon. This was in harmony with Rule 5-B (15) in the case of purchasers and Rule 7 (10) in the case of agents. The relevancy of these rules and the clauses in the agreements with the agents and purchasers will be considered later.

It is clear from a conspectus of the Act and the Rules as interpreted by the Supreme Court of India that little, if any discretion was left to the Government or its officers to alter or vary any of the terms and conditions of the agreements executed. The Rules and the agreements provided elaborately for the manner in which the State monopoly was to be worked out, how the agent was to be remunerated, the security to be furnished, the solvency certificate to be provided, the number of bags to be collected, compensation to be paid in case of shortfall, the rate of purchase of the bags by the purchaser and the compensation to be given to him in case he did not get the total quantity of leaves he had agreed to purchase and numerous other details. The Supreme Court, as has already been noted, definitely held that the appointment of agents to work the Kendu leaf trade on behalf of Government could only be on the basis of rules specifying the terms and conditions of such agency and specimen forms of agreements were to be made available to all who wished to work as agents so that nothing was left for determination in the future. These Rules and the forms would have no meaning if it was open to the Government or an officer of the Government to make changes therein either *suo motu* or on the application of an agent or a purchaser because he found it difficult or onerous to work on the terms and conditions prescribed. The little discretion which Government had under the rules was limited only to the point of time when offers of intending agents were accepted or rejected or in cases where the Government could not select agents out of persons who had applied for appointment as such, in which case they could appoint persons or parties who in their opinion were suitable for the work. Further under the agreements any dispute arising in the matter of interpretation of any of the terms of the agreement or its subject-matter whether it related to the agent or to the puchaser had to be referred to the Chief Secretary or any other Secretary to the Government of Orissa appointed for the purpose by the Government and the decision of the dispute by such person was to be final and binding on the parties.

The duties and responsibilities of the agent were clearly defined in Form G. The agent had to collect Kendu leaves from the Government lands and forests assigned to him, process the leaves so obtained and store the same after packing them in bags. He was to purchase Kendu leaves from the growers at prices fixed by the Government under Section 4 (1) of the Act, and to pay such collection charges to persons engaged for collecting the leaves from the Government forests and lands, as might be specified in writing by the Government. He was to get a fixed sum of money per bag of processed leaves towards cost incurred for purchase, collection, processing, storage, transport, packing and other handling charges and remuneration at a certain fixed rate for each bag of processed leaves that he secured by collection or purchase in respect of the minimum number of bags he undertook to procure. For each bag collected in excess of the minimum number, he was to get remuneration at an enhanced rate. If he did not secure through purchase and collection the minimum number of bags agreed, he was to be liable to pay to the Government by way of compensation at the rate of a fixed amount per bag of shortage. He had to maintain accounts at his depots and storage godowns and to display at each depot a correct list, written in Oriya, indicating the rates fixed by Government for purchase of Kendu leaves from growers and for payment of remuneration to pluckers. The agent had to deliver such quantity of processed leaves to such persons and at such time as he would be directed to do from time to time and subject to any agreed variation tender or complete delivery to the purchaser the leaves stipulated for in four instalments on the 30th June, 31st August, 31st October and 31st December.

The purchaser whose offer to purchase Kendu leaves of a particular unit was accepted by Government had to purchase from Government the entire quantity of Kendu leaves procured by the Government from there unit concerned at an agreed amount of money per bag. Government had to offer for delivery to the purchaser the Kendu leaves grown in the Unit in four instalments, namely, on the 30th June, 31st August, 31st October and 31st December. The Divisional Forest Officer had to cause a notice to be served on the purchaser at least 15 days prior to the date of collection of each instalment calling upon him to deposit the purchase price of the quantities of Kendu leaves available for delivery. In case Government was not able to deliver the minimum number of bags provided in Clause 3 of the agreement by the date of expiration of agreement the purchaser was to be entitled to compensation at a fixed rate

per bag of short supply. The purchaser could get a rebate under Clause 9 of the agreement only if he established a Bidi factory during the currency of the agreement to provide employment to residents of Orissa and paid the minimum excise duty of Rs. 3,000 per annum on the Bidi manufactured by him. In case the purchaser did not deposit the price of Kendu leaves within the due dates mentioned above, he was to be liable to pay the amount payable along with 6 per cent interest per annum by way of compensation, from the date of default till realisation irrespective of the fact as to whether he had taken delivery of the leaves or unit.

It will be sufficiently clear from the above that the hands of Government were tied in the matter of acquiring the ownership of the Kendu leaves and collecting the same from Government forests through agents and in the matter of disposal thereof. Once the property in the leaves passed the purchaser could dispose of them as he pleased. He could retain the profit he made out of his transaction and he had to bear the loss if the price anticipated by him was not realised at sales made by him. Normally the purchasers who were experienced businessmen only made offers on the basis of the market rates current at the time of the making of the offer. Government had also to see whether the offers were speculative or not and whether the purchaser was a solvent person with a clean record and take into account the experience in the trade he had in the past. As the exact number of bags to be collected in a unit could be predicated with certainty beforehand the quantity mentioned in the agreement was on the basis of estimated average production for three years or the estimated production in 1968. The agent and the purchaser had to guage the situation for himself in view of the past production. The purchaser while making a bid was expected to know the yield from the unit in the preceeding years, the quality of the leaves grown therein and the then prevailing market price of the leaves.

CHAPTER XII

The case of the State against Shri R. N. Singh Deo and Shri H. P. Mohapatra

The case of the State against Shri R. N. Singh Deo is almost the same as against Shri H. P. Mohapatra but somewhat different from that against Shri Ainthu Sahu, Shri S. Sundararajan and Shri Arjun Satpathy. The case against the first two respondents covers practically the same ground excepting that some additional charges were levelled against Shri R. N. Singh Deo with which Shri H. P. Mohapatra was not concerned.

The cause title of the case against Shri R. N. Singh Deo and Shri H. P. Mohapatra is as follows:

In the matter of—

Inquiry under Section 3 of the Commission of Inquiry Act, 1952, notified vide Government of Orissa, Home Department notification No. 44-E.C., dated the 22nd February 1973 as amended, vide Home Department notification No. 278-E.C., dated the 4th June 1973.

AND

In the matter of—

Illegal, improper and *mala fide* acts of and abuse of powers by the then Chief Minister of Orissa Shri R. N. Singh Deo, in the matter of grant of renewal of agreements in favour of Kendu Leaf Agents and Purchasers for the year 1972 and in the matter of grant of rebate, concessions and/or exemptions during the period from the 1st April 1970 to the 31st March 1972 in favour of Kendu Leaf Agents and Purchasers.

The opening paragraphs of the case against Shri H. P. Mohapatra are as follows:

In the matter of—

Inquiry under Section 3 of the Commission of Inquiry Act, 1952, notified vide Government of Orissa, Home Department notification No. 44-E.C., dated the 22nd February 1973, as amended, vide Home Department notification No. 278-E.C., dated the 4th June 1973.

AND

In the matter of—

Illegal, improper and *mala fide* acts of and abuse of powers by the then Minister of Forests, Orissa, Shri H. P. Mohapatra in the matter of grant of rebate, concessions and/or exemptions during the period from the 1st April 1970 to the 31st March 1972 in favour of Kendu Leaf Agents and Purchasers.

It will be noticed at once that the difference between the two cases lies in that Shri R. N. Singh Deo is charged additionally with illegal, improper, *mala fide* acts and abuse of powers in the matter of grant of renewal of agreements in favour of Kendu Leaf Agents and Purchasers for the year 1972. Both of them are charged with similar conduct in the matter of grant of rebate, concessions and exemptions during the period from the 1st April 1970 to the 31st March 1972 in favour of Kendu Leaf Agents and Purchasers. We may dispose of the common case against these two respondents and deal with the charge agaist Shri R. N. Singh Deo relating to the renewal of agreements while considering the case against Shri Ainthu Sahu and the two other respondents.

Shri H. P. Mohapatra was the Forest Minister for the period from the 17th November 1969 to the 6th January 1971 when Shri R. N. Singh Deo was the Chief Minister. According to the State's affidavits from April, 1969 onwards some of the purchsers of some of the units started making applications for refixation of purchase price of these units on the ground that they had offered excessive prices in respect of these units at the time of tender and accordingly the purchase price should be reduced. These prayers were not accepted by Government. In December, 1969 the purchasers of some units including units numbered 1, 82-A, 82-B and 82-C of the Rairakhol Division approached the Government by petitions for giving them substantial rebates with regard to be purchase price stipulated in the agreement. Agrain in June 1970 and thereafter the purchasers and agents of Units No. 6, 6-A, 47, 47-A, 48-A, 54, 54-A, 54-B filed petitions claiming rebate of

40 per cent in the purchase price and substantial concession by way of remission of shortfall compensation. The then Forest Secretary Shri A. K. Roy opposed the grant of rebate and concession to the purchasers and agents.

From a perusal of Forest Department File No. 7F/69 it appears that purchasers of Unit No. 47, 47-A, 48, 54, 54-A had applied as early as April, 1969, i. e., almost immediately after execution of the agreements for reduction of the tender price. The reductions asked for were only marginal. In some cases from Rs. 228·91 per bag to Rs. 218 per bag and in some others to below Rs. 201. According to the noting of the Secretary on the file "these petitions for reduction of purchase price were post tender thinking". He also quoted the purchase price of the adjoining units for reference, if required, for comparison; his suggestion was that the petitions should be rejected inasmuch as reduction in prices after units had been settled by tender should not be done. The Minister of Forest (Shri M. P. Mishra) accepted the recommendation and rejected the applications on the 6th May 1969. Thereafter purchasers of Units No. 1 and 82-B applied for refixation of purchase price on the 26th December 1969. The Secretary recommended their rejection on the 25th January 1970. Shri H. P. Mohapatra who had by then become the Minister, Forest, made an endorsement on the file to the effect that the applicants had pressed their grievances before him in person and in view of the difficulties expressed by them he desired that a full dress enquiry into the allegations should be made to find out if the prayers in the petitions could be allowed. On that the relevant portion of the noting in the office file reads "since the purchase price of Kendu Leave bags in different units have been fixed by obtaining tenders the same cannot be reduced at this stage on representations. Smuggling of leaves is not a new feature to these units only. Government are receiving representations and counter representations by the agents and purchasers reporting such acts of smuggling every now and then. It is humbly submitted that there would be no end to such complaints if enquiry is resorted to in each and every case. In the circumstances the petitions deserve no consideration." The Under-Secretary of the Department Shri A. Satpathy endorsed the file to the Secretary without any comment of his own. The Secretary, Shri C. G. Somiah put up a strong note suggesting rejection of the petitions. According to him if there was any smuggling from the unit "it was the agent of the unit who suffered as he had to account for the shortfall. As regards the purchaser he was required to pay only for the leaves actually

ready for delivery to him and in case there was a shortfall in the number of bags delivered he was to be separately compensated for the shortfall. Further the allegation of smuggling was a fairly common feature applicable to all the units. If the agents of the units were vigilant and paid the proper price to the pluckers and growers there would be little or no smuggling from any unit. It was only when the agent of any particular unit failed to satisfy the growers and pluckers in respect of their legitimate demands that the leaves from any unit moved out clandestinely". It was also pointed out that there was no provision in the agents' agreements that the Forest Department would ensure that there would be no smuggling from any unit since it was fairly impossible for the Department to control movement of leaves specially in the border villages of adjoing units. It was also said "actually it has been our experience that smuggling if at all, is done with the active connivance of the agents and purchasers of the units in order to avoid payment of royalty to the Government." This note of the Secretary was the 28th January 1970.

This was, however, not accepted by the Minister, Forest Shri H. P. Mohapatra who passed an order dated the 10th February 1970 for a full dress enquiry. A portion of the Minister's note may be quoted to show the way his mind was working. According to him "the precise issue in the present set of petitions is whether large-scale smuggling of quality leaves has actually taken place in the units concerned as alleged by the petitioners due to want of proper vigil and non-challance of the Forest Officers as a result of which the purchasers have been compelled to lift poor quality leaves collected by the agents after the smugglers had had their feed to the full. Once it is admitted, as in the above notes of the Secretary, that allegations of smuggling are a common feature in all the units, it is difficult to dismiss the pleas off hand instead of going into the merits of each case examining the matter objectively. State Monopoly in Kendu Leaf is, in essence and by character, a commercial concept in vogue under the State aegis. As such, it is susceptible to risks and wiles as in all sorts of trade practices. X X X X Normal trade practice demands that the trader should not disown his obvious responsibility of effecting delivery of quality stock of the normal standard in the deal; in fact, this is a necessary implication in all contracts even though it may not be expressly mentioned in the agreement. Hence it would amount to an abdication of the responsibility to say that

Government will not take cognizance of any allegations of smuggling because the terms of the agreements do not specifically stipulate this provision. It would certainly not be proper on the part of Government, who are not surely ordinary litigant, to kick the ball to the purchasers taking advantage of a supposed legal escape without going into the factual aspects of the allegations of large-scale smuggling of quality leaves out of those units as a result of which the purchasers would have been put to a quandary and obvious monetary loss. In case of large-scale smuggling surely the State Government has a responsibility."

The Secretary, Shri Somiah demurred to this and reiterated his stand by a note dated the 12th February 1970. He pointed out that the purchasers and agents were two separate legal entities bound down to the State by independent agreements. He also reiterated that any large-scale smuggling affecting the production of any units might lead to relief being given to the agents in the shape of writing off the compensation realisable from him for the shortfall but a purchaser had no legal claim for compensation for the loss of the agent and he could not be compensated by the reduction in the purchase price either as an interim measure or as a final measure. However, even before the enquiry was held the Minister ordered that in view of the circumstances the applicants (purchasers) may be allowed to lift the bags on payment of 50 per cent of the 4th instalment and be bound down to pay the rest by end of April, 1970.

The Divisional Forest Officer, Rairakhol Division, made an enquiry as directed regarding units No. 1, 82-A, 82-B, 82-C and furnished his report on the 5th April 1970. According to him although the agents' representative had stated that the tenants of these units were smuggling Kendu leaves to places outside and estimated that about 3,000 quintals of Kendu leaves had been smuggled there were no reliable statistics available with the agent in support of this figure. The Divisional Forest Officer noted that the agent had no evidence to substantiate that thefts of Kendu leaves were taking place. As regards the collection of third quality leaves, he merely noticed that the case of the agents was that the leaves purchased from pluckers were not of good quality as the tenants kept the good leaves with themselves for illegal sale and brought only the bad leaves to the "fadies" (depots) and the agent could not refuse to purchase such leaves in order to achieve the quantity stipulated in the agreement and to avoid payment of shortfall compensation. With regard to the

allegation that the Forest staff were unable to control smuggling the D. F. O. said that this was not correct as the Forest Department had checked and detected many smuggling cases and generally it was their experience that some of the smugglers came from outside, i.e., from Angul and Sambalpur and attempted to smuggle Kendu leaves with the help of local people in gangs by engaging trucks, jeeps and cars during the night. The D. F. Os.' opinion was that it was not possible to stop smuggling by the existing scanty special staff and territorial staff who had other field work to attend to and that if a special mobile party consisting of one Police Sub-Inspector, one Range Officer, three Forest Guards were constituted and provided with a jeep arms it was hoped that they could patrol at all vulnerable points from where smuggling was attempted. With regard to the collection of third quality leaves, the D.F.O. noted that it appeared from the report of the Assistant Conservator of Forests that the local tenants kept huge stocks with them without sale to the agents although it had been notified by the Government that the growers of Kendu leaves would sell green leaves to the agents but as there was no compulsion on them to do so the growers kept the green leaves with themselves. In the circumstances, the proportion of third and fourth class Kendu leaves alleged to be sold to the agents by the growers could not be found out as no account was maintained by the agents or growers showing collection and disposal of Kendu leaves according to quality.

On this, the Department put up a note to Secretary suggesting ways and means to stop smuggling. The Secretary, Shri C. G. Somiah passed the file to the Minister with his note dated the 6th May 1970. According to the Secretary, the Forest staff had tried their best to check smuggling but it was humanly impossible to check smuggling from any unit completely. Further the agent too had a responsibility in the matter and if wanted good and first class leaves, he had to pay for it more than the minimum as the agents of other units were generally doing. The Secretary mentioned the figures of shortfall for the four units as reported separately. In Unit No. 1 with a stipulated quantity of 2,500 bags there was a shortfall of 182 bags, in 82-A with a stipulated number of bags of 3,500, there was a shortfall of 110 bags, similarly for unit 82-B with a stipulated quantity at 3,800 bags there was a shortfall of 240 bags and in 82-C there was a shortfall of 160 bags out of the stipulated figure of 3,700 bags. According to the Secretary the shortfall was negligible and the representations had no merit.

It appears that in the meanwhile some purchasers had complained about large-scale smuggling of quality leaves during the then current season to the Minister who ordered that the Divisional Forest Officer should make a report about the position obtaining in the then current season as to whether there was large-scale smuggling in the year as alleged in the petitions of the purchasers within a fortnight. The Minister ordered that immediate steps should be taken to erect two check-gates on Cuttack-Sambalpur road and put into commission a special mobile party as suggested by the Divisional Forest Officer, Rairakhole Division. The said officer submitted his report on the 24th July 1970 wherein he stated that most of the growers of Kendu leaves of 1970 particularly in Unit 82-A, 82-B had retained their stock with them and processed into bundles without selling to the local agent at the rate fixed by the Government. As regards smuggling of Kendu leaves from Units, 82-A, 82-B and 82-C the D. F. O. reported that only three cases involving about 20 quintals in all had come to the notice of the staff who had seized the same. No smuggling of Kendu leaves had come to the notice of the staff in Unit No. 1 of 1970. As regards the collection of third class quality of leaves, the Divisional Forest Officer said that no account was maintained by the agent showing collection and disposal of Kendu leaves according to quality and as such it was not possible to give the exact proportion and quality of leaves which would be obtained by processing.

On the report of the Divisional Forest Officer, the Under-Secretary of the Department, Shri Arjun Satpathy (respondent along with Minister, Shri Ainthu Sahu) put up a note that Government might consider giving a certain percentage of rebate in the purchase price for the year 1969-70 as special case taking all necessary steps to stop smuggling of leaves and amendment of the Act.

Shri A. K. Ray who had then assumed charge of the Department as Secretary did not agree with this and gave his note on the 11th August 1970 to the effect that smuggling could not be a ground for reduction of the rate fixed by tender unless the law was changed. According to him, giving a rebate might even be illegal and the principles of State Trading might be hit.

The Minister, Shri H. P. Mohapatra in his detailed note of the 7th November, 1970 supported the view expressed by the

Under-Secretary and passed orders for rebate to be given to the purchaser as mentioned below for two years, i.e., 1969 and 1970.

Unit No. 1	..	5 per cent rebate in purchase price
Unit No. 89-A 82-B 82-C	}	20 per cent rebate in purchase price

His note to the Chief Minister contained the following observations :

" The enquiry report xxx xxx xxx reveals a dismal state of things as to how Rairakhol Division was the hot bed of large-scale smuggling of Kendu leaves. Smugglers mostly operating by the unearthly hours of night from Sambalpur and Angul with the help of local people in gangs by engaging trucks, jeeps and cars. The small Forest staff that were in position has, no doubt, acquitted itself creditably, in the given circumstances and apprehended some of the smugglers in many stray raids and booked the offenders for trial. xxx xxx xxx The report as above (of the D. F. O.) makes no secret of the vital point that there were smuggling galore. xxxx As such, the findings in the report establish the allegation of smuggling in unabiguous terms. When first class quality leaves or say, the cream vanished, the purchasers had to lift the third class discards that were offered to them by the agents concerned and in the nature of things it is quite understandable that they have sustained loss in the process. xx xx xx xx Similarly, there can be no denying the fact that in each of the four units in question, there were hundreds of registered growers who enjoyed legal privilege under the K. L. Act and rules to hold over sizeable stock of quality leaves for any length of time. Hence it was not surprising at all that they would be hand in glove with the smugglers to fetch high returns for their leaves by seditious deals than those were fixed by Government. xxx xxx xxx True, that the shortfall for the four units concerned as pointed out by the Secretary in his notes is small. But that has little relevance to the point at issue, especially in face of the contention that when the agents found that quality leaves had disappeared by surreptious means, they had to collect the third class discards to

the maximum extent possible in order to reach the target of stipulated bags and thereby escape penalty for shortfall. May be, they found in this method a hendy ruse to escape the penalty rope, cleverly transferring the burden of loss to the purchasers who were ultimately put in a quandary. In the face of it, the theory of negligible shortfall cannot be of any help in the case in point. In view of the above, it would not be proper and wise for Government to disown facts, shed responsibility and reject the petitions unconscionably without going into the merits of the allegation. xxx xxx xxx xxx Evidently, during the current year, the situation has gone from bad to worse. When the departmental staff are practically helpless to curb the menace, it is certainly idle to expect individuals like the agents or the purchasers to stem the tide. However, Secretary, in his notes.....suggested not to reduce the price fixed by tender. Although I am not inclined in this case to reduce the price, yet in the peculiar circumstances of the case the purchasers should be given some relief in view of the overhelming deterioration. The relief can be granted in shape of special rebate which will be commensurate with the quantum of harmddone. xxx xxx xxx Since the cream of the leaves vanished by dubious cannels, there is no doubt that the purchasers sustained substantial financial loss. At the same time, the aspect of Government revenue cannot be overlooked. To strike a practical balance between the two, 20 per cent rebate may be allowed on purchase price in respect of units 82-A, 82-B and 82-C which are worst affected by smuggling as per the enquiry report. So far as Unit No. 1 is concerned, the D. F. O. speaks in general terms that Rairakhol Division was the main theatre of smuggling. To meet the ends of justice and to be fair to all sides, 5 per cent rebate in respect of Unit No. 1 may be allowed though the quantum of loss as claimed by the purchasers might be more positive. The rebates shall apply only to the last year and the current year. As this rebate for two years is to be granted in terms of Rule 5-B (9) of the Kendu Leave Rules, in view of the peculiar nature of the case, it will neither affect the principle nor will it have any adverse repurcussion of the Supreme Court Case.. xxx xxx xxx It

may be borne in mind that the recent mushroom growth of Bidi Factories, both small and large in Angul areas and Sambalpur areas mostly feed on clandestine supply of Kendu leaves. On a modest estimation, it can be said that over 50 per cent of the first class leaves find their way to these factories from all the units lying adjacent to Cuttack-Sambalpur Highway. If this factor is not allowed to escape notice, then any extra expenditure on account of check-gates or mobile squads will not justify itself, but even bring in substantial revenue to the tune of lakhs which is now being harvested by the organised rings of smugglers. Any further neglect of this vital aspect will do positive injury to the trade as a whole. C. M. for approval, as his orders were taken at the time of acceptance of the tenders."

The Chief Minister accepted the Minister's recommendation and endorsed the file by putting his signature on the 19th November 1970 under the word "as proposed".

It appears that the Forest Department saw a rapid change in the personnel of the Secretary. Shri P. S. Habeed Mohammed who had come to replace Shri A. K. Ray did not feel happy with the order and evidently he discussed the matter with the Chief Minister in the presence of the Minister, Forest, Shri Mohapatra. He noted the minutes of discussion over his signature on the 2nd December 1970. The relevant portion of his note reads as follows :

" This was discussed with Minister, Forest on the 29th November 1970. I mentioned that since in this case, there are no instructions to the contrary the orders granting the rebates will have to be referred to the Finance Department before issue of orders, for concurrence. The Minister said that the matter would be discussed with C. M. on the 1st December 1970 and that action may be taken after the discussion with C. M.

During the discussion with C. M. on the 1st December 1970 when Minister (Forest) was also present I mentioned that the case should be referred to Finance Department for the following reasons :

(1) The proposed orders infringe on the finance of the State Government ;

(2) The proposal is to give concessions to private parties, against the terms of the agreements ;

(3) The Rules (Kendu Leaves Rules) do not envisage such rebates or reductions in revenue.

I also said that both the rules of business and the instructions thereunder make it clear that such cases should be referred to Finance Department before issue of orders.

C. M. said that Government have to give concessions in public interest to contractors, etc., outside the scope of the agreements with them. He specifically mentioned the Balimela dyke contracts where some deviations have been agreed upon. Minister (F) stated that the present cases relate only to receipts in a trading account and do not require the concurrence of Finance Department. C. M. agreed with this view and instructed me to issue the orders granting rebate without further referring the file to the Finance Department.

Orders may issue accordingly. After issue, the file may be put up to M. (Forest) and C. M. for information".

It may be mentioned that in his counter-affidavit Shri R. N. Singh Deo complained that the note of the Secretary Shri Habeeb Mohammed did not record correctly what he had stated during the discussion on the 1st December 1970. According to Shri Singh Deo what he had said was that Government should not always stand on technicalities and insist on the pound of flesh and that at times on grounds of equity and other considerations, Government were required to give concessions in the public interest outside the strict terms of the agreements. As regards the point of reference to the Finance Department, the version of Shri Singh Deo was that "by the very nature of the case, it was the Forest Department which could consider the various aspects and formulate its views".

Paragraphs 15 to 15 (j) of the State's affidavits against Shri Singh Deo and Shri Mohapatra deal with the case of the State against the two ministers regarding the grants of rebates and concessions. The case is as follows :

Purchasers of Units 47, 47-A, 47-B, 48-A, 6, 6-A, 54, 54-A and 54-B had presented petitions on the 15th June 1970 claiming

rebate in the purchase price of Kendu Leaf on the ground that the leaves delivered to them were of inferior quality and that they had offered unduly high prices while making tender. They claimed reduction of 40 per cent in the purchase price for the years 1969, 1970 and 1971 and also for refund of 40 per cent of the purchase price already paid by them for the year 1969.

Agents of Units 47, 47-A, 47-B and 48-A of Khariar Forest Division and agents of units 6 and 6-A of Deogarh Division presented petitions on the 12th June 1970 claiming remission of shortfall compensation towards shortage in the collection of bags on the ground that due to large-scale smuggling of leaves, natural calamities, etc., although their earlier application to the same effect had been rejected by the then Minister, Forests, Shri Murari Prasad Misra on the 6th May 1969.

On the above petitions the Minister Shri H. P. Mohapatra passed orders on the 16th June 1970 calling for reports from the respective Divisional Forest Officers. After the said reports came in the Under-Secretary Shri A. Satpathy on the 10th August 1970 recommended grant of rebates and concessions *inter alia* on the grounds of smuggling of leaves, unduly high prices offered by tenderers and unfavourable conditions existing in the units.

The then Secretary, Shri A. K. Ray by his note, dated the 11th August 1970 recommended their rejection. He noted that the said purchasers belonging to the Bolangir District had made 3 points, viz. :

(1) That the production in the units had gone down in quality and quantity due to the passing of the Titilagarh Railway line,

(2) The growers were taking advantage of lacuna in the Kendu Leaf Act and smuggling was going on, and

(3) Unfavourable weather condition had affected the production. So far as the units of Deogarh was concerned, the representation was that smuggling was going on resulting in a drop in the collection of the leaves. The Secretary noted that the report of the D. F. O. was generally on the line advocated by the contractors. The Secretary's view was—

(1) Reduction of purchase price in a sale conducted by a system of tender is an unjustifiable proposition. If the sale price is reduced after tender it becomes unfair to the other tenderers who might have agreed to take it at the reduced rate.

(2) The passing of the Titilagarh Railway lines was not something new but had taken place much earlier to the issue of the tender and was well-known to the tenderers. The point regarding lacuna in Kendu Leaf Act could only be redressed by the Legislature and not by the executive Government. It could not be presumed that the Kendu Leaf Act encouraged smuggling. Further smuggling could be a two-way process and the party itself might have benefited from such smuggling. So far as smuggling due to putting up of bidi factories was concerned, there was no report as to how many bidi manufacturers had started working and what was the magnitude of their consumption of Kendu leaves.

(3) Weather conditions were an uncertain feature and the purchaser had to live with a good year as well as a bad year.

In spite of the above view of the Secretary, the Under-Secretary while recommending rejection of the prayer of the agents for relief from shortfall compensation for 1969 as there was very little shortfall in that year as also for the year 1970 on the ground that the anticipated estimate of production could not form the basis of any relief put up a note on the 26th June 1970 in favour of the purchasers suggesting reduction of purchase price in view of the special grounds which they had put forward namely ;

(1) Due to cut throat competition they (the purchasers) had to offer high tender price expecting that they would get quality leaves as before.

(2) Due to smuggling of leaves the quality thereof was not maintained.

(3) Due to bad weather the leaves were insect infested and black spotted.

(4) After the introduction of growers' licence no care was given to timely coppicing of the plants because of the expenses involved resulting in deterioration of quality.

The Secretary Shri A. K. Ray in his note dated the 28th September 1970 stated categorically that there should be no

reduction in the purchase price and if the Minister was convinced about the correctness of the claim the matter had to be referred to the Finance Department for scrutiny under Rule 10 of the Rules of Business and after the Minister's approval had to be placed before the Council of Ministers as the formula for settlement had been evolved and approved by the Council.

There was a similar representation made by the agents of Units 54, 54-A and 54-B of Bolangir Forest Division on the 15th June 1970 for refixation of their stipulation for 3 years and refund of compensation paid for 1969 for shortfall during that year.

The report from the Divisional Forest Officer, Bolangir, called for by the Under-Secretary was to the effect that during 1969 the actual production in the two units 54, 54-A was 4,935 quintals as against the stipulated figure of 6,433 quintals and that the anticipated production for 1970 was estimated at 4,000 quintals and this was attributed in the main to the passing of the Titilagarh-Sambalpur Railway line through the units over a considerable length. The Under-Secretary favoured the suggestion of the D. F. O., Bolangir, that there should be refixation of stipulation in respect of these two units. He recommended favourable consideration of the prayer of the agent for refixation of the stipulation of these two units at 3,500 and 1,400, respectively. The Forest Secretary Shri A. K. Ray by his note dated the 28th September 1970 dissented from this on the ground that no reductions either in stipulation or in price could be made as explained by him already and if the Minister was convinced about the correctness of the claim it had to go to the Finance Department for scrutiny under Rule 10 of the Rules of Business and after Minister's approval to go to the Council of Ministers as the formula has been evolved and approved by the Council, that it was difficult to predicate how rainfall affected the growth of Kendu leaves, that the passing of the railway line was well-known to everybody before the contracts were entered into and reduction of figure on the basis of allegation of smuggling could not be accepted as smuggling was a two-way traffic and if accepted it went to the detriment of the agent and benefit in another. Obviously his suggestion was that the leaves were being smuggled out with the connivance of the agent for consideration. He reiterated his previous stand that reduction of the figure stipulated for would go against the principle laid down by the Council of Ministers and a revised formula had to be sanctioned by the Cabinet.

The Minister Shri H. P. Mohapatra passed a composite order on all these applications and proposed relief to agents and purchasers as follows :

To purchasers

Unit 6 Unit 6-A Unit 47 Unit 47-A Unit 48-A Unit 54 Unit 54-A	20 per cent rebate in purchase price for all the 3 years (1969, 1970 and 1971).

To Agents

Unit 6 Unit 6-A Unit 47 Unit 47-A Unit 48-A Unit 54 Unit 54-A	Concession for the year 1970 only to the extent of 20 per cent of the stipulated bags or the actual shortfall whichever is less. Stipulations to be refixed at 20 per cent less than the present stipulation.

His note to the Chief Minister which ran into pages may be summed up as follows :

(1) "The State monopoly in Kendu leaf is basically a commercial concept. For the trade to pick up buoyance and record better turn out from year to year, yielding corresponding larger returns to the State Exchequer, it is all the more imperative to view it from the commercial angle and give it the matter of fact-treatment it needs. "The various causes responsible for the declining production were high incidence of smuggling as a side effect. Besides the above one had to take into account the growth of small bidi making centres on the border in Angul Division which afforded ready market for the smuggled stuff and secondly there was too much disparity in the net royalty in respect of leaves in these units *vis-a-vis* those in the adjoining units.

(2) "To nullify the effect of smuggling there is a need for reorientation of the Government attitude to the problem and what is called for is a whole some

measure to correct erratic behaviour, i.e., to prune the purchase price, to be precise and to readjust it at the level of that prevailing in the adjoining units, but which by no means is to go below the reserve price level.

(3) "There was a possibility of purchasers and agents backing out altogether and in that case Government would be hard put to find substitute purchasers and agents and might even have to settle the units at throw away prices as had been done in Units 66-C and 58."

The Minister also referred to rule 58-B of the Orissa Kendu Leaf Rules and sub-rules (7), (8) and (9) thereof and took the view that Government had overriding legal powers to sall and dispose of Kendu leaves in any manner as they deemed fit and under Section 17(2) of the Act no suit or other legal proceedings would lie against Government for anything done in good faith. The Minister felt that 20 per cent special rebate in the purchase price only in respect of unit 6, 6-A, 47, 47-A, 48-A, 54 and 54-A exclusively on special consideration as a trial measure should be allowed as the purchasers has suffered right from the beginning due to bad quality and such rebate should apply to all the 3 years from 1969 to 1971 and the arrear rebates of the preceeding year (i.e., of 1969) be adjusted against current transactions. He also hoped that targets in respect of 54, 54-A may be refixed at 20 per cent less than the current stipulation and if any refund all out effort to make the units ebullient and bring in more arising out of refixation became due to the agents for the 1969 season the same might be adjusted against the future dues from him so that the agents and purchasers concerned would make an all out effort to make the units ebullient and bring in more profits to the Government coffer. In regard to the Secretary's suggestion to route the file through the Finance Department under Rule 10 of Rules of Business and to seek the approval of of Cabinet, the comment of the Minister was that minor adjustments here and there by way of readjustment of purchase price, refixation of stipulation and relief on account of shortfall had in the past been done in appropriate cases without such routing or approval. Further inasmuch as the re-orientation in respect of the seven units did not affect the Cabinet formula nor resulted in a violation of the rules there was no necessity for the paltry matter to go to the Cabinet.

The Forest Minister's recommendation was accepted by the Chief Minister Shri R. N. Singh Deo on the 19th November, 1970 by an endorsement over his signature "As proposed".

In paragraph 18 of the State's affidavit there is a chart showing the total rebate granted to purchasers and the loss to the State by refixation of the stipulated number of bags. It will be noted therefrom that the total rebate granted to the purchasers came to Rs. 36,884,321·63 P. and the concession to agents on account of shortfall to Rs. 3.16,495·20 P. According to the State rebates and concessions were allowed to a total extent of Rs. 40,00,816·83 P.

Unit No.	Original purchase price	Revised purchase price as per the above G.O.		Actual collection during 1969, 1970, 1971 in quintals	Total amounts of rebate
1	2	3		4	5
		Rebate per bag			
	Rs. P.	Rs. P.	Rs. P.		Rs. P.
6	220·30	176·30	44·00	13,426·00	5,90,744·00
6A	194·50	163·50	31·00	10,047·00	3,11,457·00
47	233·61	186·89	16·72	9,855·56	4,60,451·76
47A	231·33	185·07	46·26	10,109·00	4,67,642·34
48A	219·37	175·50	43·87	6,809·66	2,98,739·42
54	228·91	183·13	45·78	10,971·00	5,02,252·38
54A	210·81	168·65	42·16	4,512·70	1,90,255·43
82C	187·75	150·20	37·55	6,747·00	2,53,349·85
82A	191·25	153·04	38·21	6,246·00	2,38,659·66
82B	246·00	198·80	49·20	6,455·00	3,17,586·00
1	253·89	241·20	12·69	4,191·00	53,183·79
					36,84,321·63

Unit No.	Stipulated number of bags	Actual number of bags in 1970	20 per cent less bags	Actual short-fall	Compensation per bag	Total amount of rebate of actual short-fall or 20 per cent of stipulation whichever is less
1	2	3	4	5	6	7
			Rs. P.		Rs. P.	Rs. P.
6	4,328	3,595	865·00	733	56·40	41,341·20
6A	3,525	2,850	705·00	675	56·40	32,430·00
47	3,500	2,798	700·00	702	56·80	39,760·00
47A	3,600	2,843	720·00	757	44·00	31,680·00
48A	2,395	1,998	479·00	397	48·80	19,373·00
54	4,433 3,650 A-1969	3,581 3,740 A-1971	886·60	..	66·80	1,11,041·00
54	2,000 1,285 A-1969	1,505·78 .. 1,925·00 A-1971	400·00	..	51·20	40,960·00
						3,16,495·20
			Grand Total			40,00,816·83

The State's affidavit shows that the Government orders were communicated to the D. F. Os. on 28th November 1970 to implement the decisions by making proper adjustment in the purchase price so that the revised purchase price did not go below the reserve purchase price. Government orders were also issued to the Divisional Forest Officers to give necessary relief of the agents concerned on the 28th November 1970.

In paragraph 16 of the State's affidavit, reference was made to Unit No. 55-A in respect of which the agent was appointed on the 2nd April 1969 to collect 2.025 bags a year. On the 15th October 1969 the agent had made a representation that on account of delay in execution of the agreement with him the Kendu leaves of the unit had been washed away and he had

suffered loss and should therefore, be relieved from payment of shortfall compensation. The Under-Secretary Shri A Satpathy suggested that the Divisional Forest Officer be directed to realise shortfall compensation, and his note was approved by Forest Secretary Shri C. G. Somiah and also the then Minister of Forests on the 24th April 1970. Thereafter on the 14th July 1970, the agent made a further representation for remission of the shortfall compensation. The Under-Secretary in his note dated the 17th August 1970 suggested that the Secretary should endorse the file to Minister, Forest as desired by him. The file was endorsed to Minister Shri H. P. Mohapatra who by his order dated the 7th November 1970 directed that shortfall to the extent of 79 per cent for the year 1969-70 season may be waived.

The Forest Minister's recommendation to the Chief Minister was based on the agents having actually executed the agreement as late as 2nd May, 1969 and according to the Minister from March to May the "unscrupulous element like smugglers had had a field day; further the agent being a new entrant in the trade deserved some consideration and Government were morally obliged to grant relief because of their own omissions and commissions". The Chief Minister by his order dated the 19th November 1970 approved of the above.

According to the State the benefit which the agent derived from the concession amounted to Rs. 79.062·40 P. There was, however, some delay in issuing these orders. In the meanwhile the order relating to grant of rebate and concessions had been stayed by Government by order dated the 31st December 1970 of Chief Minister. Notwithstanding the same the Under-Secretary Shri A. Satpathy made a note on the 1st January 1971 and the 2nd January 1971 to the effect that the Minister, Forests had instructed him to issue the order immediately as it had already been delayed. This case was said to have no connection with the stay orders issued in cases of general shortfall in 1969 as this was a case of late settlement analogous to that of units 56-C and 58 where similar concessions had been allowed without referring to the Finance Department. The Under-Secretary noted that the Personal Secretary to the Chief Minister had also informed him over the telephone that the order should be issued immediately.

In paragraph 17 of the State's affidavit against Shri Mohapatra a complaint is made that he had reduced the figure of 1,960 bags to be collected by the agent of unit 104 for the 3-year period to 1,460 bags per year without the concurrence of the Chief Minister or consultation with the Finance Department or the

Cabinet by his order dated the 6th April 1970. This resulted in loss to the State of Rs. 16,800. The only answer given by Shri Mohapatra is that his order was just and *bona fide* and that further details would be given after inspection of the relevant files No attempt in this direction was however made.

According to paragraph 20 of the State's affidavit the orders relating to grant of rebate to purchasers and concession to agents in November. 1970 evoked public criticism and members of the coalition Government raised objection to the actions of the Forest Minister. The Chief Minister passed an order on the 31st December 1970 to keep the aforesaid orders in abeyance until the matter was placed before a Cabinet Committee. An extract of the explanation by and the order of the Chief Minister is reproduced below :

> "During my absence in Delhi in connection with the important work of the State, some Members of the Assembly and others have continued to repeat the wild and vague allegations of corruption in connection with Kendu leaf rebate. Highly exaggerated figures have been advertised to be the rebate for the purpose of motivated political propaganda. The propaganda too is managed and machinated by some politicians interested in the Kendu leaf smugglers from behind.
>
> There was nothing surreptitious or secret and everything was done openly in the interest of the State. Facts have been placed before the public and justification for the decision has been taken to rectify the situation which was leading to gradual deterioration of trade and increase in smuggling in some units. It was adversely affecting and would have done further damage to State income. In spite of this position if misrepresentation is persisting it can only be for making political capital out of the situation. Since there has been a campaign of vilification, insinuations and mudslinging and doubts and suspicious have been raised in the minds of the public, in the larger interest and to allay all suspicious created by such interested propaganda. I hereby keep the orders in abeyance.
>
> The order aimed at rectifying the abnormal pricing pattern and annihilation of smuggling and consequent deterioration of State income, will be placed before a Cabinet Committee, and further action will be taken according to the decision of the said Committee."

On the 3rd January 1971, the Chief Minister appointed a Cabinet Committee consisting of Shri Pabitra Mohan Pradhan, Deputy Chief Minister as Chairman, Shri Raj Ballav Misra, Minister, Shri Surendranath Patnaik, Shri Harihar Patel, Shri Nityananda Mohapatra, Shri Haraprasad Mohapatra and Shri Murari Prasad Misra, Ministers as Members. The Committee was required to go into the order aimed at rectifying abnormal pricing pattern and annihilation of smuggling and consequent deterioration of State income which had been kept in abeyance. According to State's affidavits before this Cabinet Committee could function the Ministers belonging to the Jana Congress Party submitted their resignation on the 6th January 1971 mainly on this issue. On that every day, the Forest Minister recommended that the rebates be revoked. He suggested the appointment of a Committee to look into representations made by the parties in all the cases in which rebates had been ordered as also other representation for relief pending consideration and to suggest measures to normalise the trade, check smuggling, increase Government revenue and protect the interest of the State. The Chief Minister Shri R. N. Singh Deo approved of the order of the Minister on the 6th January 1971.

The above order of the Minister was communicated to D. F. Os. on the 7th January 1971 but the Chief Minister tendered his resignation on the 9th January 1971. According to the State's affidavits by that date the purchasers and agents who had been granted rebate and concessions had already received the same. The agents in whose cases shortfall compensation had been waived were not required to repay the same and such of them as had already paid the same for the 1969 got refund of the proportionate compensation amount. The purchasers also had lifted their bags of Kendu leaves in accordance with the revised price fixed by Government. After resignation of the Ministry the new Chief Minister Shri Biswanath Das on the 5th May 1971 passed an order for the recovery of the amounts from the purchasers who had availed of the benefits under the rebate order. The purchasers paid the amount in instalments.

In paragraphs 19 to 19 (e) which is common to the affidavits against Shri R. N. Singh Deo and Shri H. P. Mohapatra the State laid the following charges against them of having acted unlawfully and improperly.

(1) The order of Shri H. P. Mohapatra dated the 7th November 1970 recommending reduction in the

purchase price in Units 1, 82-A, 82-B, 82-C, approved of by the Chief Minister on the 19th November 1970 was not in accordance with the terms of agreement executed by the purchasers. If there was a shortfall due to smuggling Government had to pay compensation to the purchaser as prescribed in the agreement. Accordingly, Government incurred a liability to pay compensation for each bag of short supply to the purchaser.

(2) The composite order passed by Minister Shri H. P. Mohapatra on the 7th November 1970 granting rebate to purchasers of certain units and concessions to agents in others approved of by Chief Minister on the 19th November 1970 were not in accordance with the terms of the agreements executed by the agents and purchasers. The basis of such relief on the disparity of the purchase prices in these units and those of the neighbouring units was not a valid one. The purchase price of the units was settled on the basis of tender submitted by the intending traders with reference to the quality and quantity of leaves produced in these units which varied from unit to unit. Although it had been mentioned in the order of Minister, Forests that the rebate was being granted on the recommendation of the Divisional Forest Officers only the D. F. O. of Deogarh had made such a recommendation but the D. F. Os. of Bolangir and Khariar had not done so.

(3) Such grant of rebates was not provided in the Orissa Kendu Leaf Act, 1961 and the Rules framed thereunder. There was no provision either in the Act or Rules authorising the Government to reduce the contract price agreed to by the parties on the basis of the contract executed in Form 'H' which contained stringent conditions whereby Government had the right to terminate the agreement of any purchaser by giving 15 days' notice for default and on such termination the purchaser was to be liable to pay the difference between the price payable by him and the price that would be obtained by selling the goods in the market.

(4) The rebates in the purchase price and the concessions to the agents were ordered to be given without examination of the legal aspect by the Law Advisers of the Government. The Secretary Shri A. K. Ray had suggested that such a course would be contrary to law and likely to be questioned in Courts of law.

(5) The said concessions involved financial commitment to the extent of lakhs of rupees and the cases were not referred to the Finance Department to examine the implications despite the Secretary's pointed reference to Rule 10 of Rules of Business framed under Article 166 of the Constitution. The said rule provided that no Department shall authorise any order which either immediately or by repurcussion would affect the finances of the State or which involved any grant of lease or licence of mineral or other rights or any privilege in respect of such concession or which in any way involved relinquishment of revenue.

(6) The Secretary Shri A. K. Ray's suggestion in his note of the 11th May 1970 regarding consultation with the Finance Department and the prior approval of the Cabinet was brushed aside without any consideration. This was in defiance of Rule 10 of Rules of Business that no proposal should be proceeded with without concurrence of the Finance Department unless a decision to that effect had been taken by the Cabinet.

In paragraph 21 of the State's affidavit against Shri R. N. Singh Deo it was stated that while considering the application of the purchasers of units 70 and 70-A for grant of rebate in the purchase price the Forest Secretary, Shri A. K. Ray had endorsed the file to the Finance Department. The Finance Secretary, Shri J. P. Das in his note date the 2nd January 1971 expressed his views supporting the stand of Shri A. K. Ray that the approval of the Cabinet was necessary. The matter was again referred to

the Law Department and the Legal Remembrancer in his opinion expressed on the 31st March 1971 stated that "since the acceptance of the claim would mean loss of revenue to the State, consultation with the Finance Department is mandatory. Again if the proposal is required to be placed before the Cabinet for approval under the second schedule to the Rules of Business that procedure must also be followed. If after obtaining the concurrence of the Finance Department and the approval of the Cabinet, Government decides to vary the stipulation, execution of a supplementary agreement may be necessary".

Months thereafter the matter was referred to the P. & S. Department (Political & Services) Department and Shri R. N. Singh Deo who had become the Minister with the P. & S. portfolio, passed an order on the 25th August 1971 contrary to the above view. According to him " neither the provisions of item 19 in the second schedule of the Rules of Business nor those in Rule 10 (1) (c) of the said Rules apply to this case. The income derived from Statt Trading in Kendu leaves is net profit and not revenue in the strict sense of the term. It is for this reason that such cases were never referred to the Finance Department in the past".

The Minister Shri Singh Deo observed that replies to the questions as to whether income from Kendu leaf trade was a kind of statutory revenue in the category of land revenue of whether the Kendu Leaf Act and the Rules were not self-sufficient general schemes providing for control and development of Kendu leaf trade in the State would set the matter in proper perspective. The extract of the above observations were ordered to be reproduced in the Forest Department file and sent to that Department for necessary action. According to paragraph 21(b) of the State's affidavit in the case of Shri R. N. Singh Deo, a copy of the above view of the said Minister was sent to the Forest Department and the question relating to modification of stipulated number of bags to be collected by the agents of units for 70, 70-A, 53-A, 82-A, 82-B and 82-C was not referred to the Finance Department and orders were passed by Forest Minister Shri A. Sahu at his own level without taking the approval of the Chief Minister or reference to the Cabinet.

The State's case against Shri R. N. Singh Deo in the matter of renewal of the agreement ordered by Shri A. Sahu may be left over for the time being to be considered along with the case against the said Minister.

Affidavit of the Intervenor :

Shri Pabitra Mohan Pradhan, ex-Deputy Chief Minister of Orissa, up to the first week of January, 1971 appeared as an intervener in these proceedings and filed an affidavit on the 23rd July 1973 wherein he made the following complaints :

(a) The reduction of purchase price and condonation of shortfall were illegal and irregular as there was no provision either in the Act or in the Rules empowering Government to grant the same.

(b) The action of the two Ministers, i.e., the Forest Minister and the Chief Minister invited criticism both in the press and in the political platform.

(c) The decision of the Forest Minister and the approval thereof by Chief Minister (both belonging to the Swatantra Party in the Swatantra-Jana Congress Coalition Ministry) was taken without the knowledge of the Jana Congress Ministers including himself.

(d) When pressed by the deponent the Chief Minister at first tried to avoid any talk about the matter and ultimately gave some evasive replies. Although a number of demi-official notes were sent by the deponent to the Chief Minister, he still chose to send only evasive answers which failed to convince the deponent about the propriety of his action.

(e) Realising that the decision and action taken by the Forest Minister and Chief Minister were in convinance with certain officials and in intrigue with some Kendu Leave agents he and his party decided to part alliance with the Swatantra Party.

(f) That action of the said two Ministers was against the opinion of the Forest Secretary and the Finance Secretary.

(g) Although the matter of condonation of shortfall and reduction of prices should have been discussed in the Cabinet meeting as per rules [Clause 19 in Second Schedule and Rule 8(1) of the Orissa Government Rules of Business], the Chief Minister and the Forest Minister deliberately avoided to bring the matter to the notice of the Cabinent for discussion and opinion.

(h) The waiving of shortfall compensation granted to the collecting Agent of the units 6, 6-A, 47, 47-A, 48-A, 84, 54-A was arbitrary and discriminatory.

(i) The grant of concession to the agents before the end of the Kendu leaf season was per se *mala fide*.

(j) Similarly, the grant of rebate in the purchase price much before the expiry of the period of agreement was illegal and irregular. The reduction granted to the Agents and purchasers caused a loss of revenue to the State over Rs. 20 lakhs. Shri P. M. Pradhan also levelled charges of corruption in the matter of the renewal of agreement but without any particulars.

THE COUNTER-AFFIDAVIT OF SHRI H. P. MOHAPATRA :

The counter-affidavit of Shri H. P. Mohapatra, dated the 15th October 1973 adds little to his view point as extrated from his orders already quoted. According to him :—

(a) The allegations contained in the representation of purchasers were to quote his words "grave and of far-reaching effect and if found true were such as to jeopardise the entire structure and future of State monopoly of trading in Kendu leaves unless nipped in the bud by suitable remedial measures. Necessarily such abnormal conditions of operation of trade agreements could never have been tolerated and if found true the trading parties were entitled to equitable and human considerations on grounds of administrative justice and commercial good will apart from the technical considerations of legality or otherwise of contractual obligations. The Secretary of the Forest Department appeared to have set his face against any enquiry by official channel of its field men into the truth or otherwise of the allegations. But the State was not expected to stand on technicalities and behave as a "Bania" in the matter. Since the total arrears outstanding against the purchasers were subsequently realised by it the State cannot be said to have sustained and financial loss.

(b) "The Inquiry Report from Rairakhol revealed that the petitioners from that area had a genuine grievance inasmuch as quality leaves vanished through dubious channels. The rebates were ordered in terms of Rule 5-B(9) of the Kendu Leaf Rules with the approval of Chief Minister who was also the Minister of Finance. Consequently, the order granting rebate did not require the concurrence of the Finance Department. Besides the subject-matter had already been decided upon by the Finance Department on the 8th February 1967 to the effect that these were administrative matters on which views of the Finance Department were not necessary.

An extract from the said orders dated the 8th February 1967 read as follows:

" As it is mainly an administrative matter and as the matter will go before the Tender Committee, it does not seem to be necessary to record any views of the Finance Department on the file".

It is to be noted that the deponent does not set out the facts on which the opinion of the Finance Department was based nor the exact point which was referred to that Department.

(c) At any rate net profits from Kendu leaves not being revenue in the accepted connotation of that terms it was not necessary to refer the same for the concurrence of the Finance Department. From the time of Shri Sadasiva Tripathy, the former Chief Minister similar matters were being disposed of by the Deputy Minister at his level and were never placed before the Cabinet for decision. A reference was made to the order of Shri S. Tripathy at Annexure 3 which only shows that the Chief Minister directed the Deputy Minister to pass orders.

As in the case of the order dated the 8th February 1967 extracted from above the setting in which Shri Tripathy made his order is not brought out.

(d) As regards the agents also action had been taken on the recommendation of the Divisional Forest Officers regarding amuggling and the passing of the railway line through the areas affected. In view of the prevailing circumstances and acting within the scope of sub-rule (9) of Rule 5(b) read with Orissa Kendu Leaf Act the orders passed in their favour were justified. In the past, reassessment of purchase price, refixation of stipulation and relief on account of shortfall had been done in appropriate cases without Cabinet approval. There was no necessity to route the matter through Finance Department. In one case the Forest Secretary Shri A. K. Ray had recommended the grant of rebate without suggesting that the matter be referred to the Finance Department.

(e) As regards waiving shortfall compensation from the agent of Unit 55-A the State had sustained no loss as compensation had been realised from the concerned agent.

(f) The Probe Committee headed by Shri I C. Misra had recommended to Government that in appropriate cases relief from shortfall compensation might be given.

(g) Under the general law of contract an agreement can be substituted for another in various circumstances. Reduction of purchase price settled under the original agreement with consent of parties was accordingly quite legal and the law even envisaged change in the terms of the contract in the light of subsequent happenings unforeseen by the contracting parties.

(h) It was not true to say that the Jana Congress Ministers submitted their resignation from the Cabinet on the issue of rebates and concessions. The real fact was that the aforesaid reasoned orders passed after due assessment and investigation of facts were misinterpreted and misrepresented to the public by the then Deputy Chief Minister Shri Pabitra Mohan Pradhan with *mala fide* motive and not to allay any suspicion in the public mind as alleged inasmuch an independent Committee was formed to look into the problem as a whole and to suggest remedial measures if necessary.

The Counter-affidavit of Shri R. N. Singh Deo:

Shri R. N. Singh Deo affirmed a counter-affidavit running into four hundred pages of which probably not more than a dozen were referred to by Counsel while arguing the case on his behalf. Shri Singh Deo's affidavit consists of 4 Chapters. The first from pages 1 to 10 is described as "preliminary", the second from pages 10 to 144 is headed "Crude and motivated abuse of Commission of Inquiry Act by the outgoing Nandini Ministry for their party purpose". Chapter III from pages 145 to 373 is headed "*mala fide* motives of Shri Pabitra Mohan Pradhan against the Swatantra Party (Orissa Unit) and its leader" and Chapter IV covering 27 pages from pages 374 to 400 purports to deal specifically with various paragraphs in the affidavit of the State of Orissa. The first two chapters are wholly irrelevant, so far as this enquiry is concerned. The major part of Chapter III is devoted to criticising the action and conduct of Shri Pabitra Mohan Pradhan and even charging him to be hand in glove with some smugglers in areas covered by units 1, 6, 6-A, 82-A, 82-B and 82-C. Incidentally in this chapter reference is made to the reports of the Divisional Forest Officer, which have already been taken note of. There are numerous references to the petitions of Kendu Leaf agents and purchasers in this area giving the names of persons who are alleged to have stored Kendu leaves for smuggling purposes.

The reports of the Divisional Forest Officers, Deogarh, dated the 19th July 1970, Bolangir Division, dated the 11th July 1970 and Khariar Division dated the 31st August 1970 are referred to in particular in the affidavit. It may be noted that the D. F. O., Deogarh, is quoted to have reported that the best quality of leaves which were ordinarily purchased by agents at the rate of 45 leaves per paise were being purchased by others as high a rate as 10 leaves per paisa. According to this report this difference in rate of leaves purchased from the pluckers attracted the best available quality of leaves to go outside the unit and was primarily responsible for the gradual fall in the quality of leaves collected by agents in units No. 6, 6-A year after year. Accordingly the D. F. O. suggested waiving the compensation for shortfall in the year 1969 and recommended that inasmuch as the produce of these units could not be lifted and marketed in the previous year in time Government might consider allowing reduction of purchase price in these units to the extent of 30 per cent. There is a quotation from the report of the D. F. O., Bolangir, that the purchase prices fixed for these three units 54, 54-A and 54-B were

much higher than those of the adjacent units, although the quality of the leaves were more or less the same; whereas the purchase price of these three units 54, 54-A and 54-B were Rs. 228·91 P., Rs. 210·81 P. and 196·00 P. per quintal, respectively, the purchase prices of adjoining units were much lower, that for unit 55 being Rs. 180, for unit 57 Rs. 153·00 for unit 58-A, Rs. 161·25 for 58-B Rs. 161·25 P. and for 58-C Rs. 157·55 P. Reference was also made to the passing of the railway line between Titilagarh and Sambalpur which acted as an embankment and resulted in collection of water on one side of it which people utilise for paddy cultivation. Further the springing up of small townships near the railway station served to reduce the area on which Kendu plants used to grow before.

Reference was also made to the report of the Divisional Forest Officer, Khariar who had referred to the smuggling tendency of the pluckers on the borders of the units with a sider that it was difficult to prove the same. This was in reference to units 47, 47-A, 47B and 48-B. This area was also said to have been badly affected in 1969 by a cyclone and heavy rains which had affected the growth of Kendu leaves. Reference was also made to the report of the Forest Officer that the rates of purchase in the group of units 47, 47-A and 48-A were near about Rs. 200 or over while those in the adjoining units of 48, 48-B and 51 were much lower. Even in another group of adjoining units 62, 62-A and 62-B the rates were said to be lower than this group consisting of 47, 47-A 48-A whereas the quality of leaves of all the units were more or less the same.

In paragraph 94 of his affidavit Shri R. N. Singh Deo even criticised the action of Shri A. K. Ray and Shri P. S. Habeeb Mohammed, Secretaries of the Forest Department as being guided by the private wish of Shri P. M. Pradhan who was then controlling the Political & Services Department. It was said that the opinions of Shri A. K. Ray against reduction in purchase price was without foundation since a general scheme on the Kendu leaf policy had already been approved by the Cabinet on the 15th January 1969 in broad terms which *inter alia* mentioned that the rate of purchase price for individual units should be fixed taking into account the rate of increase in the purchase price in the neighbouring units. Concurrence of the Finance Department was said not to be necessary as recommended by the Secretary in inasmuch as concession in stray cases figuring in the trading

account had no connection with statutory revenue. It was also stated that the income from Kendu leaf trade before the contract was worked out did not become Government revenue like land revenue, tax, fees, cess, irrigation rates, etc., because the Act, i.e. the Kendu Leaf (Control of Trade) Act only described the income as net profit. Shri Singh Deo also averred that the Forest Department had admitted that such individual cases had never in the past been routed through the Finance Department or the Cabinet. The deponent added that the suggestions of Shri A. K. Ray and Shri P. S. Habeeb Mohammed of routing the files through the Finance Department and the Cabinet would have made no difference inasmuch as the deponent himself was the Finance Minister during the relevant time and would have over-ruled any prejudicial advice by the Department while so far as the Cabinet was concerned, as the Swatantra Party had greater representation in it than the Jana Congress Party which held the brief of the smugglers the Cabinet was sure to decide according to the wishes of the deponent's party.

Shri Singh Deo referred to the note of Shri H. P. Mohapatra dated the 6th November 1970 wherein the Forest Minister had hinted that the smugglers "may have a built in lobby so as to thwart any sincere move aimed at their wholesale liquidation" Obviously this "built in lobby" was a veiled reference to the two Secretaries Shri A. K. Ray and Shri P. S. Habeeb Mohammed. In paragraph 96(a) of his affidavit Shri Singh Deo stated that before accepting the recommendations of Shri H. P. Mohapatra he had got them unofficially examined by his Secretariat in order to form an independent idea of the different aspects and the consequences of the Forest Minister's recommendations and this calculation was said to have been made for his own perusal and benefit. The said calculation running into several pages is purported to be reproduced in Shri Singh Deo's affidavit. It is suprising that the documents containing the calculations were not disclosed by Shri Singh Deo and no affidavit of any person responsible for the calculation was affirmed.

Shri Singh Deo also quoted extensively from the correspondence between himself and Shri P. M. Pradhan. The Commission feels that reference thereto will serve no useful purpose.

In paragraph 101 (a) of his affidavit Shri Singh Deo submitted that "with the eclipse of Shri P. M. Pradhan and his party from the political life of Orissa, the days of his unholy

influence were over and the Kendu leaf smuggling trade and its black market set up which had thrived so long on his political influence, as well as behind-the-curtain support and blessing of Shri Pabitra Mohan Pradhan, crumbled down to pieces along with the downfall of its patron. Being exercized of the evil spell, all the eleven units that were granted special rebate in 1970 on account of smuggling of leaves, etc., returned to their normal health and registered steady progress from 1971 onwards. A table is appended to paragraph 101 (a) of the affidavit to show that a comparison of the figures of production of leaves in these units for the year 1970 to 1972 will bring out how the orders made in 1970 had benefited State trading.

The Commission feels it necessary to add to that table two columns showing stipulated number of bags according to the agreements executed and the actual production in the year 1969 as given in the State's affidavit in rejoinder.

Unit No.	Stipulated No. of bags as per agreement	Actual production in quintals in—			
		1969	1970	1971	1972
1	2	3	4	5	6
6	4,328	5,013	3,595·00	4,818·70	4,918
6A	3,525	3,568	2,850·00	3,628·60	3,848
47	3,500	3,500	2,798·00	3,557·56	3,506
47A	3,600	3,602	2,843·00	3,664·26	3,608
48A	2,395	2,396	1,998·00	2,415·66	2,401
54	4,433	3,650	3,581·00	4,133·00	3,972
54A	2,000	1,285	1,505·70	1,925·00	1,819
1	2,500	2,318	1,873·60	2,304·00	2,120
82A	3,500	3,373	2,875·00	3,365·00	3,410
82B	3,800	3,501	2,954·00	3,350·00	3,120
82C	3,700	4,044	2,703·00	3,366·00	3,528
	37,281	36,250	29,576·30	36,527·78	36,250

Columns I, IV, V and VI are from Shri Singh Deo's affidavit while columns II and III are from State's affidavit in reply.

A perusal of the above table will show that there is no substance in the contention of Shri R. N. Singh Deo inasmuch as the production in 1972 did not overtop the figures of 1969 except in one or two cases and there was only a marginal rise or fall from the figures in the stipulated number of bags, the overall total remaining the same. Reference may also be made to the statements in some affidavits that 1970 was in general a bad year.

Chapter IV of Shri Singh Deo's affidavit may be summarised as follows :

(1) The orders of the Minister Shri H. P. Mohapatra were approved of by the deponent after he was himself fully and independently convienced about the justice of the causes advanced and on the basis of the reports of the D. F. Os. and other field officers.

(2) Consultation with the Finance Department or approval of the Cabinet was not necessary.

(3) The apprehension of the Minister of Forests that the termination of the contract of the agents and purchasers in the middle of the year, i. e., in the month of June, would have made it impossible to find out new purchasers and particularly such as those who would have worked harmoniously with the collecting agents was perfectly justified.

(4) Smuggling of the leaves from out of the units as reported to by the Divisional Forest Officers could not be ignored.

(5) At times on grounds of equity and other considerations Government were required to give concessions in the public interest outside the strict terms of agreements.

One of such instances as was quoted by the deponent with regard to the construction of the dykes at Balimela wherein road haul method of calculation for leads was prescribed in place of the "radial distance method" laid down in the agreement and incentive bonus from 5 per cent to 7 per cent in a phased manner for the Contractors of the three dykes had also been given.

(6) Unit No. 55-A was settled with the agent after the season for collection of Kendu leaves was nearly at an end and the shortfall in collection could not be attributed to any laches on the part of the agent.

(7) The Cabinet had laid down in their decision on the 15th January 1969 that "the rate of purchase price for the unit will be fixed taking into account the rate of increase in the purchase price in the neighbouring units" and this had to be borne in mind to realise why large-scale smuggling of good quality leaves from some of the units had been taking place.

(8) State trading could not be equated with private trading and the State" cannot stick to the letter of the contract, on the face of the reports of its own officers who categorically reported large-scale smuggling activities not attributable to the laches of the agents".

* * * * *

"Originally it was envisaged by both the parties, that a given unit would reasonably produce with due diligence a certain quantity of Kendu leaves of a particular variety. But when during the currency of the agreement it came to the notice of the Government that both these factors which formed the substratum of the contract and its very basis and foundation, on which both the parties were all along proceeding, was no longer available, due to reasons beyond control of the Agents, the Government acted *bona fide* in the larger interest, to effect the rationalisation both in the price structure corelatable to the quality and the remission of the penalty which is corelatable to the quantity of production."

The rest of the affidavit raised the question of the renewal of the agreement in 1971 and the part played by him therein and this will be dealt with at the time of discussion of the case against Shri Sahu and others.

There is nothing of any importance in the affidavits in rejoinder of the State against Shri H. P. Mohapatra and Shri R. N. Singh Deo except the figures of production of Kendu leaves from 1969 to 1972 already referred to and the Commission does not think it necessary to take any further note of the same.

We may now discuss the issues framed against Shri R. N. Singh Deo and Shri Mohapatra in the light of the above.

Issues one to four in the case of Shri R. N. Singh Deo are the same as those in the case of Shri H. P. Mohapatra. The first part of issue 5 in the case of Shri Singh Deo corresponds with issue 5 in the case of Shri H. P. Mohapatra. The second part of issue 5 in Shri Singh Deo's case stands by itself.

In order to find out whether the orders granting rebates in purchase price to purchasers of units and concessions to the agents for shortfall in collecting the stipulated quantity of leaves from the units in their charge were lawful we have to test the arguments put up on the basis of the Kendu Leaf Act, and the Rules and in the light of the Supreme Court decisions. The Kendu Leaf Act of 1961 and the Rules framed in pursuance thereof have already been examined in some detail. The Supreme Court decisions give ample guidance as to the respective functions of the agents and purchasers. Even at the cost of repetition the following may be stated. In Akadashi Padhan's case the Court held that in order that a State monopoly of trading in Kendu Leaves might be conducted properly it was necessary that whoever acted on beholf of the State should be an agent in the real sense of the term and particularly he should not be put in a position where he could be describel as trading substantially on his own account. The Court also emphasised that Government could not be allowed to fix the terms of business with the agents on an *ad hoc* basis and that the terms on which agents were to act were to be made well-known to the trading public so that anyone who wanted to act as an agent of the Government in its monopoly business would know exactly what he had to do and what his commitments were going to be. It was also observed that the terms should be such that an agent did not become personally liable to bear the loss which under the normal rules of agency the principal would have to bear.

In Rash Bihari Panda's case which originated in the Orissa High Court in 1968 the Supreme Court had to consider the validity of the agreements with agents in Form 'G' and with additional agents in Form 'I'. The main attack against the Government was directed to the legality of the action of the State Government of offering to enter into agreements for advance purchases of Kendu leaves by private offerers in preference to open competition. The Supreme Court did not accept the finding of the High Court of Orissa that the exercise of discretion by

the Government was neither arbitrary nor lacking in *bona fides*. According to the Supreme Court the Government was not shown to have considered the prevailing prices of Kendu leaves about the time when the offers were made, the estimated crop of Kendu leaves, the conditions in the market and the likelihood of offerers at higher prices carrying out their obligations and whether it was in the interests of the State to invite tenders in the open market from all persons whether they had or had not taken contracts in the previous year.

In framing the rules and the forms in which the agreements were to be entered into the State Legislature appears to have borne in mind the guidance given by the Supreme Court in Akadashi Padhan's case in that an agent was to get only a fixed amount per bag of leaves as his remuneration, besides a fixed amount per bag of proressed leaves towards cost incurred for purchase, collections, processing, storing, etc. But when it came to purchasers. i. e., the persons who were to purchase the leaves collected by the agents there was a certain amount of indefiniteness in the agreement in that it was not possible to predicate beforehand how much a purchaser could secure for himself after he had sold the leaves acquired from Government by his purchase. Under Rule 5-B the Kendu leaves were ordinarily to be sold by entering into a contract in advance for which tenders were to be invited. The tender notice was to be published in the official Gazette and advertised in newspapers. Government was not obliged to accept any tender and had to consider various grounds mentioned in Clause (7) of Rule 5-B before rejecting a tender. No upper limit of tender being fixed tenderers could bid as high as they liked keeping in view the prices which they were likely to get themselves. Naturally it is to be expected that tenderers would always keep in mind the market price of the Kendu leaves then ruling as also the trend of the market. They were to make estimates of their own about the expenses which they would have to incur prior to the sale by them and payment of the price due to Government. The margin of profit to the purchaser in the case of sale by tender could not be fixed or calculated in advance and in the nature of things it was not possible to do so.

It is to be borne in mind that Government never gave any assurance either to the agent or to the purchaser that they would be able to collect or secure a specified number of bags. The figure which was to be entered in the agreement as the stipulated figure was inserted in the agreement on the basis of the Cabinet decision, namely, the average of the actual production figures for

the years 1966 and 1967 and the stipulated number of bags for 1968 or the last mentioned figure whichever was higher. Some little uncertainty certainly crept in the above estimation by reason of the fact that the actual production figures for 1968 was not taken into account and it was not improbable that the stipulated figure for 1968 might be somewhat higher than the average of the actual productions in 1966, 1967 and the estimated figure for 1968 but it is unlikely that the first figure would overtop the second appreciably. Whatever be the reason, this was the policy adopted by the Cabinet and it cannot be said that there was anything arbitrary or capricious about it.

Under the terms of the agreement with the Government the agent had to collect the number of bags stipulated for and if his collection fell short of that figure he had to pay compensation.

As a corollary to the above, in the case of purchasers if the number of bags fell short of the stipulated figure Government had to pay the purchaser compensation for the shortfall. Neither the Act nor the Rules made any provision for reduction in purchase price or for waiver of compensation for any shortfall in collection by the agents. Consequently the statutory forms of agreements with the agents and the purchasers did not contain any clause envisaging such reduction or concession.

Under Rule 5-B (9) rebates in purchase were available to the purchasers only on specified conditions which do not call for examination. This rule did not authorise the grant of any rebate as interpreted by Shri Mohapatra in his note to the Chief Minister.

It cannot be said that the statutory forms of agreements left no scope for the settlement of any controversy which might arise in the course of working out thereof. Of course, if something extraordinary were to happen which could not be said to have arisen out of the subject-matter of the contract the agent or the purchaser would very likely have thrown up the contract and refused to proceed with it and looked to the law for their protection. But there can be no doubt that if the agent or the purchaser wanted to be relieved partially from the obligations under the contract he could only do so by raising a point for adjudication under the contract. Probably he could do so if an unforeseen contingency like a cyclone or an earthquake came about destroying the Kendu plants or damaging them very badly in a particular area. If there occurred a wholesale or serious

loss of leaves in a Unit by reason of something beyond the control of the agent or the purchaser he could properly ask for relief. But it cannot be said that anything and everything which was not in the normal course of nature would afford such a ground, e.g., for instance rainfall below the average or the inability of the agent to find sufficient labour for doing his work including processing of leaves in time, large-scale pilferage of leaves from his godown or even the laying of Railway line in the recent past. So also smuggling of leaves out of the Unit in large quantities.

The introduction of the Titilagarh-Sambalpur Railway line which was referred to in a number of petitions of the agents and the purchasers for relief from their obligations, was not a relevant factor to be considered. It was pointed out by the Secretary to the Forest Department more than once that the said Railway line had come into existence much prior to the year 1969 when complaints on that basis were being raised by the contractors. The Secretary had rightly pointed out that this fact was well known to the contractors when they had entered into contracts with the Government and to raise a plea that their obligations should be scaled down because of the Railway Lines was not a factor which could be considered by Government.

So far as complaints based on smuggling was concerned, the Secretary pointed out that very often the agents themselves were persons interested in smuggling and stood to make profit thereby and this applied to the case of the purchasers. It is difficult to judge correctly the extent of smuggling which was going on in the years 1969 and 1970 but it is clear from the Taxation Enquiry Committees' Report of 1959 that there was a certain amount of smuggling going on even at that date. It is common experience that control and smuggling go together and whenever there is a control of prices within a certain area without a similar control just outside or whenever the demand in an area is greater than the supply of the commodity there will be people who will take to smuggling. To take the case of Kendu leaves in units close to Angul-Sambalpur where a number of Bidi Factories were supposed to have grown up, it is easy to see that any person who could take his leaves to the manufactures of Bidies would get much more than he could get by supplying the identical leaves to the Government Agents. There was a big gap between the price which the agent had to pay to secure the leaves and process the same and that which the purchaser collecting leaves from the agents had to pay to Government,

If Bidi manufacturers were to purchase the leaves from a Government purchaser. They would have to pay much more than to a person from whom they could buy processed leaves which had not passed through the hands of Government agents and purchasers. Even an agent would find it greatly profitable to supply leaves to a Bidi manufacturer supressing the same from his own accounts. If the agent and the purchaser joined hands they could easily share large illicit profits made this way.

Smuggling of Kendu leaves could be appreciably, if not wholly, stopped by adopting one of the following courses :—

(1) By raising the price which the agent had to pay to the grower of the leaves so that the grower would get something more than the minimum amount fixed by Government and would consider it unwise or not worth his while to go in for a risky transaction of smuggling even though by doing so he might make more profit.

(2) Preventing smuggling by deploying a sufficient number of forest guards and patrol by them of affected areas. Smuggling in Kendu leaves could not go on as smuggling in a commodity like rice. Smuggling a few kilograms of rice may be worth ones while but smuggling of a few kilograms of Kendu leaves would hardly be a business proposition for any one. The reports of the District Forest Officers show that smuggling was done by means of cars, jeeps and trucks. Such smuggling could easily have been prevented by placing of guards on the roads along which the smugglers operated.

In any case of serious dispute arising between an agent or a purchaser on the one hand and the Government on the other, the arbitration clause in the agreements should have been resorted to. The said clause ran :

"In case any dispute arises in the matter of interpretation of any of the terms of the agreement or with respect to any matter arising from out of the subject-matter of the contract, the said dispute shall be referred to the Chief Secretary or any other Secretary to the Government of Orissa appointed for the purpose by the Government. The decision of the dispute given by the said person shall be final and binding on the parties."

According to the Commission any plea raised by an agent that he could not "secure through purchase and collection the minimum number of bags stipulated for because of smuggling of Kendu leaves out of his unit" would give rise to a controversy inasmuch as Government could not accept the same without examining the merits of the case and a plea which needed adjudication on the basis of the proposal and Government's standpoint that the matter called for enquiries at their end would be tantamount to a dispute arising out of the subject-matter of the agreement. The clause would equally apply to such a dispute raised by a purchaser on an identical ground or on the ground that the quality of leaves offered to him were not in terms of the contract. Again an agent could raise a dispute that a mistake had been made in the stipulation for the number of bags mentioned in the contract on any ground available to him or that a modification of the figure was necessary in the circumstances of a case.

The Act and the Rules do not envisage any administrative action by any Minister of the Government to modify the terms of the agreement once a contract is entered into. Neither the Government nor any of its officers had any discretion to vary the terms of the contract by any administrative action. As has been noted already the Kendu leaf business was to be run as a monopoly business by the State in terms of the Act and the Rules and observing and performing the terms and conditions of the agreement executed leaving no room for any modification therein by administrative action. There was no legal sanction behind any administrative action taken by a Minister for any deviation from the terms of the contract. The grants of rebates and concessions in effect amounted to the agreements being on "*ad hoc* basis" which was deprecated by the Supreme Court. The only manner in which relief could be asked for by an agent or the purchaser was to apply for arbitration in terms of the clause set forth above. The orders of Shri H. P. Mohapatra, dated the 6th November 1970 and the 7th November 1970 and of Shri R. N. Singh Deo dated the 19th November 1970 granting rebates in the purchase price and waiving of shortfall compensation were *per se* illegal, i.e., not sanctioned by law.

Even otherwise objections were raised to the course adopted by the Ministers. More than one Secretary pointed out to the Minister Shri Mohapatra and to the Chief Minister Shri R. N. Singh Deo that before granting rebates and concessions it was

necessary to consult the Finance Department under the Rules of Business formulated under Article 166 of the Constitution of India.

By his note dated the 11th August 1970 to the Minister Shri H. P. Mohapatra, the Secretary, Shri A. K. Ray pointed out that smuggling would not be a ground for reduction of rate and that although Government might change the law if it so desired, the price fixed by tender could not be reduced as this might be illegal and the principles of State Trading might be hit. Notwithstanding the said note, mentioned earlier, the Minister Shri H. P. Mohapatra by his order dated the 7th November 1970 directed that a rebate of 20 per cent from the purchase price should be given to purchasers of Unit Nos. 82-A, 82-B and 82-C for the years 1969-70 and 5 per cent rebate to the purchaser of Unit No. 1 for the said two years. On approval of this course of action by Shri R. N. Singh Deo, the then Chief Minister on the 19th November 1970, the Secretary, Forests, Shri P. S. Habeed Mohammed by his note dated the 2nd December 1970 categorically pointed out that the above orders infringed the finances of the State inasmuch as the proposal was to give concessions to private parties against the terms of the agreements and the Kendu Leaf Rules did not envisage such rebates or reductions in revenue and that these cases should be referred to the Finance Department before the issue of orders under the Rules of Business and the instructions issued by Government regarding the same. The Secretary also noted that the Chief Minister's view was that Government had to give concessions in public interest to contractors outside the scope of the agreements and that the cases under consideration related only to receipts in a trading account and as such, not requiring the concurrence of the Finance Department.

On another occasion arising out of the application of the agents and purchasers of Units Nos. 47, 47-A, 47-B and 48-A, the Secretary, Shri A. K. Ray in his note dated the 28th September 1970 pointed out to the Minister, Shri H. P. Mohapatra that "if Minister is convinced about the correctness of the claim, it has to go to F. D. (Finance Department) for scrutiny under Rule 10 of the Rules of Business and after Minister's approval to the Council of Ministers as the formula has been evolved and approved by the Council.

A similar note concerning Units Nos. 54, 54-A and 54-B was put up by the same Secretary to the Minister, Forests with regard to the changing of the figure stipulated for on the ground that as

the formula for stipulation had been laid down by the Council of Ministers any change therein had to be approved by the Cabinet.

The Commission has, therefore, to examine the matter in the light of the Rules of Business and in particular to see whether such reductions in the purchase price or waiver of compensation for shortfall affected the finances of the State or involved any relinquishment of revenue.

The relevant Rules of Business are as follows :

Under Rule 4 of the Orissa Government Rules of Business made under Article 166 of the Constitution of India "The business of the Government shall be transacted in the Departments specified in the First Schedule and shall be classified and distributed between those departments and their branches as laid down therein".

Omitting the Proviso Rule 4 (A) runs—"There shall be a Committee of the Council of Ministers to be called the Cabinet which shall consist of the Ministers. Except when the Council of Ministers meets on any occasion, all matter referred to in the Second Schedule shall ordinarily be considered at a meeting of the Cabinet".

Under the Rule 5—"The Governor shall, on the advice of the Chief Minister, allot among the Ministers the business of the Government by assigning one or more Departments to the charge of a Minister".

Rule 6 provides—"Each Department of the Secretariat shall consist of a Secretary to Government who shall be the official head of that Department and of such other officers and staff subordinate to him as the State Government may determine."

Rule 7 provides—"The Council shall be collectively rsponsible for all executive orders issued in the name of the Governor in accordance with these rules whether such orders are authorised by an individual Minister on a matter appretaining his portfolio or as a result of discussion at a meeting of the Council or of the Cabinet or howsoever otherwise."

Rule 8 (1)—"All cases referred to in the Second Schedule shall be brought before the Cabinet by the direction of—

(i) the Chief Minister, or

(ii) the Minister-in-charge of the case with the consent of the Chief Minister.

(2) Cases shall also be brought before the Cabinet by the Chief Minister by the direction of the Governor under Clause (c) of Article 167 :

Provided that no case in regard to which the Finance Department is required to be consulted under Rule 10 shall, save in exceptional circumstances under the direction of the Chief Minister, be discussed by the Cabinet unless the Finance Minister has had opportunity for its consideration."

Rule 10 (1)—"No department shall without previous consultation with the Finance Department, authorise any orders (other than orders—pursuant to any general delegations made by the Finance Department) which, either immediately or by their repurcussions, will affect the finances of the State or which in particular, either—

(a) relate to the number or gradings or cadres of posts or the emoluments or other conditions of service of posts; or

(b) involve any grant of land or assignment of revenue or concession, grant lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession; or

(c) in any way involve any relinquishment of revenue.

(2) No proposal which requires previous consultation with the Finance Department under sub-rule (1) of this Rule but in which the Finance Department has not concurred, may be proceeded with unless a decision to that effect has been taken by the Cabinet."

Rule 13—"The Secretary of the Department or branch concerned is in each case responsible for the careful observance of these rules, and when he considers that there has been any material departure from them he shall personally bring the matter to the notice of the Minister-in-charge and the Chief Secretary. The Secretary in each Department or branch shall also be responsible for the due execution of sanctioned policy and for the discipline and efficiency of the administrative department or branch in his charge."

Second Schedule—Item No. 7—"Any proposal which affects the finances of the State which has not the consent of the Finance Minister."

Item No. 19—"Proposals involving the alienation, either temporary or permanent, or of sale, grant or lease of Government property exceeding Rs. 10,000 in value or the abandonment or reduction of revenue exceeding that amount except when such alienation, sale, grant or lease of Government property is in accordance with the rules or with a general scheme already approved by the Cabinet."

There was a good deal of controversy as to whether the grant of rebates in the purchase price or waiver of shortfall compensation attracted Rule 10 of the Rules of Business. The said rule would be attracted if the purchase price of Kendu leaves payable to Government and the income from compensation payable for shortfall in collection were revenues.

According to the shorter Oxford Dictionary the word "revenue" means *inter alia,* "the collective items or amounts which constitute an income, especially that of a person having extensive landed possessions, a ruler, State, etc." as also "a separate source or item of (private or public) income; the annual income of a Government or State, from all sources out of which public expenses are defrayed". It would appear that income from Kendu Leaf Trade in the hands of the Government had been arising steadily through the years. In paragraph 140 of the Government of Orissa's report of the Forest Enquiry Committee, 1959 (page 144) it is stated that "the minor forest products of the State play an important role in the economy of the State. These are used as raw materials in various industries". In Appendix XII thereto it is stated "these bring in substantial revenue to the State Exchequer. As a matter of fact the gradual rise of revenue from Kendu leaves alone has been spectacular". Again in paragraph 189 of the said report (at p. 59) it is stated that "the Kendu leaves bring in a substantial revenue to the State and, therefore, the way by which the State could legitimately continue to get this and possibly increased revenue, from its forest has to be divised". Reference may also be made to the Orissa Taxation Enquiry Committee Report, 1961. In two particular paragraphs 18 and 19 at (pages 292-293) in Chapter XII of the same book, non-tax revenue of the State are described as those coming from forests, minerals, State undertakings, like Electricity undertaking, Road Transport undertakings and others, and State Trading. The Table set out at page 285 of that report is headed "the distribution of forest revenue by different kinds of forest-produce" and item 5 thereof is "Kendu leaves".

The learned Advocate-General referred to paragraph 97 of the Report of the Comptroller and Auditor-General of India for the year 1970-71 for the State of Orissa wherein it is stated :

> "The amounts credited to the Government on account of revenue from the Kendu leaves up to 1965-66 has been mentioned in paragraph 68 of the Audit Report, 1967. The revenue credited to Government on account of the Kendu Leaves during 1966-67 to 1970-71 is as follows :

The Ministers and the Secretary in their various notes and Memoranda uniformly refer to the income from Kendu leaves as "revenue". Shri Mohapatra, (as quoted already) more than once referred to such income as "revenue". In particular reference may be made in this connection to his note to the Chief Minister dated the 7th November 1970.

In the Memorandum on Kendu Leaf Policy for 1969 which was submitted by the Secretary to the Government of Orissa to the Cabinet and approved of by the Cabinet with Shri R. N. Singh Deo as the Chief Minister and Shri H. P. Mohapatra as Minister of Law on the 15th of January, 1969 it was stated in paragraph 1 "in changing the present monopoly system any alternate scheme would have to be thoroughly examined from different angles and such scheme must also safeguard the State revenue and the interest of the pluckers and growers as well as of the trade." More definitely it was stated in paragraph 2 "in pursuance of the above Government decision the matter has been examined in detail in the Co-operation and Forestry Department and it is proposed that the Kendu Leaf Policy for the year 1969 may be as follows for safeguarding the State revenues and interest of the pluckers and growers as well as of the trade".

In the preliminary note dated the 13th August 1971 in opening file No. 7F-69/71, the Under-Secretary Shri Satpathy stated *inter alia* "the practice of inviting tenders for three years with the provision for one year at a time was initiated with the intention that the longer the period the greater will be the incentive to work the unit and consequential increase in the revenue to Government. This fact has also been proved by substantial increase of Government revenue during the present contract period. "The Secretary Shri Sundararajan in referring the matter to the Chief Secretary/Minister, Forests opined on the 16th August 1971 that "if fresh tenders for settlement of the units for a short period of one or two years from 1972 was desired there was possibility of the revenue dropping down."

Shri Sahu also entertained the same view about income from Kendu leaf trade. In his note to the Chief Minister dated the 23rd August 1971, Shri Sahu stated that "fresh tender for one year will not bring extra revenue to the State Exchequer and rather there is every possibility of the revenue dropping down as pointed out by the Secretary".

The matter had also engaged the attention of the Law Department of the State.

The question arose in connection with a prayer of the agent of Units No. 70 and 70-A for reduction in the stipulated figure of bags in the agreement. The then Legal Remembrancer opined on the 31st March 1971 that "since acceptance of the claim would mean loss of revenue of the State, consultation with the Finance Department is mandatory. Again if the proposal is required to be placed before the Cabinet for approval under the second schedule of the Rules of Business, that procedure must also be followed. If after obtaining the concurrence of the Finance Department and the approval of the Cabinet, Government decides to vary the stipulation, the execution of a supplementary agreement may become necessary."

In Akadasi Padhan's case, the Supreme Court of India observed in paragraph 7 that the monopoly created in favour of the licencee was changed over to controlled competition and this "had led to a loss in Government revenue". Further in paragraph 15, the Court pointed out that "the State may enter trade as a monopolist either for administrttive reasons or with the object of mitigating the efforts from the competition or with a view to regulate prices, or improve the quality of goods, or even for the purpose of making profits in order to enrich the State Exchequer".

In Rasbihari Panda's case, the Supreme Court referred with approval the decision of the High Court appealed from wherein the High Court had remarked "evidently the Government acted as any prudent businessman would do, for the purpose of getting the maximum revenue—net profits from the tratet in Kendu Leaves".

Even if the matter was *res integra,* there could not possibly be any doubt that the granting of reductions or concessions "would affect the finances of the State" or would involve "relinquishment of revenue".

Rule 4 of the Rules of Business of the Government of Orissa makes it abundantly clear that the business of the Government must be transacted on the terms specified in the schedule. Under Rule 10(1), it was not open to any Department to authorise any orders which either immediately or by their repurcussions would affect the finances of the State or under Rule 10(1)(c) "in any way involved any relinquishment of revenue".

There can be no doubt that granting a reduction in the purchase price fixed under an agreement with a purchaser, would affect the finances of the State. Moreover, if income from Kendu leaf business be revenue in the accepted sense of the term any order which would have the effect of depreciating that income would amount to relinquishment of revenue.

The language of Rule 10 is so clear that "one who runs may read" it. It is so mandatory in its nature that it is surprising that anybody could *bona fide* entertain any doubt about its application to all proposals concerning revenue or their being superseded by any past precedents to the contrary. Sub-rules (1), (2) and (3) are all couched in similar terms. Under sub-rule 1, no Department was authorised to pass certain orders unless prescribed conditions were fulfilled. The word "shall" here can only mean "must". So under sub-rule (2) no proposal which was not in terms of the rule was proceeded with. Under sub-rule (3) no appropriation could be made by any Department except under the conditions therein laid down.

In Haridwar Singh against Begum Sumbrui (AIR 1972 Supreme Court 1942) the Court had occasion to consider almost identical Rules of Business formulated by the Bihar Government under Article 166 of the Constitution. The Court held "the negative or prohibitive language of Rule 10(1) is a strong indication of the intent to make the rule mandatory. Further Rule 10(2) make it clear that where prior consultation with the Finance Department is required for a proposal, and the Department on consultation does not agree to the proposal, the Department originating the proposal can take no further action on the proposal. The Cabinet alone would be competent to take a decision". Rule 10(2) of the Bihar Government rules though worded slightly differently has the same effect as Rule 10(2) of the Rules of Business of the Government of Orissa.

It is significant to note that the Bihar case also arose out of an order passed by the Minister, Forests, settling a forest coup which had the effect of nullifying a prior settlement on the basis of an auction held by a forest officer.

It was, however, contended on behalf of the Ministers by Shri R. Mohanty that Rule 10 of the Rules of Business was not attracted because the Kendu Leaf Act treated the income from Kendu Leaf business as "net profits" and no where used the word "revenue". He referred to Section 11(1) of the Act reading "out of the net profits derived by Government from the trade in Kendu leaves under this Act, an amount not being less than 50 per cent thereof shall be paid to the Samitis and the Grama Panchayats" and cited Section 67 of the Electricity (Supply) Act which showed how the revenue of the Board were to be utilised in meeting its liabilities, and expenses and interest on loans and provided that one half of the balance to be arrived at in the way indicated was to go to the consolidated fund of the State.

On a prior reasoning Mr. Mohanty argued that as one moiety of the net profits after meeting all the expenses was to go to Samitis and Grama Panchayats under Section 11 of the Act and as such net profits could only be found out at the end of a financial year, if the year's working resulted in a surplus any income from the business before ascertainment of the net profits could not come within the definition of "revenue" of the State. In the opinion of the Commission this argument is fallacious and must be rejected. Any money which comes from a regular source of income of a State and goes into its exchequer under a recognised procedure, be it by way of exercise, sales tax or out of any kind of trading by the State in any of its multifarious present day activities, must be treated as forming a part of the revenue of the State. It does not matter whether the receipted amount goes to the Consolidated Fund of the State under Article 226(i) of the Constitution or is credited to the public account of the State under Article 266(2).

The learned Advocate-General referred to Basu's Constitution of India, 5th Edition, Vol. IV at page 276 where the Learned author classifies the principal sources of non-tax revenue as including industrial and commercial subjects.

The above discussion makes it clear that a grant of rebate in the purchase price or the waiver of shortfall compensation from an agent where he was not able to collect the stipulated quantity of bags undoubtedly involved the finances of the State and

amounted to a relinquishment of revenue. If under an agreement, an amount say one lakh of rupees is to accrue to the Government any order which has the effect of reducing the said figure be it ever so small would amount to a relinquishment of revenue.

An attempt was made by Shri Singh Deo in his counter affidavit to show that there were numerous instances in the past where no reference had been made to the Finance Department and pointed out by way of illustration a variation of the terms of the Balimela Dyke contract where the said Department had not been consulted. The Commission was not made aware of the terms of the contract relating to the Balimela Dyke, and is, therefore, not in a position to examine the merits of the argument based on the variation of terms in that contract. The Commission is of the view that the Kendu Leaves (Control of Trade) Act, 1961 and the Rules do not envisage any variation in the terms of the contracts and do not reserve any power in the Government to modify such terms. An attempts at such modification by an administrative action must be considered to be unlawful.

No doubt, it is open to the parties to a contract to modify the terms of any agreement by subsequent arrangement mutually agreed to. This is the position under the general law of contract and in particular Contract Act Section 63. Even if that section was not expressly excluded by the Orissa Kendu Leaves Act, 1961 the proper course of action where an agent or a purchaser was asking for a modification of the terms was for him to have the matter settled by arbitration by the Chief Secretary or any other Secretary of the Government specifically appointed for the purpose by the Government under the relevant clause of the agreement either in Form G or in Form H. After such an arbitration was held, resulting in the acceptance of a part or the whole of the claim of the agent or the purchaser, it would be open to the Government and the party to enter into a subsequent agreement modifying the terms already arrived at in terms of the award of the Chief Secretary or other Secretary specially appointed. Neither the Minister, Forests nor the Chief Minister had any power under the Rules of Business or the Orissa Kendu Leaf (Control of Trade) Act, 1961 to act in the way they purported to do.

It was, however, contended for on behalf of Shri Singh Deo that consultation with the Finance Department would have been an empty formality inasmuch as even if there was any adverse report by that Department, Shri Singh Deo who held the Finance

portfolio at the relevant time would have over-ruled any adverse recommendation and given his fiat to the proposal of the Forest Minister.

To say the least, the contention seems to be astounding. When the Rules of Business lay down that the Finance Department has to be consulted, the other department where the proposal orginates must refer the matter to the Finance Departmetn and it is not open to a Finance Minister to say in advance that his mind is made up and that he will disregard any advice which the Finance Department may record. The business of the Government cannot be properly conducted if a Minister is to make up his mind beforehand and indicate his mind before the Department though its Secretary has placed before him the facts of the case with the Secretary's own opinion thereon.

Shri Singh Deo in his counter-affidavit has further said that it was unnecessary to have the matter placed before the Cabinet inasmuch as his party, i.e., the Swatantra Party was in a position to over-ride all opposition of the other parties constituting the United Front Government at the time. Again, the Commission finds such an attitude not only to be illegal and highly arbitrary in its nature, but also undemocratic in principle. If the Rules of Business make it obligatory for a matter to be placed before the Cabinet and a decision taken thereon the Cabinet must be consulted and it would be unlawful and undemocratic for a Minister to say that he or his party had the Cabinet in his pocket.

In view of the repeated objections made by the Secretaries reliance on former precedents where the Rules of Business were either over-looked or ignored cannot be of any help and cannot explain away the unlawful conduct of a Minister even after his attention was drawn to the Rules of Business and the compulsory course of action therein laid down. It is the duty of a Minister to familarise himself with the Rules of Business and even if a Secretary be so unmindful thereof as not to bring it to the notice of the Minister that a particular course of action was contrary to the Rules of Business any action ordered by the Minister which is not in compliance with the Rules of Business can only be described as irregular and unlawful. Non-observance of the Rules of Business may be unintentional in which case although the action would be unlawful no censure on such conduct might be called for. But when action is taken deliberately in conscious and flagrant disregard of such rules despite the Secretary's pointedly drawing the attention of the Minister to it his conduct is not only unlawful but grossly improper and *mala fide*.

Apart from the question of law above discussed lengthy arguments were advanced on either side on the merits of the applications for rebates in purchase price and the waiver of shortfall compensation to agents.

In view of the finding of the Commission on the legal aspect it is hardly necessary to examine the merits of these applications. It must be remembered, however, that the Commission does not function as an appellate body from the decision of the Ministers of the Government. The Commission can only consider whether such grants or concessions were authorised by law and secondly whether any irrelevant considerations were allowed to enter the field and allowed to cloud the minds of the officers and the Minister who dealt with the applications.

As already noted the grant of rebates or concessions were not envisaged by Kendu Leaf (Control or Trade) Act, 1961 and the Rules framed thereunder. The only provision for rebate in the purchase price is contained in clause 14 of Rule 5-B of the Rules under which a purchaser who established a Bidi Factory on fulfilment of certain conditions became entitled to a rebate of 2 per cent of the purchase price.

The facts relating to applications for grant of rebate and concessions have already been set out earlier in this report. Reference was made by Shri Mohanty to the *Orissa Gazette* notification, dated the 13th October 1972 to show that the State had instituted a very large number of cases in the Criminal Courts arising out of cases of smuggling of Kendu Leaves during the years 1970, 1971 and 1972. It is to be noted that only a very few of them related to the year 1970 which is hardly suggestive of smuggling having been rampant in that year. Mr. Mohanty referred to the affidavits to show that in all smuggling was reported from 11 Kendu Leaf Units which were on the boarder of Angul and Sambalpur and where according to the reports of D. F. Os. smugglers from outside used to carry on their illegal activities and it was not possible for the scanty forest personnel to stop smuggling. It may also be noted that in these reports reference was made to the complaint that the agents were collecting leaves of 3rd and 4th class quality.

It was argued both on behalf of Shri R. N. Singh Deo and Shri A. Sahu (who was responsible for orders reducing the number of bags to be collected by agents) that the State was a

Welfare State and in its commercial activities it could not set up like a "Bania" and that it had to bear in mind the interest of the traders and to see that the traders were not harashly treated.

It is difficult to accept these contentions. As already pointed out the root cause of smuggling could only be the small profit or remuneration allowed to the growers of the Kendu leaves and the much higher prices which Bidi manufácturers were prepared to pay. This could only be stopped by directing and if necessary by enacting law compelling the agents to pay the growers at higher rates so as to ensure better return to the growers of Kendu leaves. The only other way of minimising smuggling, if not altogether stopping it, would be by putting up check-posts and constant patrol by forest guards of roads along which cars, jeeps and trucks plied with smuggled leaves.

So far as the deficiency in the quality of leaves of which the purchasers complained the Commission does not find it possible to hold that there could be a lawful grievance on that score inasmuch as the agents could only reject leaves offered to them if they were not fit for manufacture of Bidis. If they were so fit the agent could not reject then and the purchaser was bound to accept them. There was no stipulation as to quality of any particular kind and under the law the only implication is that the goods had to be reasonably fit for the purpose for which they were bought.

Mr. Mohanty argued that the leaves of all the Units were not of the same quality or the enormous variation in the purchase prices of different units would show. He cited 'The Orissa Taxation (on Goods Carried by Roads or Inland Waterways) Act, 1968 to show that Kendu leaves could be of superior quality and ordinary quality and Government had to give relief to purchasers who complained that they were not getting leaves of the superior quality produced in the units of Rairakhol Division. No exception can be taken to the proposition that the leaves were not all of the same class or that no grievance could be raised where a person who had agreed to purchase leaves of a superior class was being supplied with leaves of inferior quality.

Under Section 4 of the Act the Advisory Committee was to fix the price to be paid to the growers considering the quality of the leaves grown in the unit. It goes without saying that an intending purchaser would bid more for leaves from some units than

he would do for leaves from other units. In Rairakhal Division the price was the highest. So far as the purchasers of Kendu leaves in this division were concerned all that they could insist on was merchantable quality of the leaves grown in that area. It is nobody's case that purchasers in this areas were being offered leaves grown elsewhere.

The only plausible case which could have been put by the purchasers was that as they were acting as agents for the Government in the narrow sense of the term as expounded by the Supreme Court in Akadasi Padhan's case it was for the State to see that they did not have to bear any loss which should have properly been for the State to bear. No such argument was however advanced.

On the above basis even assuming for a moment that administrative action could be taken to give relief to the purchasers for the alleged deficiency in the quality of leaves supplied by the agents the State had to satisfy itself that the agents were incurring losses through no fault of their own and that the prices at which the units were auctioned were causing loss to them. This could be done only in one or two ways, either by their showing that the working of the year 1969 would bear out that the price which they had to pay to Government exceeded the price which they had realised by the sale of leaves or secondly the purchase price fixed was lower than the prevailing market price. There was no effort made by the purchasers to satisfy the Government in either of the above two ways. Nor was any attempt made by the Minister or the Forest Department to ascertain whether the purchasers were in fact incurring any losses. If the true position had been determined and the loss to the purchaser confirmed, the Ministers could probably have taken the view that granting relief to the purchaser was in line with the dictum of the Supreme Court in Akadasi Padhan's case. As no such effort was made at any stage the matter need not be further examined in this light. Merely because the purchasers raised a clamour from time to time that they were suffering loss through smuggling it was not competent for the Ministers to grant them any relief on that basis. The Ministers had to bear in mind that the interest of the State, i.e., the public was paramount and nomally the trader who had entered into an agreement anticipating that the rates bid for by him and accepted by Government would still leave a profit of margin, was not entitled to plead his inability to gauge the trend of the market at the moment he had

made his bid. The calculations contained in the State's affidavit against Shri Singh Deo and Shri Mohapatra clearly demonstrate that the rebates and concessions had made a dent in the State Exchequer to the extent of Rs. 40 lakhs when the total revenue was about two and a half crores. The amounts in no case were trifling and if the Ministers had only taken the trouble to direct a calculation to be made showing how much the State was going to lose as a result of concessions and rebates instead of considering the matter solely from the point of view of the private trader's pocket—they would have pondered over the matter and probably not made any order.

As already mentioned, other factors like the inclemency of weather, i.e., rainfall above or below the normal, the running of railway line through a particular unit were wholly irrelevant considerations. These considerations were wholly extraneous to the working of the Kendu Leaf Act and Rules.

So far as the State's complaints in paragrah 16 of the affidavit regarding reduction in the number of bags of Kendu leaves for Unit No. 55-A fixed at 2,025 bags per year the same considerations will apply as in the case of grants of rebates to purchasers and waiver of shortfall compensation to agents. Such a change affecting a vital term of the contract was beyond administrative action of a Minister. The proper course for the agent would have been to apply for arbitration and for the State to enter into a supplementary agreement on the basis of the award of the Chief Secretary or other Secretary acting as arbitrator in the matter.

The same can be said of the State's complaint regarding reduction of the figure Unit No. 104 for the entire period of three years from 1969 to 1971 which was ordered by Shri Mohapatra on the 6th of April, 1970 without even referring the matter to the Chief Minister.

Having discussed at length the facts relating to the grant of rebates in purchase prices, waiver of shortfall compensation, alteration of the term as to the stipulation for securing a certain quantity of Kendu leaves, the procedure followed in relation to the above, the notes of the Secretaries bearing thereupon and the ultimate decision of the Ministers the Commission has to consider whether such decisions were lawful or proper or otherwise.

A recent decision of the House of Lords in England (Pedfield & as—v—Minister of Agriculture & ors 1968) A. C. 997

amply illustrates when a Minister can be said to have acted unlawfully. The question before the Court in the case was whether a Minister could refuse to refer to a Committee of investigation a complaint made about a scheme which was said to operate prejudicially to the interest of a certain section of millk producers. The complaint in these cases was by farmers in the populous south-eastern region that they were being discriminated against in the matter of fixation of price of milk which was being paid to producers in the sparcely populated regions compared to the prices which they were getting. The Minister had power under section 19 of the Agricultural Marketing Act. to refer the complaint to a Committee of investigation which was charged with considering and reporting on complaints made to him about the operation of any schemes. In this case the Minister refused to refer the complaint to a Committee giving his reasons for doing so. The point at issue on an application for a writ of mandamus was whether in exercising his powers and duties conferred on him by a statute, the Minister could be controlled by a prorogative writ if he acted unlawfully. It is interesting to note that the scheme and the Act according to their Lordships created a monopoly and imposed severe restrictions on an individual's liberty of action. According to Lord Upjohn, who adopted the classification of Lord Parker C. J. in the Divisional Court :

> "The Minister may be acting unlawfully :
>
> (*a*) by an outright refusal to consider the relevant matter or ;
>
> (*b*) by misdirecting himself on a point of law or ;
>
> (*c*) by taking into account some wholly irrelevant or extraneous considerations or ;
>
> (*d*) by wholly omitting to take into account the relevant considerations."

According to his Lordship "in practice they merged into one another and ultimately it became a question whether for one reason or the other the Minister had acted unlawfully in the sense of mis-directing himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings mentioned."

It will not be out of place to mention that in discussing the limits within which the authority must exercise its discretion the Supreme Court of India in Rohtas Industries Ltd., against Shri S. D. Agarwalla, A. I. R. 1969, Supreme Court 707 quoted

from the above judgment and relied on the dictum in Roncarelly—V—Duplessis 1959 S. C. R. (Canada) page 121 that "discretion necessarily implies good faith in discharging public duty ; there is always a perspective within which a statute is intended to operate ; any clear departure from its lines or objects is just as objectionable as fraud or corruption."

Reference may also be made to the judgment of the Supreme Court in Jagannath Rao against the State of Orissa. A. I. R. 1969, Supreme Court 215 (paragraph 8) where it was said that "if a statutory authority exercises its power for purpose not authorised by law the action of authority is *ultra vires* and without jurisdiction. In other words it is a *mala fide* exercise of powers." The case would be worse where the authority has no power under any statute.

In the light of the above decisions there can be no doubt that the actions of Shri H. P. Mohapatra and Shri R. N. Singh Deo in ordering grant of rebate in purchase price to purchasers and waivers of shortfall compensation to agents and reduction in the figure of bags stipulated for were unlawful and improper. These acts being without jurisdiction were *ultra vires* and as such *mala fide*. Such acts can also be described as abuses of power. Normally "abuse of power" means the use of power in a manner not sanctioned by law or warranted by the circumstances of a case. But where the statute and the Rules confer no power and the agreements in statutory forms do not envisage any modification by administrative action in working the monopoly system any act not sanctioned by the statute and the Rules or not contemplated by the agreements must be held to be in abuse of power.

The Commission does not think it necessary to refer further to the affidavit of the intervenor Shri Pabitra Mohan Pradhan which does not throw any additional light on the points canvassed before it. That affidavit only suggests that the Forest Minister and the Chief Minister were working hand in glove with each other in keeping their unlawful activities back from the gaze of the Cabinet and even of the scrutiny of the Finance Department and when the story of the grant of rebates and concessions leaked out the intervenor and members of his party were compelled to withdraw their support to the Swatantra Party led by Shri R. N. Singh Deo. The Commission is not concerned with the party politics in the State and does not feel itself competent to express its views thereon.

CHAPTER XIII

Conclusion in the case of Shri R. N. Singh Deo and Shri H. P. Mohapatra

Issue 1(a)—In the light of the above, the orders mentioned in the schedules of orders appended to the issues namely those of the 6th November 1970 and the 7th November 1970 and the 6th April 1970 made by Shri H. P. Mohapatra and all the orders of Shri R. N. Singh Deo made on the 19th November 1970 must be held to be unlawful.

Issue 1(b)—Undoubtedly the orders affected the revenues of the State detrimentally causing a loss of over Rs. 40 lakhs to the State of Orissa as shown in the calculations contained in the affidavits of the State at page 61. The rebates shown therein came to Rs. 36,84,321·63 P. and the concessions given to agents to Rs. 3,16,495·20 P. Besides the above, the Government suffered loss to the extent of Rs. 79,008 by reduction of the number of bags to be collected in Unit 55 A and Rs. 16,008 in Unit 104. The last mentioned loss, i.e., of Rs. 16,008 was caused by the order of Shri Mohapatra alone.

Issue 1(c)—It has already been seen that it was necessary to consult the Finance Department under the Rules of Business of Orissa Government as the Cabinet had never ruled that prior consultation with the Finance Department was not necessary. Consultation with the Finance Department was obligatory even though the Chief Minister Shri R. N. Singh Deo held the portfolio of Finance and even though the Swatantra Party comprising *inter alia* of himself and Shri Mohapatra was the majority Party in the Cabinet. As the grant of reductions in purchase price and concessions by waiver of shortfall compensation were covered by Item 7 and Item 19 of the Second Schedule to the Rules of Business proposals relating thereto should have been brought before the Cabinet under Rule 8 of the Rules of Business. The matters could have been brought before the Cabinet by the Chief Minister Shri Singh Deo or with his consent by the Minister, Forest Shri Mohapatra.

Issue 1(d)—The said orders were not in accordance with the agreements executed by the purchasers and agents.

Issue 1 (e)—The grant of rebates and concessions were not provided for in the Kendu Leaf (Control of Trade) Act and the Rules.

Issue 1(f)—No attempt was made to get the legal aspect of grant of rebates and concessions examined by the Legal Advisers of the State.

Issue 2—The said orders were neither proper nor justified in the circumstances of the case. They were also not made *bona fide* inasmuch as they were made without any jurisdiction. Being *ultra vires* they were made *mala fide*. On the question as to whether sanction of rebates and waiver of shortfall compensation by orders of Shri H. P. Mohapatra were justified on the basis of past precedents it is enough to say that not much argument was advanced thereon although in his counter-affidavit Shri Mohapatra made reference to the same. This point as also the point as to whether reduction of the stipulated number of bags was being given in the past can only be decided against Shri Mohapatra on the grounds that the orders were without jurisdiction as also that a violation of the Rules of Business cannot be overlooked merely because there had been such lapses in the past.

Issue 3(a)—There can be no doubt that the said oders resulted in substantial loss of revenue to Government. It is to be noted there that Shri R. N. Singh Deo passed an order on the 31st December 1970 to keep the orders of the 19th November 1970 in abeyance until the matters were placed before the Cabinet Committee. Shri Mohapatra proposed revocation of the grant to purchasers on the 6th January 1971, and such revocation was agreed to by the Chief Minister Shri R. N. Singh Deo. No order was, however, made by them directing the restitution of the benefit received by the purchasers. No order was over made revoking the concessions given to agents.

Issue 3(b)—Merely by revocation of the orders on the 6th January 1971 the loss already suffered was not made up. The State's affidavit shows that the purchasers and agents reaped the benefits of the orders as soon as they were made. The loss continued so long as the orders for recovery was not passed and restitution of benefits received was made to Government.

Issue 3(c)—The answer to Issue 3(c) is, therefore, that the orders for grant of rebates and did result in the loss of revenue. But most of the loss was made good by a subsequent order of Chief Minister Shri B. N. Das in May, 1971.

Issue 4—As the Act and the Rules did not envisage grants of rebates and concessions the answer to Issue 4 about the legality of the procedure adopted in such grants is in the negative.

Issue 5—Shri H. P. Mohapatra abused his power in making the orders of the 5th November 1970, the 7th November 1970 and the 6th April 1970 and so did Shri Singh Deo in his orders dated the 19th November 1970.

There is a mistake in Issue 5 so far as Shri Singh Deo is concerned. His order dated the 25th August 1971 was not concerned with the renewal of agreements but contained a direction that the Forest Ministry could dispose of cases relating to refixation of the stipulated number of bags on its own without reference to Finance Department. This question as also the part played by Shri Singh Deo in the matter of the renewal of the agreements in 1971 will be dealt with later.

CHAPTER XIV

The case against Shri A. Sahu, Shri S. Sundararajan and Shri A. Satpathy with comments.

Paragraphs 1 to 46 in the affidavit of the State against Shri Sahu are verbatim copies of those in the paragraphs similarly numbered in the affidavit used against Shri Sundararajan. The main charge levelled by the State against Shri Sahu and others relates to the renewal of the agreements with agents and purchasers for the year 1972 and the affidavits of the State aginst him and other persons may now be noted. Shri Ainthu Sahu was the Minister of Forests for the period the 5th April 1971 to the 14th June 1972, Shri S. Sundararajan was the Secretary of the Forest Department for the period the 14th July 1971 to the 15th September 1972 and Shri A. Satpathy was the Under-Secretary of the Department for the period the 1st July 1969 to the 8th June 1973.

The first twelve paragraphs in the said affidavits against Shri Sahu and Shri Sundararajan are the same as in the affidavits against Shri Singh Deo and Shri Mohapatra. In paragraph 14 of the State's affidavit against Shri Sahu, it is stated that after the General Election to the Orissa Legislative Assembly held in March 1971, a new coalition Government of the Swatantra Party, Utkal Congress and Jharkhand Party came into power; Shri Biswanath Das became the Chief Minister of the State and Shri A. Sahu elected on Swatantra ticket became a member of the Cabinet and was allotted the Forest portfolio. On the 30th April 1971, the Chief Minister had a discussion with the Chief Conservator of Forests and others regarding Kendu leaf policy to be followed in 1972 and directed the Chief Conservator of Forests to submit a scheme regarding Kendu leaf trade which would be carried on through the Forest Department and the Orissa Forest Corporation Limited. The Corporation also prepared scheme which was ultimately sent to the Government in the Forest Department. Both the Schemes envisaged working the Kendu leaf units in a phased manner commencing from

1972-73 with the object of covering the whole State in the fifth year. There was a Conference held on the 20th May 1971 attended by the Chief Minister Shri B. Das, the Minister for Political & Services Department Shri R. N. Singh Deo, the Minister for Home Affairs, Shri Nilamani Routray besides the Chief Secretary, the Secretary of the Forest Department, the Secretary of the Finance Department and Managing Director of Orissa Forest Corporation and others. The Minister of Forest Shri A. Sahu could not attend the meeting. A decision was taken in the said meeting that both the Corporation and the Department should apportion the Kendu leaf units amongst themselves and an attempt should be made to take over the kendu leaf business completely within two to three years. It was, however, decided that the scheme would be implemented in a phased manner commencing from 1972.

On the 21st May 1971, the then Forest Secretary Shri J. P. Das apprised the Minister, Forest Shri A. Sahu about the discussions held on the previous day and prepared a note for perusal of the Minister. The note which forms Annexure 2 to the State's affidavit contains the following besides what has been stated above :

(1) The Managing Director of the Orissa Forest Corporation Ltd. indicated that the Corporation had taken up one unit in Rairakhol Division in which they had derived substantial profit.

(2) It was decided that two independent schemes one for the Corporation and the other for departmental working should be examined by the Forest Department early and placed before the Government for approval.

(3) The actual work of collection would start from March, 1972, Preliminary operations like construction of godowns, training of staff, etc., might have to be undertaken during the then current financial year. It was decided that a non-plan scheduled should be prepared by the C. C. F.'s Office and furnished to the Finance Department for being incorporated in the budget for the year 1971-72 in respect of items of expenditure to be incurred.

According to paragraph 16 of the State's affidavit, in accordance with the above decision and after obtaining the concurrence of the Finance Department to the proposed initial

expenditure, a new demand schedule for a provision of Rs. 2,17,000 in the budget estimate of 1971-72 in the non-plan side was prepared by the Forest Department. The new demand schedule was endorsed by the Secretary on the 24th May 1971 to the Minister, Forest and to the Chief Minister through the Chief Secretary for approval. The Chief Secretary endorsed the file on the same day and Minister, Forest also agreed. The Chief Minister approved of it with the following observations :

> "It will be a departmental work. The Forest Corporation when it takes up this work has to do it as the agent of the Department".

According to paragraph 17, the memorandum in respect of the new demand schedule was approved by the Minister, Forest and the Chief Minister for discussion in the Cabinet.

The same was finally approved by the Cabinet with a slight modification on the 31st May 1971. The Cabinet opproved the memorandum with the modification "Government have indicated that it is their intention to take more Kendu leaves for the departmental working with a view to increasing revenue from the trade."

File No. 7F-48/71 was opened in the Forest Department for scrutinising the scheme submitted by the Chief Conservator of Forests. The scheme was sent to Finance Department for detailed examination on the 9th June 1971. The note of the Finance Department dated the 28th June 1971 was as follows :

> "(1) The scheme may be re-formulated in the light of the Cabinet decision.
>
> (2) The staff component and other expenditure in the scheme formulated by the Chief Conservator of Forests are too high and should be reduced substantially.
>
> (3) It will be more practicable and desirable to simultaneously utilise the services of the Forest Corporation who have some experience in the line also.
>
> (4) For the next year, the following policy may be considered by the Forest Department :
>
> (a) The Forest Corporation may be asked to choose an area preferably contiguous to their present area of operation which will yield them about 60,000 quintals. This area should be settled with the Corporation for at least three years.

(b) The Department may select another area which will yield them about 40 to 50,000 quintals of processed leaves and keep two Divisional Forest Officers in charge.

(c) After watching the progress in the first year, the areas of both of the Department and Corporation may be suitably increased.

(d) For the balance area, policy decisions may be taken either to renew the settlement of the units with the present agents and purchasers by one year more, depending upon their performance or settle them for a period of one or two years by tender.

It is necessary to take policy decisions in this matter early so that the units are all settled well before the commencement of the season."

The Secretary Shri J. P. Das of the Department commented that the Finance Department's suggestions were reasonable and if approved, further action should be taken accordingly. The file was sent to the Minister who made his endorsement on 25th July merely saying "the Department may examine the matters in detail and put up."

After Shri Sundararajan had taken over as Secretary of Forest Department in place of Shri J. P. Das on the 14th of July a scheme for departmental working of the Kendu Leaf Trade was discussed in the Assembly Chamber of the Forest Minister on the 4th August 1971 in presence of the Chief Conservator of Forests and other Conservators of Forests, the Managing Director of the Forest Corporation and the new Secretary, Shri Sundararajan. The minutes of the discussion were recorded by Shri Sundararajan in file No. 7F-48/71.

The relevant portion thereof reads as follows:

".....Minister explained that the decision of Government was not that all the Kendu leaf units in the State will be worked departmentally within three years from 1972. But the intention of Government was to take up more and more Kendu leaf units for departmental working with a view to increase State revenues.....After discussions, the following broad conclusions emerged:

(1) During 1972-73, the entire Forest Division of Rairakhol consisting of 17 Kendu Leaf units with a total yield of

52,000 quintals of Kendu leaves may be taken up for departmental working. Regarding Unit No. 2 which is at present being worked by the Orissa Forest Corporation as agent and purchaser, the Orissa Forest Corporation may make up their mind finally and let Government know whether they would like to continue to operate in the unit side by side with departmental working in other units of the Division, so that a decision can be taken.

(2) Units No. 81 and 81-A of Sundergarh Forest Division with a total yield of 7,010 quintals of Kendu leaves may be worked by the Orissa Forest Corporation as agent and purchaser during 1972-73.

(3) The C. C. F. should revise the requirement of staff keeping in view the observations of Secretary, Finance.....

(6) Since the idea is to gradually expand the departmental working of Kendu leaf units, other units should not be settled for a period longer than one year under the present system.

(7) In order that Kendu leaves collected departmentally can be suitably disposed of the Orissa Forest Corporation should from now on explore to find a market for the total anticipated collection through departmental working. Government can order disposal of the Kendu leaves through O. F. C."

The above record was made on the same date on which the discussion took place.

When the file went to the Minister, Forest, he made the following endorsement on the 10th August 1971 :

"Seen. However, the matter be examined in detail as ordered by me on 25-7-1971. As regards Rairakhol Division, we may await further consideration."

According to the counter-affidavit of Shri Sundararajan, (paragraph 5) this consideration and the Minister's ultimate decision never came. In the meanwhile, the Minister asked him as also the Under-Secretary Shri Satpathy to put up immediately proposals for taking a policy decision about the units to be taken up for departmental working.

Within the department, however, the private traders appeared to have a "built in lobby" and were favoured in preference to the State as will be apparent from a perusal of file No. 7F-22/71. It appears from a noting thereon under date the 19th April 1971 that the O. F. C. had proposed to take a lease of all the units of Rairakhol Division to meet the requirement of Ceylon Government interested in purchasing 35,000 quintals of leaves per year from the O. F. C. In case the proposal of Ceylon Government was accepted the O. F. C. would have to find another 25,000 quintals to meet their requirements. As "the best quality of Kendu leaves were available in the Rairakhol area private traders would be discontented, if they were all settled with O. F. C."

In a note, dated the 1st May 1971, the department also expressed the view that the proviso to Clause (1) of the agents' and purchasers' agreements in forms G and H gave scope to Government to renew the agreement with existing agents and purchasers and it was expected that almost all of them would apply for such renewal at the appropriate time and Government might according to the provisions in the agreement grant their renewal. It was, therefore, proposed that no assurance shall be given to O. F. C. about allotment of other units although their application would be kept in view. Finally it was suggested by the Under-Secretary on the 21st May 1971 that Government might negotiate with the leading purchasers of Kendu leaves to spare 5 per cent of their leaves for supply to Ceylon Government and this was accepted by the Minister, Shri Sahu on the 26th May 1971.

The decision of the Minister that a policy decision should be taken early about the balance area left after determination of the units which were to be worked departmentally seems inexplicable. In the normal course of things, one would have expected the Department to make up its mind first about the area and the number of units which were to be worked by itself and then define its policy with regard to the balance area.

The file 7F-48/71 does not show that the matter was ever examined in detail as ordered by the Minister on the 25th July 1971. The Minister did not even indicate what were the details he had in his mind which had to be examined and no one even took care to find out the same. It is surprising that after the meeting attended by him and the Chief Conservator of Forests and other Conservators of Forests had taken a decision on the

4th August 1971 that the entire Forest Division of Rairakhol should be taken up for departmental working the Minister by his note dated the 10th August 1971 side-tracked the proposal regarding Rairakhol Division remarking that it should await further consideration. As already mentioned no such consideration ever took place. The Chief Conservator of Forests submitted a modified scheme by a letter dated the 11th August 1971 on the margin whereof the Forest Secretary, Shri Sundararajan noted on the 12th August 1971 that action should be taken immediately to move the Finance Department for sanctioning the scheme as was proposed for 1971-72 and for sanction of staff.

The comment thereon made in the affidavit of the State in paragraph 22 reads :—

> "The file does not show that any further action was taken for implementation of the scheme. A perusal of the connected files shows that no action was taken thereafter to implement the Cabinet decision to work out Kendu leaf business departmentally or through the Forest Corporation in a phased manner."

According to paragraph 23 of the Government affidavit, file No. 7F-69/71 was opened in the Forest Department for determining the Kendu Leaf policy for the year 1972. Why it became necessary to start a new file does not appear from any Government affidavit but in paragraph 5 of his counter affidavit Shri Sundararajan stated that the Minister, Law asked him as also the Under-Secretary to put up proposals immediately for taking a policy decision, about the remaining units pending a decision about the units to be taken up for departmental working. This is corroberated in the counter affidavit of Shri Arjun Satpathy in paragraph 9 that he did so under the verbal instructions of the Minister for Forest.

File No. 7F-69/71 starts with a longish note from the Under-Secretary, Shri Arjun Sotpathy dated the 13th August 1971. In the opening portion of this note, it is stated that "all these units except Unit No. 75 were settled during 1969 either by tender or by negotiation for a period of three years with effect from 1969 with the provision for renewal for such period not exceeding one year at a time. This was subject to the condition of satisfactory performance by the agent and the purchasers and subject to such terms and conditions us may be mutually agreed upon. It was noted that the settlement of units by tender for three years with

a provision for renewal had stepped up the income of Government from Kendu Leaf trade considerably. After referring to the Cabinet decision and the Finance Department's recommendation and the desire of the Minister, Forest that the scheme furnished by the C. C. F. should be examined in detail the note proceeded to record that pending examination of the scheme for departmental working of Kendu Leaf units, it was necessary to initiate proposal regarding the policy to be followed in 1972 and as it was not intended by Government to take up work in all the units at a time by the departmental staff and by the Corporation, it was necessary to decide the policy for remaining units for the next year.

The note then proceeds to record that while inviting tenders in 1969 for disposal of Kendu leaves for the yeors 1969, 1970 and 1971, it was indicated in the Tender Notice issued by Government that if the parties selected and appointed as purchaser and agent of any Kendu leaf unit duly observed and performed all the terms and conditions embodied in their respective agreements during the currency of the agreements and if Government were satified about the performance of the agent and purchaser, Government might grant to the agent and the purchaser renewal of their contract for such period not exceeding one year at a time subject to such terms and conditions as may be mutually agreed upon. This condition was given in the Tender Notice in pursuance of the provision contained in Rule 5(B) (15) and Rule 7(10) of the Orissa Kendu Leaves (Control of Trade) Rules, 1962. According to the note the practice of inviting tenders for three years with the provision for renewal for one year at a time was recommended presumably with the idea that the longer the period of settlement, the greater would be the incentive to improve the unit and consequential increase in Government revenue. This was also said to have been demonstrated by substantial increase of Government revenue during the then current contract period. Similar provision was also to be found in the agreements executed by the agents and purchasers for 1969-71. According to the Under-Secretary's note "in the face of the facts stated above, it was necessary that Government should take a decision as to whether the units other than those which would be kept reserved for departmental working were to be renewed in pursuance of the provisions contained in the rules as well as in the agreements of the agents and purchasers. To quote from the note "it may not be out of place to mention here that renewal for at least one year may, perhaps, be obligatory

on the part of Government in view of the provision contained in the agreements of the agents and purchasers subject to their performance to the satisfaction of Government."

The note proceeds :

> "During 1966 similar clause for renewal was there in the Tender Notice as well as in the agreements, executed by the purchaser. In pursuance of these provisions, renewal was granted for one year, i.e., for the year 1967 with the approval of Chief Minister as may be seen from the extract taken from the policy file of 1967 at Flag 'E'. (The Policy file for 1967 is not readily available).
>
> "In view of the express provision for renewal in the agreements executed by the parties and the policy decision taken by Government for the year 1967, it may, perhaps, be necessary to renew the contracts of the remaining units subject to a satisfactory performance during the present contract period. Since it is the intention of Government to extend the area of operation for departmental working gradually, settlement by tender of the remaining units, may not be desirable.
>
> Orders of Chief Minister through Minister (Forest) may now be obtained with regard to the policy to be followed for the year 1972. On receipt of Government Orders, further action as may be necessary will be taken in time so as to finalise the preliminaries well ahead of the commencement of the next Kendu leaf season and avoid late settlement."

It is clear that the Under-Secretary's attempt was to canalize the new policy directly against the Cabinet decision because if it was obligatory on the part of Government in view of the express provision contained in the agreements for renewal for one year, there was hardly any chance of departmental working in 1972 except when the Government decided not to renew the agreement because of the failure of the agent or the purchaser to perform the terms of the agreement satisfactorily. No further reference to the Cabinet was thought necessary by the Under-Secretary and orders of the Chief Minister through the Minister, Forest was suggested to be sufficient, following the alleged policy decision of 1967, the file relating to which was not traceable.

Shri Sundararajan to whom the above note came made comments of his own on the 16th August 1971 for the Chief Secretary and the Chief Minister. The Secretary referred to the clauses in the agreements about renewal and the tentative conclusions arrived at on the 4th August 1971, which according to him were to the effect (1) that Rairakhol division be worked departmentally, (2) Units 81 and 81-A be given to the Forest Corporation and (3) "in the meanwhile the agreements with the agents and purchasers in respect of other units be extended by one year as provided in the agreement on the existing terms and conditions."

It is to be noted that the minutes of the discussion held on the 4th August 1971, do not show that there was a general consensus that the renewal of the agreements should be on existing terms and conditions.

Paragraph 6 of the note of Shri Sundararajan for the Chief Secretary reads as follows :

> "In my view, the suggestion of renewing the existing agreements with the agents and purchasers, made by the Finance Department and endorsed by the C. C. F. and the Conservators of Forests in the discussions with the Minister (F.), appears to be the best course to be adopted for the following reasons :
>
> (i) The agents and purchasers have already operated for three years in the respective units and have set up an organisation including processing units, godowns, a net work of staff to collect Kendu leaves, etc. If a new set of people are brought into the picture for the short period, that may elapse between now and the take over of the units for departmental working, we will fail to take advantage of the existing field organisation and the new agents and purchasers may not be able to replace it quickly and work in the units satisfactorily. This may result in complaints from the Kendu leaf growers and other public in the units.
>
> (ii) Besides, there is a clause for renewal in the existing agreements with the agents as well as purchasers, if their performance is found to be satisfactory. In fact, there was a spurt in the revenue from Kendu leaves during 1969 mainly because of the long-term settlement and the incorporation of a clause for

renewal in the agreement. The qusetion of renewal of the agreements for at least one year in the cases where the agents and purchasers have worked satisfactorily and have applied for such renewal according to the agreement, would be justiciable, in view of the incorporation of the renewal clause 7 in the agreement.

(iii) If in spite of this, Government desire to call for fresh tenders for the settlement of these units for a short period of one or two years from 1972 there is every possibility of the revenue dropping down, as the private trader is already apprehensive that he will evantually be squeezed out and would, therefore, be reluctant to offer more."

The Secretary then referred to the events in 1968 when there was considerable increase in the prices and opined :

"I do not think this would be possible now, mainly because the background against which the renewal, if at all, will be granted now is totally different from the background then. At that time, Government were thinking of changing the monopoly system of State Trading in Kendu leaves in favour of private trade and this was in fact one of the points for joint programme of action by the coalition Government. But the background against which renewal is now being proposed is just the opposite, i.e., to intensify State monopoly by taking more and more areas for departmental working. Naturally the private trader would be wary and already representations have been made to the Minister in this regard."

The last paragraph runs :

"We should avoid the risky experiment of fresh tender and unnecessary delay in negotiations with the existing parties. Renewals may be granted on the same terms and conditions as before subject to satisfactory performance of the agreements by the agents and the purchasers regarding which recommendations would be called for from the concerned D. F. Os. through the C. C. F. and Government orders for renewal will be taken in individual cases."

"In the cases which do not qualify for renewal for the reason that the performance of the agent or purchaser has not been satisfactory or for the reason that a change

in the terms, not acceptable to Government is being sought, we may have to resort to fresh tender. Since I am not suggesting any change in the existing scheme and the future Kendu leaf policy has already been approved by the Council of Ministers, it would be adequate if orders of Chief Minister in file are taken approving the above course of action as was done during 1968. If approved, the D. F. Os. concerned will be asked to receive applications for renewals from the existing agents and purchasers and forward them with their recommendations well before the end of this year so that renewal agreements can be executed in January 1972."

The Chief Secretary obviously was not inclined to accept the views of the Forest Secretary and made the following endorsement on the file on the 18th August 1971.

"It would appear that even when renewing the agreements, fresh terms and conditions can be stipulated. How has the price trend been ? Will it be possible to attempt an increase of about 15 to 20 per cent while granting renewals ? If this is going to present serious difficulties, it may be advisable to call for fresh tenders. Please examine this aspect."

On the 18th August 1971, the Secretary referred the question of renewability of the agreements to the Law Department of the State for opinion.

In the normal course of Government working, the Forest Secretary should have examined the matter in the light of the suggestions of the Chief Secretary. What happened immediately thereafter does not appear from the Government affidavit. But the counter affidavit of Shri Sundararajan in paragraph 36 shows that the Minister, Forest had rung him up on the 23rd August 1971 and enquired about the then position of examination of the policy for the year 1972 for the balance units. When he was told about the note of the Chief Secretary and of the fact that reference on the rights of the agents and purchasers had been made to the Law Department the Minister desired to see the file at that stage. This is borne out to by Shri Sundararajan's note on the file No. 7F-69/71. Shri Sundararajan, therefore, requested the Chief Secretary to send the file to the Minister of Forest and on coming to know later on in the day that the Chief Secretary was away at Delhi and had extended his stay there to attend another meeting and would be back only after the 26th

of August, had the file withdrawn from the office of the Chief Secretary, and sent the same on to the Minister on the 23rd August 1971. Thereafter, he had no occasion to see the file before the 21st September 1971.

The Minister, Forest, wrote out a note on the file on the 23rd August 1971 which reads as follows :

> "I called for the file on my return from tour and have gone through the note of Secretary, Forestry and the observations of Chief Secretary. I wanted to discuss with the Chief Secretary about the points raised by him, but he is absent from headquarters."

"The Chief Secretary has pointed out that while renewing the contract, fresh terms and conditions can be stipulated. As per the renewal clause in the agreement, fresh terms and conditions can be stipulated only on mutual agreement and cannot be imposed unilaterally. It may be seen that purchase prices offered for the present contract period are very much on the high side compared to the prices fixed during 1968. On the other hand, the agent's charges fixed for the present contract period are not adequate. Hence the agents are complaining for increase in the reimbursement charges. In the circumstances, any increase in the existing purchase price may necessitate corresponding increase in the agents' charges resulting in no extra profit to Government. Fresh tenders for one year will not bring extra revenue to the State Exchequer and rather there is every possibility of revenue dropping down as is pointed out by the Secretary".

"I, therefore, entirely agree with the suggestions of the Secretary to renew the agreements for one year more on the existing terms and conditions instead of going in for a risky experiment of fresh tender for one year only. Since it has been decided to gradually extend the area for departmental working from year to year, this will not apply to the units which will be ear-marked for the departmental working for the year 1972. In the past, the agreements with the existing parties were renewed as per renewal of the clause on the same terms and conditions."

The file does not indicate that any comment by the Under-Secretary was called for at this stage. But there is a note made

by him on the 27th August 1971 appearing on the margin of his note dated the 13th August 1971 which reads as follows:

> "However on examination of some of the individual unit files of 1966-67, it is seen that as per the renewal clause provided in the agreement of 1966 which is worded more or less on the same lines as the present renewal clause the agreements were renewed in favour of the then existing parties for the year 1967, on the same terms and conditions as during 1966. Files of Unit Nos. 87/66 and 87/67, 77C/66, 13/66 and 13/67, 54A/66 and 54A/67 are linked below for reference".

There was no occasion for the file going to the Under-Secretary at that stage. The Under-Secretary in his counter affidavit explained this by saying that the Minister, Forest, desired him to quote precedents from past records showing renewal on the existing terms and conditions.

The original file does not show that it was sent to the Chief Minister through the Department in the usual way. But the Chief Minister's note dated the 29th August 1971 shows that he had discussed the matter with the Forest Minister before passing his order on the 29th August 1971 which reads:

> "I have gone through the file. Anxious as I was to take up this work immediately nationalising the entire trade and be done with this periodic trouble. Neither the Department nor the Corporation—I found—is agreeable to this course. On enquiry, I found it is not as easy as I was thinking. Operational programme stages of operation of seasonal variations, processing work, accommodation and a huge army of workers in a diffused manner are its requirements. Since the period is short..and phase and processes, etc., are lengthening the apprehensions of the Under-Secretary and the Secretary are not unjustified. Accordingly I accept the note of the H. M. and approve it. At the same time, let him with his persuasive ways try to see if anything more is possible."

The original file discloses something remarkable which was not referred to or commented on in any affidavit. Shri A. Sahu's signature under his note dated the 23rd August 1971, the Chief

Minister's note and signature thereon dated the 29th August 1971 and Shri A. Sahu's endorsements dated the 21st September 1971 after his tour from Japan are all in violet ink—a feature not to be found elsewhere in the file except in one or two signatures of Shri Sahu. This suggests that they were all made with one pen and leads to the inference that it was Shri Sahu's pen which was used by the Chief Minister on the 29th August 1971 and made at a conference between the two Ministers. The same ink was used by Shri Sahu while making his endorsement dated the 25th July 1971 in file No. 7F-48/71.

Lengthy arguments were advanced on these notes. It was argued on behalf of Shri A. Sahu that the Chief Minister had accepted the position that agreements with agents and purchasers had to be renewed for another year on the existing terms and conditions and that it was, therefore, not possible on the face of the order of the Chief Minister to give effect to the Cabinet decision or the decision arrived at in the Assembly Chamber of the Minister on the 4th August 1971 to set apart a fairly large number of units for departmental working or working by the Forest Corporation. The Commission finds itself unable to take that view. The order of the Chief Minister clearly shows that although he was anxious to have the entire trade nationalised immediately, he found that there were difficulties in the way and that neither the Department nor the Corporation was prepared to take up the work at once. He, therefore, reconciled himself to the view of the Forest Minister that there would be an extension of the area to be worked departmentally from year to year and areas not taken over by the State should be entrusted to agents and purchasers. Although the Chief Minister noted that the apprehensions of the Under-Secretary and the Secretary were not unjustified as a matter of fact the Under-Secretary did not express any apprehension. The Secretary certainly apprehended that calling for fresh tenders for one year only when the trade was going to be nationalised in the near future would be a risky experiment, and there was every possibility of the revenue dropping down in that case. No doubt the Forest Minister was of the view that fresh terms and conditions could not be stipulated unilaterally. But the substance of the note of the Forest Minister was that the purchase price offered in 1969 for the contracts in force was much higher than those fixed during 1968, and any increase in the existing purchase price might necessitate corresponding increase in the agency charges resulting in no extra profit to Government. His suggestion was that in respect of areas not earmarked

for departmental working for the year 1972 the agreement should be renewed for one year on the existing terms and conditions instead of going in for a risky experiment of fresh tenders for one year in view of the decision to gradually extend the area for departmental working from year to year. Clearly the approval of this by the Cheif Minister of the Forest Minister's note implied that nationalisation of entire trade not being immediately feasible and calling for fresh tenders for the short space of one year being fraught with risk only areas which were decided not to be taken over for State trading should be settled with trader. At the same time the Chief Minister hoped that the Forest Minister would be able to secure an increase in prices even though in the past agreements had been renewed on existing terms and conditions. Read as a whole the Chief Minister's order cannot be taken to mean that he had approved of the dictum of the Secretary or the Under-Secretary that renewal was obligatory or of the Forest Minister that fresh terms and conditions were forbidden by the renewal clause and the only course open was to leave the trade in the hands of the existing agents and purchasers without initiating the Cabinet decision of nationalisation. The Chief Minister's note only shows that his view of immediate nationalisation of the entire trade was not a practical proposition.

It is surprising that in such an important matter where Government's policy as decided upon by the Cabinet to nationalise a substantial part of the trade immediately was involved depending on a proper interpretation of the renewal clauses the officers of the department, i. e., the Under-Secretary and the Secretary were freely laying down the law without getting the matter examined by the Law Department and the Forest Minister ignored the opinion of the Chief Secretary that fresh terms and conditions could be stipulated even if the agents and the purchasers were allowed to remain and that if an increase in price by 15 to 20 per cent was not possible fresh tenders might be resorted to.

As already noted after the Chief Secretary's note but before the Forest Minister's opinion recorded on the 23rd August 1971 a new file No. 7F-69/71 (Part) was opened on the 18th August 1971 by the Secretary (Forest) for getting the advice of the Legal Remembrancer. The file starts with a note from the Under-Secretary mentioning the renewal clauses in the agreements and requesting the Law Department to give its advice as to whether it would be justifiable in the face of such express provision for

renewal by Government not renewing the contract with the purchasers for another year in case Government were satisfied that the purchaser was prompt in taking delivery of leaves and making payment therefor. Reference was also made to similar provisions for renewal in the agreements executed by the agents. The Secretary added his own comment thereto on the same date mentioning the renewal clauses and quaerying "will it be a justifiable question as Government can refuse renewal at their discretion? If not, what should be the reason for renewal to be refused? Shall be grateful for early return of the file with the legal advice required." It appears that the file was sent back to the Administrative Department without opinion as it was wanted there. On the 1st September 1971 a further question was put up from the Forest Department to the Law Department e. g., "whether in the event of Government deciding that a particular unit should be worked either departmentally or through the Orissa Forest Corporation during 1972 the application for renewal filed by an agent or a purchaser of that unit can be rejected on this ground even if the other conditions for renewal were fulfilled?"

The Legal Remembrancer Shri B. N. Misra gave his opinion on the 10th September 1971. The relevant portion thereof reads "It is a matter of common knowledge that when any agreement comes to an end it is always open to the parties to negotiate for the renewal of the agreement if they so wish. There is no need whatever to insert so obvious a provision in any agreement unless it is to confer an express right of renewal. The renewal clause can have no other significance but as an expression of the intention of the parties that after the expiry of the present term and subject to the purchaser or the agent satisfying the conditions stipulated for renewal, the lease will be renewed for a period not exceeding one year at a time if the purchaser or the agent requires a renewal. In other words, if the agent or the purchaser has fulfilled all the conditions for renewal as stipulated in the rules and the model forms and Government and the purchaser or the agent mutually agree upon the terms and conditions, the latter would be entitled to a renewal.

"In case it is decided that the work entrusted to a purchaser or agent should be carried either departmentally or through the Orissa Forest Corporation, the renewal clause contained in the statutory rules and the model form should be deleted altogether."

It will be noted that the Legal Remembrancer did not categorically state that renewal if applied for, will be automatic in case the agent or the purchaser satisfactorily, performed the terms of the agreement. The penultimate paragraph of his opinion shows that the renewal would depend upon the parties mutually agreeing to the terms and conditions.

Shri Ainthu Sahu, Minister, Forests, had gone on tour to Japan on the 2nd September 1971 and during his absence from the State the Minister, Political & Services, Shri R. N. Singh Deo took charge of the Forest Department. The opinion of the Legal Remembrancer, dated the 10th September 1971 was endorsed to the Forest Minister Shri R. N. Singh Deo by the Secretary Shri Sundararajan. The first paragraph of the endorsement reads "this settles the procedure that Government have to follow to implement their intention of working more and more Kendu Leaf Units departmentally. Since renewal is obligatory except in cases where the performance has been unsatisfactory, Government can take up the departmental working during 1972. Only in the units which do not qualify for renewal for clear reasons. Even such cases are likely to be fought out by the agents and purchasers in the Court of Law for the non-grant of renewal. The Orissa Forest Corporation can also be allotted only such units during 1972.

"In the renewal agreement now to be signed by the parties and fresh agreements in cases of fresh settlements on re-tender for the year 1972, there should be no clause of renewal, if we have to implement the proposal of the departmental working without any hitch at least from 1973 onwards. This requires amendment of the corresponding provisions of the Orissa Kendu Leaves (Control of Trade) Rules and the forms of the agreements for which the approval of the Council of Ministers is required these being the statutory rules. If approved, the memorandum will be prepared in consultation with the Law Department and put up."

The Minister Shri Singh Deo sent the file on to the Advocate-General on the 11th of September 1971 for his opinion. The Advocate-General in his opinion, dated the 12th September 1971 referred to Rules 5-B (15) and 7 (10) and the provisos to clause 1 in the model Forms 'G' and 'H' and opined that "there is no room left for any doubt that once the agent applies for renewal and satisfies the terms and conditions laid down therein, the Government shall have no option but to renew the

contract for a period not exceeding one year at a time. The word 'may' in the Rules and Forms quoted above means 'shall'. In the matter of interpretation of statutes the word 'may' in such circumstances means 'shall', and it is obligatory on the State Government to renew the lease for a period not exceeding one year at a time. The next sentence "subject to such terms and conditions as may be mutually agreed upon" is an innocuous term ; "subject to such terms and conditions as may be mutually agreed upon" means if any alterations are proposed such alterations must be mutually agreed upon by both the parties. It is common knowledge that every agreement should be bilateral. If for instance some change is proposed and one party to the agreement does not agree can it be said that the agreement fails on that account and no renewal can be granted ? My answer will be in the negative.

"In interpreting different clauses of a statute or rules, courts try to give a harmonious construction. In the instant case also, if a harmonious construction is put on the language of the aforesaid rules as they stand, I am of the opinion that the words "subject to such terms and conditions as may be mutually agreed upon", in case of refusal the purchaser or agent can enforce the same in a Court of Law."

"The answer to the second question is that if Government chooses not to renew the lease, in that case, amendment in aforesaid rules and forms would be necessary. Till such amendments are made, the purchaser or the agent, as the case may be, if any in time satisfy the conditions laid down in rules 5-B (15) and 7 (10), it is obligatory on the part of the Government to renew the lease for the period as prescribed in the said Rules."

"In the light of what I have indicated above, I fully endorse the opinion expressed by the Law Department."

Whatever be the reason the file does not seem to have been brought to the notice of the Minister Shri Singh Deo before the 20th of September, 1971. It was marked to the Secretary, Forest, over his signature dated the 20th September 1971. On the margin there appears an endorsement marking the file to "Under-Secretary" by Shri Sundararajan on the 21st September 1971. This is followed by a note of the Secretary on the 24th September 1971 reading "Chief Secretary may like to see the notes from page 1 ante. I am taking necessary action for the amendment of

the Kendu Leaf (Control of Trade) Rules and the Agreement Forms. A draft memorandum for the Council of Ministers will be put up immediately after the Puja holidays." There is no endorsement in the margin to show that the file was sent to the Chief Secretary. The next endorsement on the file is also by Shri Sundararajan. "Since Minister, Forests, desires to see these papers urgently, submitted before showing to the Chief Secretary as per my earlier note." This is dated the 25th September 1971. The last endorsement on the file is signed by the Minister Shri A. Sahu reading "Seen—6-10-71." The file ends here.

A note may here be made that the endorsement of Shri Sundararajan of the 25th of September 1971 was not correctly quoted in the State's affidavits. According to the State's affidavit the endorsement read "as desired by M. (F) the file is being submitted herewith before showing to Chief Secretary as per my earlier note." According to the State's affidavit the file was not subsequently put up before the Chief Secretary even after the 6th October 1971.

Pending the receipt of the opinion of the Law Department and of the Advocate-General, matters did not lie quiet in the Forest Department. It will be remembered that by his note dated the 16th August 1971 Shri Sundararajan while suggesting that renewal should be granted on the same terms and conditions as before subject to satisfactory performance of the agreement by agents and purchasers, recommended that the D. F. Os. concerned should be asked to receive applications for renewals from the existing agents and purchasers and forward them with their recommendations well before the end of the year so that the renewal agreements could be executed in January, 1972.

As a matter of fact, even if renewals were obligatory, Government could not make up their mind to grant any renewal till after the end of the period of the agreement namely after the 31st December 1971 in the case of the agents and 15th of January, 1972 in the case of the purchasers. File 7F-78/71 headed "Performance of purchasers and agents during 1969-70-71" starts off with a note by the Under-Secretary to the Secretary dated the 6th September 1971 to consider whether reports about performances should be called for from the D. F. O's. through the C. C. F. as there was possibility of the agents and purchasers applying for renewal as provided in the agreements.

Paragraph 29 of the State's affidavit mentions the opening of file 7F-78/71. Referring to the said paragraph Shri Sundararajan in paragraph 38 of his counter affidavit states that direction for calling for reports about the performance of the agents and purchasers quickly from the D. F. Os. had been given verbally by Shri A. Sahu before he left for Japan. When thereafter Shri Singh Deo (temporarily in charge of the Forest portfolio) asked the Secretary again to expedite the proposals for calling for performance reports he put up the file suggesting that the performance reports be called for from the D. F. Os. through the C. C. F. by the end of October, 1971 but Shri Singh Deo having first approved of the note told Shri Sundararajan later that the reports would be in that case be delayed and Government would not be able to settle the units well before the next season as suggested by the Finance Department and so the reports should be called for so as to reach the Government by 15th of September, 1971 at the latest and that in view of the short time which was being given, the reports should be called from the D. F. Os. direct with information to the C. C. F. The Secretary therefore, revised his earlier proposals and resubmitted the file to the Minister. The revised proposals and the subsequent orders of the Minister on them were actually pasted over the earlier proposals and orders. This endorsement of the Secretary is of the 7th September 1971 as also the signature of Shri Singh Deo.

Shri A. Sahu came back from Japan to Orissa round about the 20th September 1971 and took charge of the Forest portfolio on the next day. His endorsement on the File 7F-69/71 on the 21st September 1971 occurs immediately after the endorsement of the Chief Minister Shri Biswanath Das on the 29th August 1971 reading "I have referred in my prepage note and Secretary has also explained the position clearly that increasing the rates or variation of terms and conditions were never done on similar occasions in the past and it will not be possible to do so now especially in view of the uncertainty about the future policy.

"I have explained the position personally to Chief Minister. As C. M. has already approved, necessary steps be taken to find out the performance of the agents and purhcasers for the purpose of renewal as instructed by me earlier." The file was marked over to the Secretary, Forests on the same day. This was followed by the endorsement of the Secretary dated the 24th September 1971 reading "C. S. last saw this on the 18th August 1971

He may like to see the notes thereafter. Action to renew the agreements has been taken separately as ordered by Government." This endorsements bears the date the 24th September 1971.

On the margin of the file there is an endorsement reading "U. O. I. No. 141/SF, dated 25-9-71" which means that the file was unofficially issued from the Forest Secretariat on the 25th of September, 1971 but as a matter of fact the file never left the department and the next endorsement by Shri Sundararajan reads "M (F).—As desired by M (F) the file is being submitted herewith before showing to the Chief Secretary as per my earlier note." This is dated 27-9-71. "The last endorsement on this file is by Shri A. Sahu dated the 6th October 1971 reading "Seen".

In this connection it may be interesting to note that whenever a file moves out of a particular Department or even in the Department from one officer to another there is always an endorsement reading (U. O. I.) meaning "unofficial issue" with the date thereon and a corresponding receipt of the addressee reading (U. O. R.) meaning "unofficial receipt" of the Department concerned with the date of such receipt. There is no such endorsement on the margin when the file was meant to go to the Chief Minister after Shri A. Sahu's endorsement on the 23rd September 1971 nor was any endorsement or receipt marked after the Chief Minister's note dated the 29th August 1971. The inference to be drawn is that the file was sent privately to the Chief Minister or what appears to be more likely taken to him personally by Shri Sahu and the Chief Minister's order was obtained probably by the application of his "persuasive ways" without the Department knowing anything about it. The use of the same ink (and probably the same pen) by Shri Sahu and the Chief Minister suggests that the Chief Minister's note dated the 29th August 1971 was made in the presence of Shri Sahu.

Shri Sundararajan's version that he had no occasion to see the file after he marked it to the Minister on the 22nd August 1971 till he got it back on the 21st September 1971 appears to be correct.

As soon as Shri Sahu came back from Japan, the work of renewal of agreements was taken up with remarkable zeal. Annexure 3 to the State's affidavit against Shri Sahu shows that a very large number of applications for renewal had poured in from agents and purchasers from the 20th September 1971 to the 24th September 1971 exceeding 80 in number. It should be

mentioned that there were a few which were received on the 17th and 18th September 1971. On two days, i.e., the 23rd September 1971 and the 24th September 1971 no less than 86 agents and purcharsers were given orders for renewal. This number included some persons who had made the applications on the 17th and 18th of September 1971 as also a few whose applications were not included in Annexure 3.

There is nothing to account for the unseemly haste in grant of renewal to those people. The unusual feature of the renewals is that they were being granted much before the proper time for judging the performance of the agents and purchasers in terms of the agreements inasmuch as two quarters ending on the 31st October 1971 and the 31st December 1971 had still to run out.

The Secretary stated in paragraph 44 of his counter-affidavit that the heaviest receipt in respect of applications was on the 20th and 21st September 1971 and when he asked those who came and met him at the time of filing the applications as to how so many of them happened to come to Bhubaneswar at the same time and file applications for renewal, they told him that they had come to meet Shri A. Sahu, the Minister of Forests as desired by him. The Secretary reiterated in this paragraph what he had stated earlier in paragraph 19 of his counter-affidavit that the Minister Shri Sahu had given verbal instructions to himself as also to the Under-Secretary to examine these applications immediately and put up for his orders so that offers of renewal were given to the agents and purchasers before the Puja holidays scheduled to commence from the 26th September 1971. According to the Secretary the examination of individual applications and the processing of files for the issue of the orders of the Minister and the issue of offers for renewal were all done "during a short period" on the specific oral instructions of the Minister.

There is a sheet of paper which was not a part of any of the files (but later incorporated in file No. 7F-69/71, Part II) containing an order of Minister Shri A. Sahu, dated the 23rd September 1971 and reading "the purchasers and agents in whose case I have already passed orders for giving offers of renewal for the year 1972 wish to take delivery of the orders urgently. It would be convenient if the Department sends the fair copies of the orders to be delivered to them in my office from where they will collect the same under proper acknowledgement. This will avoid unnecessary gathering in the Secretariat corridor." Below it there is an

endorsement of the Under-Secretary Shri A. Satpathy reading "Secretary may please see the orders of M (F) above. M (F) gave this to me personally today." Under this again there is an endorsement of Secretary, Forests Shri Sundararajan reading "Seen, spoken to M (F). He desires that the above procedure may be followed despite this being a little odd. Take action accordingly." This is dated the 23rd September 1971. There is no other note on the sheet of paper except Shri Satpathy's signature at the bottom, dated the 23rd September 1971.

According to the affidavit of Shri Sundararajan, the above does not correctly represent what happened on the 23rd of September 1971. As will be apparent from the following quotation from paragraph 40 of his counter-affidavit the order of Minister (Forests), dated the 23rd September 1971 about the sending of fair copies of orders to his office for delivery to the purchasers and agents was not directed to the Secretary. They were actually brought to him by the Under-Secretary who told the Secretary that the Minister had given it to him personally. He had also recorded this fact while endorsing the orders of Minister for him to see. According to Shri Sundararajan "actually the Under-Secretary had already complied with the orders of Minister by sending the fair copies of letters in the cases where he had signed them on the 23rd September 1971 to the Minister for delivery to the parties, by the time he brought the note containing the orders of the Minister to me in the evening. When I asked him why he did so without first showing the orders of Minister to me he said that as they were the orders of the Minister and there was no violation of the procedure prescribed for despatch of letters he had complied with them. I then checked up and found that there was actually no violation of any rules or instructions in this regard, though the procedure ordered by the Minister was certainly not normal. I, therefore, spoke to the Minister over phone and told him that the procedure ordered by him was rather unusual and suggested to recall the orders. But he justified his orders saying that there was no violation of the rules." It is difficult to say which if it be true that the Under-Secretary had complied with the orders of Minister by sending the fair copies of the letters to the Secretary on the 23rd September 1971 for delivery to the parties before he had brought the matter to the notice of the Secretary whatever was required to be done had been done and there was no point in the Secretary's recording that he had spoken to Minister, Forests or asking him to recall the orders.

His note does not corroborate his suggestion of such recall. His recording 'that action be taken according to the order of the Minister despite its being odd should be carried out' has no meaning. The Minister's behaviour is quite inexplicable. He does not explain as to why he was beset by a such large number of agents and purchasers on the 23rd September 1971 and how there was such urgency for the Government's making the offers when performance up to the 31st December 1971 still remained to be judged. Why the Minister was so anxious to avoid unnecessary gathering in the Secretariat corridor is also mysterious.

Shri Sundararajan's affidavit explains the matters in part. The agents and purchasers had put in applications on 21st September and soon thereafter they had been summoned by the Minister. The latter was anxious that the orders for renewal be rushed off as soon as possible without attracting any notice as the presence of a large number of agents and purchasers in the Secretariat corridor was bound to do. This also fits in with his and Shri Singh Deo's earlier directions that the performance reports be filed before the 15th of September. Shri Sahu lost no time in putting the entire matter through as soon as he came back from Japan without caring to inform the Chief Minister as to what he was going to do or bothering to trouble what effect his course of action would have on the Cabinet decision of May, 1971 to put the nationalisation programme in action from 1972.

It appears that there was feverish activity on the part of the Forest Department from the 21st September 1971. Lengthy notes were made out on a large number of files by the Head Assistant of the Department. In nearly almost all of them it was suggested that renewals of the agent's and purchaser's agreements in different units should be carried out. These notes appear to have been typed in bunches by making several carbon copies at a time and leaving the names of the agents and purchasers, the numbers of the units and the other details of the units to be filled in later. The Under-Secretary's notes on the said recommendations were also typed in bunches with carbon copies made at the same time. Shri Sundararajan merely acted as a conduit pipe. He merely endorsed all the files with the laconic endorsement "M (F)" over his signature. The receipts for the orders distributed were pasted on the Peon Book of the Department sometime after 14th of October, 1971, even the pasting being done in bunches one on top of another.

The explanation for this curious procedure of pasting was given by Shri Sundararajan when there was a change of Government and the emergency Peon Book of the Forest Department was called for by the Personal Secretary to the new Chief Minister. Although the Secretary Shri Sundararajan was not asked to give any explanation about such requisition, he wrote to the Secretary to the Chief Minister on the 21st June 1972 explaining that although normally the parties in whose favour orders of renewal are passed by the Department take delivery of them personally or they are sent by post, as the Minister, Forest, desired that the fair copies of the orders were to be sent to his residence for delivery to the parties concerned this procedure was adopted. The orders appeared to have been delivered to the parties and receipts were sent to Department for record and these were pasted in the Peon Book later on.

The common complaint of the State against Shri Sahu and Shri Sundararajan regarding the renewal of the Agreements in September, 1971 is as below :

(1) No action was taken by either of them for implementing the Cabinet decision to work out the Kendu leaf business departmentally, or through the Forest Corporation after the 12th August 1971. (Para. 23 of the State's affidavit).

(2) Before taking the decision to renew the agreements in September, 1971 there was no suggestion made by them about reference to the Finance Department or consultation with it although the same was obligatory under the Rules of Business (Paragraphs 32 and 42 of the State's affidavit).

(3) Even without consultation with the Finance Department the Secretary advised that as the future Kendu Leaf Policy has been approved by the Cabinet, orders of the Chief Minister was sufficient. The advice was contained in his note dated the 16th August 1971 wherein he suggested that the risky experiment of fresh tenders and unnecessary delay should be avoided and renewals might be given on the same terms and conditions as before, subject to satisfactory performance and as he was not suggesting any change in the existing scheme and the Kendu Leaf Policy had been approved by the Council of Ministers it would be adequate if orders of the Chief Minister were taken on the file. (Paragraphs 34 and 42 of the State's affidavits).

(4) The policy decision taken by the Cabinet to start departmental working from 1972 was abandoned without any reference to that body.

(5) The extraordinary manner in which the renewals of the agreements were effected amply demonstrate the absence of good faith on the part of both the Minister and the Secretary.

The procedure directed by the Minister was at complete variance with the agreements executed. According to the agreements the agent or the purchaser had to give the Government fifteen days' notice in writing prior to the expiry of the term expressing a desire to take a renewal and only if they had observed and performed all the terms and conditions to the satisfaction of the Government and Government were satisfied in the case of the agent that he had done his best to collect the maximum quantity of leaves and in the case of the purchaser that he had been prompt in taking delivery of the leaves and making payment therefor was the Government in a position to grant renewal properly.

The procedure adopted by the Minister reversed the whole process. Government started by directing D. F. Os. on the 7th September 1971 that the D. F. Os. should report about performance by the 15th September 1971. The Minister thereafter directed the Under-Secretary verbally to send offers for renewal to be made by Government to the agents and the purchasers to his residence on the 23rd September 1971 and the Under-Secretary complied therewith even without the Secretary's knowing anything about it. On the same day the department typed out notes in bunches in favour of renewal, the Under-Secretary's long notes recommending renewal, were also typed out in bunches the Secretary merely endorsing the files to the Minister who made the invariable order "The agreement may be renewed."

Apart from the manner of renewal of the agreements in 1971, the complaints in the State's affidavit in paragraph 43 is that in respect of 16 units there was unexplained delay in the renewal granted to the purchasers and agents. In respect of these units fresh applications were invited by Government by notice dated the 6th March 1972 published in the *Orissa Gazette* dated the 10th March 1972 calling for applications by the 15th March 1972 for appointment of agents. In some cases the new

agents appointed were either close relations of or otherwise connected with the old agents. The statement giving the particulars of the units, the dates of applications of the agents and purchasers and their dates of appointments are given below :

Unit Nos.	Agent	Purchaser	Agent	Purchaser
	Date of application	Date of application	Date of appointment	Date of renewal
1	2	3	4	5
108	20-9-1971	20-9-1971	14-4-1972	4-4-1972
108-A	20-9-1971	20-9-1971	14-4-1972	4-4-1972
107	21-9-1971	21-9-1971	20-4-1972	4-4-1972
99	14-10-1971	14-10-1971	19-4-1972	30-3-1972
87-A	25-9-1971	25-9-1971	10-4-1972	10-4-1972
13	22-9-1971	22-9-1971	17-3-1972	17-3-1972
68-A	8-12-1971	15-12-1971	25-4-1972	2-5-1972
64	9-11-1971	15-9-1971	8-4-1972	8-4-1972
82-D	25-9-1971	25-9-1971	11-4-1972	4-4-1972
55-A	9-11-1971	15-10-1971	8-4-1972	5-4-1972
14-A	21-9-1971	21-9-1971	28-4-1972	17-3-1972
31	24-12-1971	24-12-1971	25-3-1972	25-3-1972
88-A	18-9-1971	16-9-1971	8-4-1972	16-12-1971
64-A	14-9-1971	11-10-1971	8-4-1972	22-12-1971
69-C	8-10-1971	8-10-1971	8-4-1972	24-12-1971
88	18-9-1971	16-9-1971	8-4-1972	16-12-1971

According to the State this went to show the arbitrary and capricious manner in which renewals were granted. The Advocate-General pressed before the Commission the cases of only 8 out of the 16 units mentioned in the above list to illustrate

the State's complaint and his grievances as called from the affidavits and the files are as follows :

(a) Unit No. 13—Purchaser Shri N. S. Agasthi applied for renewal on the 22nd September 1971. As satisfactory report of his performance was received, Under-Secretary recommended his case on the 24th September 1971 for renewal. The Secretary endorsed the recommendation the very next day. The Minister Shri Sahu made a query to check the power of attorney regarding the agent's application. But without any reason the disposal of the purchaser's application for renewal was delayed till the 12th March 1972 although his performance was satisfactory. The same person N. S. Agasthi, as a power of attorney holder of the agent P. S. Pande, had applied for renewal of the agency agreement on the 22nd September 1971. Both the Secretary and Under-Secretary reported his performance to be satisfactory. On the Minister's query mentioned above both the Secretary and the Under-Secretary reported the power of attorney to be valid. No orders were however, passed on the agent's application. On the 6th March 1972 a fresh application was invited for the agent's appointment in this unit. P. S. Pande did not make any application in pursuance of this notice. The agency agreement was renewed by order dated the 17th March 1972. The same was however cancelled and a fresh order was issued on the 27th March 1972.

(b) Unit No. 55-A—The agent Shri Ramesh Mediratta applied for renewal of his agreement on the 9th November 1971. The Under-Secretary and the Secretary recommended the application. The Minister, however, made a query regarding the purchaser and the agent's appointment was delayed. The Minister passed orders on the 31st March 1972 renewing the agent's agreement though no application had been filed by Shri Ramesh Mediratta in pursuance of the notice of the Government dated the 6th March 1972. Shri Mediratta submitted a fresh application on the 4th April 1972 beyond the period prescribed in the notice of the 6th March 1972. Government order for renewal was issued on the 8th April 1972 appointing him as agent.

The purchaser Shri S. L. Mediratta had applied on the 15th October 1971 for renewal of his agreement. This was recommended by the Under-Secretary and the Secretary. The Minister made a query and asked for report from the D. F. O. The D. F. O. reported that the purchaser had defaulted in carrying out the terms of the agreement and lifting the bags and was otherwise indifferent to working out the agency. On the 30th March 1972 the Under-Secretary noted in the file that he understood from the discussion with the D. F. O. that the purchaser had in the meanwhile cleared up his arrear dues. Minister thereafter passed orders for renewal of the purchaser's agreement and formal orders were issued on the 5th April 1972.

(c) Unit No. 64—Agent Shri A. K. Mediratta applied for renewal of his agency on the 9th November 1971. The Under-Secretary reported that the performance of the agent was bad and Secretary endorsed the note of Under-Secretary on the 8th January 1972. The Minister made a query on the 27th January 1972 if the D. F. O.'s report about the agent had been received. In the meanwhile fresh agency application was invited on the 6th March 1972 and the Under-Secretary recommended on the 30th March 1972 that the agent's performance being unsatisfactory one of the new applicants, namely, Shri G. K. Saha or the Forest Corporation might be considered for such appointment. Thereafter an application for withdrawal of appointment as agent by A. K. Mediratta through S. Mediratta was received by the Department on the 8th April 1972. S. C. Mediratta also applied for the agency himself on the 8th April 1972. Yet another application dated the 28th March 1972 was received from one Ramesh Mediratta without any earnest money deposit receipt on the 8th April 1972. On this day Minister ordered Ramesh Mediratta's application to be granted. According to the State's affidavit neither Shri Saha nor the Forest Corporation had ever expressed want of interest in such appointment.

(d) Unit 68-A—Agent Shri Kanji Chakubhai applied for renewal of his agency on the 8th December 1971. The application was not disposed of. Fresh applications, however, were invited by the notice dated the

6th March 1972. No application under this notice was made by Shri Kanji Chakubhai but the Orissa Forest Corporation applied for such agency. The Minister on the 22nd April 1972 ordered the appointment of Kanji Chakubhai without considering the application of the Orissa Forest Corporation.

(e) Unit No. 82-D—One Prakash Chandra Pradhan submitted an application for renewal of his agreement on the 25th September 1971. Reports of the Divisional Forest Officer were received regarding the satisfactory performance. The Under-Secretary on the 22nd October 1971 recommended the renewal of the agreement. Secretary endorsed it on the 16th February 1972. The Minister commented "this seems to be a case of heavy shortfall. Please discuss". Again on the 15th February 1972 the Minister passed the following orders :

" Discussed. Please call for report from the Divisional Forest Officer to know the cause of shortfall."

There is no material in the file to show that there was any shortfall or that any report was made against the persons about unsatisfactory performance. No report was called for from the D. F. O. On the 4th April 1972 the agreement of the purchaser was renewed. According to the State the cause of delay despite the satisfactory report regarding performance remains unexplained and it was a clear case of abuse of powers.

(f) Units No. 108 and 108-A—One Tarachand Vithal Das, purchaser of the above units applied for renewal of his agreement on the 20th September 1971. Both the Under-Secretary and Secretary were against the renewal of the agreement as the performance was not satisfactory as would be borne out by the D. F. O.'s report. The file which was sent to Minister on the 15th October 1971 remained with him till the 14th February 1972 and returned to the Department on that date. On the 29th March 1972 the Under-Secretary suggested the renewal of the purchaser's agreement as he had not violated the terms. On the 31st March 1972 Shri Sahu passed orders for renewal and such order was issued on the 4th April 1972.

(g) Unit No. 69-C—Shri K. C. Panda, agent of the Unit applied for renewal of his agreement on the 8th October 1971. On the 25th October 1971 Under-Secretary reported that the agent was irregular in maintaining accounts. The Secretary endorsed the file to the Minister suggesting that the agent's agreement may not be renewed. On the 6th March 1972, notice inviting applications for appointment of agents was issued. On the 5th April 1972 Shri K. C. Panda withdrew his renewal application and the Under-Secretary recommended that Shri Agasthi Panda, son of the purchaser may be appointed although Orissa Forest Corporation Ltd. was one of the applicants for the agency. The Secretary endorsed the file to the Minister who passed orders on the 8th April 1972 appointing Agasthi Panda as the agent without considering the case of the Orissa Forest Corporation.

Similar irregularities were alleged to have been committed with regard to other agents. The Commission does not feel it necessary to deal with them. The details of the units given above sufficiently illustrate the case of the State against the Minister.

The next ground of complaint against the Minister and the Secretary starts with paragraph 45 of the State's affidavit. The complaint in this paragraph is as follows :

(a) That although the orders granting rebates and concessions during the regime of Shri R. N. Singh Deo as Chief Minister and Shri H. P. Mohapatra as Forest Minister were kept in abeyance by Shri R. N. Singh Deo's order, dated the 31st December 1970 and so far as the rebate to the purchasers were concerned the same was revoked by order, dated the 6th January 1971 they were never restored by the succeeding Chief Minister. Shri A. Sahu, however, after assuming office as Minister started granting concessions to agents. Although the reconstitution of the Kendu leaf areas into 180 units had taken place in the year 1969 as a result of bifurcation of some of the old units and stipulation as to the number of bags to be collected from the new units was fixed on the principles adopted by the Cabinet at its meeting held on the 15th January 1969 mentioned earlier Shri A. Sahu passed orders

whereby the term of the agreements relating to the number of bags to be collected by the agents was modified to the prejudice of the Government.

According to the State's affidavit the method adopted was irregular and the proposals were never processed through the Finance Department, the concurrence of Finance Department was not taken, neither was the approval of the Chief Minister or of the Cabinet obtained. Further while reducing the stipulated number of bags in respect of one of the bifurcated units steps were to be taken to refix the stipulation in other part at a higher level. This policy was not implemented when the renewal of agreements for 1972 was granted.

The Advocate-General classified the units under six separate groups, viz., with regard to (1) 82-A, 82-B, 82-C, (2) Unit Nos. 70 and 70-A ; (3) Unit No. 68-A ; (4) Unit No. 64 ; (5) Unit No. 66 and (6) Unit No. 53-A.

The State's case regarding these was as follows :

(1) Unit Nos. 82, 82-A, 82-B and 82-C—The agents of these units had made representatitions during the time of Shri H. P. Mohapatra for giving concession by way of waiving compensation on account of shortfall but although the then Minister by order, dated the 7th November 1970 allowed the prayer of the purchasers for reduction of purchase price, he did not accept the agents' prayer for waiving compensation for shortfall. The report of the D. F. O. in regard to these units was that there was little shortfall in 1969 in 82-A, 82-B and none in 82-C but the shortfall was not negligible in the year 1970. The agents repeated their prayer for waiver of compensation for shortfall on the ground of smuggling. The Under-Secretary in his note, dated the 11th December 1971 recommended that the agent may be granted remission of shortfall compensation for both the years 1969 and 1970. The Secretary by his note dated the 13th December 1971 recommended for consideration of the agent's request in the light the recommendations of Shri I. C. Mishra, Probe Committee which had neither been accepted nor rejected by Government. The Minister Shri Sahu by

his order, dated the 15th February 1972 allowed the prayer of the agents for waiving of compensation for entire shortfall in respect of both the years 1969 and 1970. According to the calculation given at the foot of page 71 of the State's affidavit the State thereby sustained a loss of Rs. 1,29,742·00.

(2) Unit Nos. 70 and 70-A—Unit No. 70 was bifurcated in 1969 into two units 70 and 70-A. As a result of the bifurcation the stipulated collection figure for Unit No. 77 was 3,776 bags, while for 70-A it was 1,910 bags. The agents of these two units applied for modification of the stipulated number of bags on the ground that the total stipulation of these two units had exceeded the stipulation of the old unit No. 70 and there was shortfall due to sudden conversion of waste land into cultivated land after the construction of the Saluki River Project. The Secretary Shri A. K. Ray suggested that the stipulation should be reduced by 500 and 300 bags for the above units respectively after obtaining the views of the Finance Department. The Finance Department advised that legal implications should be examined by the Law Department and since the earlier stipulation had been made in accordance with the Cabinet decision the revised orders should be approved by the Cabinet. The Legal Remembrancer suggested that :

(1) dispute between the parties should be resolved by arbitration in accordance with the clause contained in the contract ;

(2) consultation with the Finance Department was mandatory ; and

(3) since earlier decision had been taken by the Cabinet any modification of the contract terms should be placed before the Cabinet and if approved by the Cabinet a supplementary agreement should be executed. Thereafter the matter was referred to the Political & Services Department.

Shri Singh Deo as Minister in charge of the Political & Services Department passed an order on the 25th August 1971 that these matters did not involve revenue

of the State and reference to the Finance Department was not required. Shri Sundararajan acting upon the said order endorsed the file to the Minister Shri Sahu for reducing the stipulated figures and Shri Sahu approved of the same on the 25th September 1971. On account of the above order Government sustained a loss of Rs. 1,17,600·00.

(3) Unit No. 68-A—The agent of this unit had contracted to collect 1,287 bags per year for the three-year period 1969 to 1971. After executing the agreement he made a representation for reduction of the number of bags to be collected and second representation in March, 1970 for refixing the number of bags and for waiving any compensation towards shortfall. The Under-Secretary Shri Satpathy recommended the reduction in the number of bags and the Secretary Shri Sundararajan by his order, dated the 12th August 1971 accepted the note of Under-Secretary and endorsed the same to the Minister. The Minister Shri A. Sahu approved refixation of the stipulation on the 23rd August 1971. The State sustained a loss of Rs. 59,614·00. For this there was no concurrence of the Finance Department nor approval of the Chief Minister or Cabinet.

(4) Unit No. 64—One Shri A. K. Mediratta had executed an agreement in favour of the Government as the agent for the unit undertaking to collect 2,550 per year. In August, 1970 a representation was submitted on behalf of the agent to reduce the number of bags to 1,830 ; subsequently another representation was submitted to reduce the number of bags to 1,800 per year. The Under-Secretary though alive to the fact that the Government would sustain a loss of Rs. 39,750 on account of the concession recommended the same for favourable consideration and the Secretary passed it on to the Minister. The Minister by his order, dated the 11th June 1971 refixed the stipulation at 1,850 considering the actual production for the year 1970, i.e., 1,830 bags and said it would be just and fair to refix the number at 1,850. Thereby the Government lost Rs. 1,14,240 which it should have received by way of shortfall compensation.

(5) Unit No. 66—One Shri Gour Kishore Saha, an agent of this unit entered into an agreement to collect 3,641 bags per year. He prayed for reduction of the number of bags. The Under-Secretary recommended for refixation at 2,500 bags per year on the basis of the actual fadiwise collection from 1965 to 1970. The Secretary accepted the suggestion and the Minister passed orders on the 20th November 1971 refixing stipulated number of bags to 2,500 bags per year. As a result of the refixation, Government lost by way of shortfall compensation an amount of Rs. 1,47,873·00.

(6) Unit No. 53 A—One Shri Jaya Lal Nanda entered into an agency agreement to collect 4,230 bags per year. Subsequently, he prayed for reduction of the stipulated number of bags. The Under-Secretary and the Secretary recommended such reduction and the Minister passed orders on the 22nd October 1971 reducing the stipulated bags to 3,500 per year. The shortfall compensation lost by the Government came to Rs. 1,19,136.

In paragraph 47 of the State affidavit against Shri A. Sahu there is a reference to a letter from the Joint Secretry to the Government of India, Ministry of Home Affairs dated the 2nd April 1973 to the Chief Secretary to Government of Orissa. Reference is made therein to a letter of one Shri A. C. Sharma who had complained that he had been made to pay a sum of Rs. 20, 520 in the month of September 1971 to Shri A. Sahu, Minister of Forests at the residence of Shri R. N. Singh Deo. A copy of the said letter was appended as Annexure IV to the State's Affidavit. The letter purports to show that Shri Sharma had entered into a contract for the purchase of 1,800 quintals of bidi leaves at the time of renewal of his agreement for the year 1972-73.

It will be remembered that Shri A. C. Sharma had appeared before the Commission on the 6th June 1973 but he did not file any affidavit in support of the allegations contained in his letter. There being no affidavit filed by anybody suggesting payment of illegal gratification to any of the Ministers or other public servants the Commission did not allow such an issue to be raised although the question of payment of illegal gratification was contained in the Government notification, dated the 22nd February 1973.

The main points to be noted in the counter-affidavit of Shri Ainthu Sahu are :

(a) The discussion at the meeting on the 4th August 1971 in the Assembly Chamber showed a general concensus of opinion that it would be risky to settle units by tender for 1972 because the period of settlement would be for one year only and the initial investment called for in this trade would necessarily be too large for a new tenderer and once it became known in the trading circles that the tenders were lower than the old rate of settlement it would be difficult to persuade old purchasers and agents to accept their old rates with the result that there would be a drop in the revenue.

(b) There was no reliable information with regard to the market price of Kendu leaves in the important markets and the Orissa Forest Corporation did not have a machinery for acquiring or maintaining any market intelligence and the only available price index was the rate offered by the National Small Industries Corporation of the Ceylon Government who had offered at Rs. 299 per quintal for the best grade mixture leaves.

(c) The scheme relating to the departmental working needed to be examined in detail with a view to substantially reducing the cost as suggested by the Finance Department. The deponent as Minister ordered the examination of the scheme in detail. The Under-Secretary suggested that pending further examination of the scheme for departmental working it was necessary to initiate proposals for formulating the policy to be followed for 1972 on the question of renewal of the agreements or tender for a period of one or two years.

This, however, does not accord with the counter-affidavit of Shri Satpathy. According to him it was the Minister who had suggested the opening of a new file for this purpose.

(d) The files of past year, i.e., 1967 showed that agreements with the agents and purchasers had been renewed as a matter of course because of the existence of the renewal clause in the agreement for 1966.

The deponent had asked the Secretary to expedite processing the question of renewals in terms of the advice by the Finance Department and he was informed that the Chief Secretary's views had been sought for. As the Chief Secretary was out on tour and was not expected to return till the 25th August 1971 he had asked his Secretary to withdraw the file from the Chief Secretary's office and send it on to him for examination of the comment of the Chief Secretary. The deponent was convinced that his Secretary's opinion was right and the Chief Secretary obviously was not aware of the background in which the Secretary Sundararajan had tendered his advice.

(e) From his experience as a lawyar he took the view that the renewals were obligatory on the part of the Government in such cases which qualified for renewal and refusal to renew would bring about a spate of litigation and he, therefore, passed his order on the 23rd August 1971.

He sent the file to the Chief Minister who after discussion with the deponent agreed with him and passed order on the 29th August 1971 as already noted.

He, thereafter, instructed the Secretary and the Under-Secretary to ask for performance reports from the Divisional Forest Officers so that Government would know which units would qualify for renewal and which would not so that the area available for departmental working could be found out.

It is difficult to accept the above statement inasmuch as neither the deponent nor Shri Singh Deo was right in his view that a report about performance before the 31st December 1971, was enough to satisfy the Government about the agent's or the purchaser's rights to ask for renewals. The files do not show that anyone ever cared to examine what areas would be available for Governmental working which would be a precondtition to find out which units would be earmarked for settlement with traders in terms of the policy suggested by the Finance Department. As soon as Shri Sahu came back from his Japan tour

he sent for the agents and purchasers who put in applications for renewal at his behest and Shri Sahu ordered the Under-Secretary to send fair copies of orders for renewal for delivery to the agents and purchasers without the departmental head, i.e., the Secretary coming to know about till the whole thing was *fait accompli.*

(f) According to Shri Sahu, in deference to the Chief Minister's suggestion in his note dated the 29th August 1971 the deponent negotiated with the purchasers and was able to persuade them to agree to give 5 per cent of the Kendu leaves purchased by them to the Orissa Forest Corporation Ltd. at their purchase price so that the Corporation could export these to other countries and earn a profit of Rs. 20 lakhs without risk or investment. The deponent also took the opportunity of ascertaining if they would be willing to an increase in the event of renewal, but they were not so willing.

Again the question as to how the purchasers came to agree to give 5 per cent of the Kendu leaves to the Forest Corporation is a debatable one inasmuch as Shri Sundararajan has a different story to tell.

(g) According to Shri Sahu there was nothing irregular on the part of the deponent to direct the Secretary to send back all fair copies of the orders directly to his residence for delivery to the purchasers and agents. It did not violate any rule or procedure. The deponent cited numerous instances where letter meant for Government officers were carried by or delivered to private parties and receipts for the letters were pasted on the Peon Book.

It is to be noted that pasting of the receipts by itself means nothing but what was irregular was the manner in which the whole thing was done, i.e., the Minister asking the Under-Secretary personally. to carry out his orders of sending the offers of renewals to his residence even without the knowledge of the Secretary and his carrying out that order and informing the Secretary at the end of the day that he had done so. No reason is shown as to why it had

become such an urgent matter for the Minister personally to make over the orders to the traders at his residence. Again why a large number of persons flocked to his residence long before the expiry of the period of the agreement remains a mystery unless one is to accept Shri Sundararajan's statement that they had been sent for by the Minister himself. It is obvious that the Minister pursued a hush hush policy and did not even allow the Secretariat to learn in advance what was going to be done.

(h) Shri Sahu's explanation with regard to the renewals was as follows :

Inasmuch as the Cabinet had taken a decision on the 15th January 1969 to provide for a renewal clause in the agreement forms of the agents and purchaser to renew their agreements for one year or more in the event of the satisfactory performances and the incorporation of the clause for renewal in the terms and conditions in the agreement forms 'G' and 'H' had resulted in substantial rise in the income from the Kendu leaf trade and the Finance Department had suggested the renwal of the contracts of the existing agents and purchasers for one year or more as one of the alternatives, the advice of the Under-Secretary on the 13th August 1971 and that of the Secretary dated the 16th August 1971, respectively explaining that renewal was obligatory was *bona fide* and timely. The advice of the Advocate-General as well as of the Attorney-General of India was finally accepted by the Chief Minister on the 29th December 1971. The opinion of the Attorney-General was of an informal character and was never given in black and white.

It is to be noted that the Attorney-General refused to give his opinion in writing unless permission regarding thereto had come from the Union Law Ministry. It further appears that the opinion of Shri C. K. Daphtary, ex Attorney-General of India went completely against the advice of the Legal Remembrancer and of the Advocate-General.

It is not for the Commission to examine in detail the various opinions recorded but it seems an elementary proposition of law that a clause for renewal of an agreement can only be interpreted so as to make to the renewal obligatory if it can be said with

certainty that the parties had agreed upon the terms which were to be inserted in the agreement to be renewed and there was no scope for any further negotiation.

In Anson's Law of contract, 21st Edn. page 23 the proposition of law laid down is "unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it. One of the illustrations given is the case of Montreal Gas Co.—*V*—Vasey 1900 App. Cases 595. In that case the Gas Company had entered into a contract with Vasey to sell all the ammoniacal liquor produced in its works to the latter for a period of 5 years on certain terms. Five days after the execution of this contract the Company wrote to the purchaser "if we are satisfied with you as a customer, we will favourably consider an application from you at the expiration of the term for renewal of the same for another period". According to the House of Lords "the terms used imply that the appellants reserved to themselves the right to deliberate on the question of renewing the contract if the respondent should apply to them to do so".

The agreement with the agents and purchasers provided:

(a) that the agents and purchasers could only ask for renewal if they had duly observed and performed all the terms and conditions to the satisfaction of the Government and the Government were satisfied that the agents and the purchasers had done their best to give effect thereto. Even if the agents and purchasers had performed their part of the agreement to the complete satisfaction of the Government, the clause for renewal could only operate if in addition thereto the parties mutually agreed about the terms and conditions which were to be inserted in the new contract. The phrase "subject to such terms and conditions as may be mutually agreed upon" makes it clear that the terms and conditions of the renewal had to be negotiated on afresh. The word were not "subject to such alteration in the terms and conditions as may be mutually agreed upon" as suggested by the Advocate-General. Again it would be begging the whole question if one is to say that "there seems no significance

at all in the existence of the aforesaid renewal clause if they had not conferred a right on the agents or the purchasers" as mentioned by the Legal Remembrancer. Afterall any contract must be interpreted according to the entirety of its terms and when the renewal clause is couched in one sentence no portion of the clause can be given precedence over any other portion and a meaning must be given to the whole. It is also to be noted that the renewal clause was not similar to the usual clauses to be found in the renewal clauses of agreements between landlords and tenants where there is generally a provision to the effect that on the tenant performing the terms and conditions of the agreement he should get a renewal for a fresh term of years.

The clause for renewal appears to have been inserted to serve as an inducement to agents and purchasers to do their best in the performance of the contract. The clause only enabled the trader to expect a renewal without binding Government to any set of terms already agreed.

The curious procedure in the matter of renewal of agreements rendered it necessary to refer to the original files of the units for illustrating the extraordinary behaviour of the Minister and of the Department including the Secretary and the Under-Secretary.

The Commission looked at all the files in this connection.

Reference may in particular be made to some of the files of the Units in respect whereof renewals were granted on the 23rd September 1971 by way of illustration. Agents and purchasers of Units 56, 56-A, 56-B, 56-C and 82 all submitted applications for renewal on the 20th September 1971. The note prepared in the Department (apparently by the Head Assistant and typed) in the relevant files, omitting the figures reads as follows:

"Applications submitted by the agent and purchaser of Unit No. may be seen at page in pursuance of the provisions contained under Clause 1 of the agreement, the agent and the purchaser have now come up with the applications for renewal of their agreements for the year, 1972 under the same terms and conditions. They

have stated in their applications that their performance during the currency of the existing agreement have been quite satisfactory and they have not committed breach of any of the terms and conditions of the agreements. In this connection, relevant extracts of the report of the D. F. O. may be seen at page.....

For orders."

The note of the Head Assistant was signed by him over the date which at first read 20/9 and was later altered to 21/9.

The note of the Under-Secretary to the Secretary was always in the same terms. The note in case of Unit No. 82 may be taken by way of samples.

"Secretary.

"Government have in file No. 7F-69/71 dealing with the Kendu Leaf Policy for 1972 ordered that in the units which will not be taken up for departmental working the agreements of the existing Agents and Purchasers may be renewed for the year, 1972 on the same terms and conditions provided their performance during the period of contract has been found satisfactory with reference to the terms and conditions of the agreement. Separately the Law Department and the Advocate-General who examined the renewal clause in the existing agreements of the Agents and purchasers have advised that renewal will be obligatory in the cases where the performance is satisfactory and if Government want to take up Departmental working, it is desirable to omit the renewal clause to avoid complications. Action is being taken separately for amending the Orissa Kendu Leaves (Control of Trade) Rules, 1962 and the form of agreement to omit the renewal provisions."

"The Agent and the Purchaser of Unit No. 82 have applied for renewal of their agreements for the year, 1972 on the same terms and conditions. The report of the Divisional Forest Officer, Rairakhol, extracted at page 3/c indicates that the performance of the Agent and the Purchaser has been satisfactory. In view of the Government policy and the legal advice as above, Government may have to renew the agreements with the agent and the purchaser for the year, 1972, on the same terms and conditions. The agreement will be executed after the rules and the form of agreement are amended and the renewal clause is omitted."

"In this connection, it may be recalled that the O. F. C. Ltd., has committed to supply 40,000 quintals of Kendu leaves to N. S. I. C., Ceylon during 1972. To enable the Forest Corporation to fulfil its export commitments, in the background of the above developments, we may while renewing the stipulate that the purchasers should supply 5 per cent of the leaves purchased by them to the Forest Corporation at the same purchase price as approved for them by Government. This condition will be included in the renewal agreement."

"Government may like to order renewal of the agreements with the Agent and Purchaser of the Unit for the year 1972 on the existing terms and conditions subject to their agreeing to supply 5 per cent of the Kendu leaves to O. F. C. Ltd."

"After Government orders an offer of renewal on the above lines will be sent to the parties for acceptance".

Sd. A. Satpathy

22nd September 1971"

The Under-Secretary's note regarding supply of 5 per cent of leaves by purchasers to O. F. C. Ltd. in all cases suggests that there was a plan to do so and belies the Minister's statement in his affidavit that he could persuade such purchasers to give up 5 per cent of their purchase at the time when they met him for getting renewals. The date of the Under-Secretary's signature in all these cases is the 22nd September 1971. The Secretary, Shri Sundarajan has no comment to make in any of the cases and forwarded the files to the Minister of Forest over his signature dated the 23rd September 1971.

The invariable order of the Minister, Shri Ainthu Sahu over his signature and dated the 23rd September 1971 reads:

"The agreement be renewed as suggested above".

The above is followed by the endorsement of the Under-Secreary dated the 23rd September 1971 reading:

"Put up draft orders"

In respect of all the agreements whether with agents or with purchasers which were renewed on the 23rd and the 24th September 1971, the noting of the Department is in the same words most of them being carbon copies of an original note which was also

typed on the note-sheet regarding a particular unit. So is the case with the note of the Under-Secretary. It will be remembered that the original file with the opinion of the Advocate-General was seen by Shri Singh Deo for the first time on the 20th September 1971 and the file was sent by the Secretary to the Under-Secretary on the 21st September 1971. It becomes clear from the above that the noting of the Department under the original date dated the 20th September 1971 could only have been made in pursuance of a plan. The date "20/9" which was later altered to "21/9" could not have been put in by mistake as this manner of putting the date is common to a number of files. The Under-Secretary's note expressly mentions the advice of the Law Department and of the Advocate-General which he could not have seen before the 21st September 1971. The Secretary makes no comments of his own on any of the files while sending the same up to the Minister of Forest. He does not recommend either renewal or rejection. He acts merely as a carrier between the Under-Secretary and the Minister; and the Minister invariably orders renewal of the agreement on the same date, and the Peon Book of the Department shows receipt by the purchaser on the same date the receipt being pasted on the Peon Book much later.

As has already been noted according to the affidavit of Shri Sundararajan, the Minister had passed an order on the 23rd September 1971 that the letters offering renewal should be sent to his residence as the agents and purchasers wanted to take delivery thereof urgently and the Under-Secretary had complied therewith by sending such letters to the residence of the Minister without informing the Secretary thereof. If the above affidavit be true, the signature of the Secretary forwarding the file to the Minister and the latter's order sanctioning the agreement could only have been recorded only after the agreements had been taken delivery of from the residence of the Minister. This would explain why the Secretary found it unnecessary to make any endorsement on the file.

In the normal course of things, the Under-Secretary would not write or type out dozens of notes on the applications for renewal on the same date inasmuch as he had to satisfy himself that the performance of the agent or the purchaser concerned was satisfactory by checking up the reports of the Divisional Forest Officers. Similarly, the Secretary would be expected to make some endorsement showing that he had gone through the note of

the Under-Secretary and approved of the same. It is inconcei vable that dozens of applications would be dealt with anc disposed of on the same day as a matter of routine. One i: forced to the conclusion that what was done was the result of ar order or a designed plan to rush the matter through.

Further, the Under-Secretary and the Secretary would h: expected to have borne in mind the decision arrived at on th: 4th August 1971 that Rairakhol Division was to be worke: departmentally and that Orissa Forest Corporation Ltd. shoul: be allotted units adjacent to those which were already being operated on by the Corporation so as to produce an additional quantity of 25,000 quintals of leaves. Nobody including the Head Assistant of the Forest Department, its Under-Secretary, the Secretary and the Minister gave any thought to this matter. As the Cabinet decision was to inaugurate notionalisation of the Kendu Leaf Trade in the year 1972, it was the duty both of the Under-Secretary and the Secretary to have pointed out to the Minister as it was of the Minister himself to have borne the matter in his mind that renewing of the agreements wholesale even in terms of the advice of the Advocate-General went completely against the Cabinet decision and it was the duty of all concerned to have placed the matter before the Cabinet prior to the renewal of a single agreement so that the Cabinet could reconsider the matter and agree upon as amended policy. Whatever be the lapse on the part of the Under-Secretary and the Secretary, the Minister could not exculpate himself by saying that he had followed legal advice in ignoring the Cabinet decision. There was no need for the blind hurry to renew the agreements. Placing the matter before the Cabinet and obtaining its sanction to any scheme to be followed, would only have held up renewal by a week or two at the most with about three months in hand before the expiry of the period of the agreements. The noting on the file shows that the Minister saw the file with the advice of the Law Department and the Advocate-General on the 6th October 1971. This would show that he had ordered renewal of agreements on the 23rd September 1971 merely on the strength of the noting made by the Under-Secretary. The Minister's affidavit on the point as to when he saw the legal advice is far from precise and does him little a credit. In his counter-affidavit he says that he had heard about it from Shri R. N. Singh Deo and the endorsement over his signature bearing date the 6th October 1971 did not mean that he had not

seen it earlier. The original file, however, puts the matter beyond any such pre-varication. After the file with the opinion of the Advocate-General was received by the Secretary on the 21st September 1971, he wanted the Chief Secretary to persue the same as his marking of the file to the Chief Secretary dated the 24th September 1971 bears out and the latest endorsement of the 25th September 1971 reading :

> "'Since M (F) desires to see these papers urgently, submitted before showing it to the Chief Secretary, as per my earlier note".

establishes. The file had not been marked to the Minister before the 25th September as would have been the case if it was meant to be placed before him prior to that date.

Further the endorsement of the Minister on file No. 7F-69/71, dated the 21st September 1971, makes no mention of the advice received from the Law Department. Therein he merely purports to record that variation in the terms and conditions was never done in the past and it would not be possible to do so at a time when there was uncertainty about the future policy. He would certainly have referred to the legal advice if he had seen it before making his endorsement.

From the above it is abundantly clear that whatever be the reason the Minister Shri Sahu did not care to look at the opinion expressed by the Legal Remembrancer or the Advocate-General when he was giving orders on the 23rd September 1971 directing the renewal of the agreements. He did not pause to consider for a moment that by his action directing the wholesale renewal of agreements he was scuttling the Cabinent decision of nationalising the trade at least partially from 1972 and his action in ordering such renewal without himself seeing the legal advice can not be considered *bona fide*.

With regard to the State's case about delay in disposing of the applications with respect to 16 units mentioned in the State's affidavit, Shri Ainthu Sahu stated in paragraph 44 of his counter-affidavit that in order to appreciate the background in which the fresh applications for 16 units was called for note must be taken of the policy decision arrived at and recorded by the Secretary in file No. 7M-69/71 (Pt. II), on the 2nd March 1972.

The Secretary's note reads:

"Since the preliminary operations like coppicing, etc., of the leave areas have to be urgently taken up by the agents, it appears desirable that in all the 17 cases including the case of Unit No. 15 where offers of renewal have not been given to the agents as yet, and no clear decision to refuse has been taken except in four cases, we may without prejudice to the claim of renewal by any agent invite fresh applications for agency according to Rule 7. Nothing precludes the existing agents from applying afresh in response to this notice. If he is selected, it will be fresh settlement. Thus the whole matter will still be open as far as they are concerned, even if fresh applications are invited. On the other hand, Government interest will be safeguarded by calling for applications at once as there will be no delay in taking up the required operations." The Minister approved of the same on the next day.

As regards Unit No. 13, where the agent had made an application on the 22nd September 1971, the only comment of the Minister is that as his performance was found to be satisfactory, the order of renewal was passed in his favour on the 12th March 1972 and communicated to him on the 17th March 1972; that the unit actually should not have been included in the notification for appointment of any fresh agent. There is no explanation attempted to be given for the delay in renewal because in cases where applications had been made on the 22nd September 1971 and were recommended by the Secretary within a few days thereafter renewals had been ordered long back. With regard to Unit 55-A, the explanation sought to be given has no connection with the grievance made in the State's affidavit. Shri Sahu merely says that the agent for the unit had submitted his application for renewal on the 9th November 1971 and the purchaser had also applied for renewal on the 15th October 1971, that the report of the D. F. O. that the agent was a defaulter was found not to be correct as it was found that he was granted time to pay the instalment. The further report of the D. F. O. that the agent was more interested in the manufacture of graphite crusibles was not a valid ground calling for disqualification.

Regarding Unit No. 64, no attempt was made to explain the Under-Secretary's recommendation that Shri G. K. Saha or the Forest Corporation might be considered for being appointed as agent. The Minister merely said that "Shri G. K. Saha and Forest Corporation were not interested in the agency alone." No basis for such opinion is indicated.

With regard to Unit No. 68-A, the Minister's explanation is that although there was no adverse report against the purchaser and the agent, there was some delay in renewing the agreement and the purchaser appointed in 1969 had died during the period of the agreement. But as there was no adverse report either against the heir of the purchaser or the agent, they had qualified for renewal and inspite of the issue of notification in March, 1972 inviting fresh applications, there was nothing wrong in renewing the agency in favour of Shri Kanji Chakubhai.

With regard to Unit No. 82-D, the State's case was that although the report of the D.F.O. was in favour of the purchaser Shri Prakash Chandra Pradhan and the renewal was recommended by the Under-Secretary and endorsed by the Secretary, the Minister held up the file by making a comment on the 15th February 1972 that this was a case of heavy shortfall. The explanation given by the Minister was that as the old agent had not applied for renewal, a new agent Khalil was appointed as the agent and the purchasers' agreements could not be renewed earlier as a compatible person had to be selected as an agent. The real cause seems to have been that the purchaser was a relation of Shri Pabitra Mohan Pradhan who was responsible for bringing about a down fall of the Coalition Ministry in January, 1971. The main reason alleged for disposing of the files regarding Unit Nos. 108 and 108-A was that the Minister was pre-occupied with other matters and was not able to dispose of this particular file till the 24th December 1971. He then wanted certain clarifications and ultimately on the 31st March, 1972 agreed to the proposal to reappoint the purchaser as there was no tangible reason to disqualify him. Further, the application of the agent was withdrawn and another agent had to be found compatible with the purchaser.

With regard to Unit No. 69-C, the Minister's comment is that the allegations were almost identical with those to Unit No. 66-A and his comments with regard to that were applicable to this Unit also.

On the question of compatibility of the agent with the purchaser, the Minister relies on the decision of the Supreme Court in Shri Trilochan Mishra's case where there is an observation to the effect that the fact that the agent was a relation of a purchaser was not necessarily against a State monopoly in Kendu leaf trading and that the agent and the purchaser had to act in

harmony with each other. This, however, did not mean that the purchaser who was otherwise entitled to renewal could not get his agreement renewed until the Department found an agent who according to it was compatible with the purchaser.

According to the Commission, the excuse given by the Minister for late disposal of the applications was lame in most cases. There was no excuse for rejecting the applications of the Orissa Forest Corporation which was required to play an important part in nationalisation of the trade. The publication of the notice calling for applications was only a pretence.

With regard to the allegations made in paragraph 45 of the Government affidavit regarding concessions granted to the agents the Minister submitted that the entire matter was examined in detail by the concerned officers of the Department who made their recommendations and that he (the Minister) had no doubt that the officers bore the interest of the Government and of the trade itself in mind. In some cases shortfall in supply by the agents was waived when it was found that the production had come down for reasons beyond the control of the agent like storm, forest fire, drought, etc. Again in some cases concession was given for a bifurcated unit where the other part of the unit had registered an increase.

Further according to the Minister, the Cabinet decision of the 15th January 1969 regarding the principle for fixation of the stipulated number of bags for a particular unit was not a satisfactory one, " and the whole thing was done in a most hasty manner and the actual production figure (mentioned in the formula) at its very best was an approximate figure, which in fact, proved to be over ambitious in case of a number of units".

With regard to the necessity for consultation with the Finance Department, the Minister's explanation in his counter-affidavit is as follows :

(a) In the past, cases relating to reduction in purchase price, remitting of shortfall penalty and reduction of stipulations were finally disposed of by the Secretary of the Forest Department although in some instances, orders of the Deputy Minister in charge or the Minister-in-charge were taken. Extracts were quoted by the Minister from orders recorded in several files of the past relating to Unit No. 55-B/66, where the Secretary of the

Forest Department, Shri Gian Chand had recommended that the price may be fixed at Rs. 107 instead of Rs. 126 and the Deputy Minister, Forest, had sent the file up to the Chief Minister that the bid for the unit was suspected to have been speculatory. Thereupon the then Chief Minister, Shri S. Tripathy accepted the proposal of the Deputy Minister and added "such cases of representation have to be considered by the Tender Committee and examined by the Co-operation & Forestry Department, and the Finance Department. The Conservator of Forests of the Division should be consulted by the Tender Committee. Thereupon there was a further note by the Secretary of the Forest Department "as Chief Minister specifically desires, the Tender Committee would be consulted. I may also point out that the Finance Department need not be ordinarily consulted in the matter. But since Chief Minister specifically desired, the Finance Department would be consulted". Finally, the Finance Department in that case made a note on the 8th February 1967 reading :

> "As it is mainly an administrative matter and the matter will go before the Tender Committee, it does not seem to be necessary to record any views of the Finance Department on the file."

Thereupon the Secretary, Shri Gian Chand had recommended consideration by the Tender Committee for fixing the rate at Rs. 113 per bag. The Chief Minister Shri S. Tripathy by order, dated the 9th February 1967, directed that the rate be fixed at Rs. 110 as Shri Nanda (the applicant) was an ex-Forest Officer and deserved to be associated with the trade.

The Minister also quoted from other files in one of which Shri C. G. Somiah had recommended the reduction of the stipulation for the collection of the bags in 1969 on the ground of late appointment without suggesting consultation with the Finance Department. A similar instance of recommendation by the Secretary, Shri A. K. Ray was also given.

On the question as to whether income from the trade was revenue or not, reference was made by the Minister to Section 11 of the Act according to which after the performance of the contracts by the agents and purchasers and the finalisation of the deals, the balance 50 per cent of the net profit was to be credited to the Consolidated Fund of the State and it was only at this point of time that the connotation "revenue" applied to the income from the trade.

The comments of the Minister with regard to the State's grievance regarding the refixation of the stipulated number of bags in various units may now be considered.

With regard to the Units 82-A, 82-B and 82-C, the case of the Minister was that there was a report that Shri Pabitra Mohan Pradhan was behind the organised set of smugglers through his blood relation Shri Gandharba Pradhan of Unit No. 82-D and that altogether 17 cases had been instituted for smuggling. Further, the cases of these units were referred to the Kendu Leaf Probe Committee to be constituted by Government headed by Shri I. C. Misra and according to that report, the case of agents for reduction in stipulated quantity or for the waiver of shortfall compensation could be considered by Government and decided on the merits of each case. The Minister had directed concessions to the agents on the 15th February 1972 after the examination by the Under-Secretary.

It is to be noted that the name of Shri Gandharba Pradhan did not figure either in the note of the Under-Secretary or the Secretary. Further, when the order granting concessions to the agents of these three units had been kept in abeyance by the former Chief Minister's Order, dated the 31st December 1970, giving of such concessions on the 15th February 1972 without even consulting the Chief Minister was wholly irregular.

With regard to Unit Nos. 70 and 70-A, the Minister stated that the advice of the Law Department in pursuance of the suggestion of the Secretary, Shri A. K. Ray, dated the 6th October 1970 was that consultation with the Finance Department was mandatory under the Rules of Business. The Minister's submission was that the advice of the Law Department was contrary to the practice followed previously and even during 1970, orders granting concessions to the agents on the Orders of the Chief Minister had been issued without consulting the Finance Department. The matter was referred to Political & Services Department as already mentioned and Shri R. N. Singh Deo in charge of that portfolio gave his dictum on the 26th August 1971 that income from Kendu leaf trade was net profit and not 'revenue' and therefore, consultation with the Finance Department was not necessary. The Minister had seen this file on the 25th September 1971 and acted accordingly.

With regard to Unit No. 68-A, the Minister's case in the counter-affidavit was that the stipulated quantity for this units had not been correctly fixed in 1969. At the time of inviting tenders in 1969, the stipulated quantity was 1,509 quintals, but

the Minister of Forest on the basis of the report of the D. F. O. reduced the quantity to 1,287 quintals on the 4th May 1969 when the agent made another representation, the Minister had remarked that the agent should execute the agreement, but the actual position might be checked up later. The D. F. O., Phulbani, reported that the actual figures during 1966, 1967 and 1968 were 750·60 quintals, 894·60 quintals and 840·00 quintals, respectively which went to show that there was an error in fixing the stipulated quantity and inasmuch as the Minister found that the recommendation of refixation of the stipulation at 840·00 quintals was justified, he approved of the same by an order, dated the 23rd August 1971.

With regard to Unit No. 64, the case of the Minister was that there was a bifurcation of the Unit resulting in the breaking up thereof into Units No. 64 and 64-A and that taking this into consideration, the actual production of Unit 64 in 1970 which was a normal year being 1,803 quintals he ordered for refixation of the stipulation at 1,850 bags.

With regard to Unit Nos. 66 and 53-A according to the Minister there had been a mistake in fixing the stipulated number of bags, which the Minister had to put right.

With regard to the allegation of Shri A. C. Sharma, the Minister's comment was that the allegations were false and frivolous and that the State Government should not have incorporated an allegation on the basis of any such matter.

Shri Sundararajan's counter-affidavit may now be noted. He took charge as Secretary of the Forest Department on the 14th July 1971 and continued there till the 15th September 1972. At the meeting in the Assembly Chamber on the 4th August 1971 the Chief Conservator of Forests and most of the Conservators of Forests agreed that if the policy was to take up more and more areas for departmental working and gradually extend the same to cover all the Kendu leaf areas it was not desirable to settle any unit for more than one year. Again if the period of settlement was to be limited to one year, it would be risky to settle them by tender because Government could not expect competitive offers from new people. Government in that case would have to depend on the old set of purchasers who would not offer more but were likely to offer less than the previous purchase price. Thus, there was every reason to fear that revenue might drop if the units were settled by tender for a short period of one year.

Government had no reliable information about the prevailing market price of Kendu leaves obtaining in important markets outside the State.

On the question as to whether Government could ask for any increase in the price at the time of renewal, the Secretary's view was that it was difficult to justify the same and Government would do well to secure the level of revenue then prevailing and so the agreements should be renewed on the existing terms and conditions.

Further, the only index of up-to-date consumer price available was the price of Rs. 299 per quintal agreed upon between the National Small Industries Corporation Ltd. of Ceylon and the Forest Corporation Ltd. The quality mix of leaves supplied under this contract was 70 per cent 1st grade, 20 per cent second grade and 10 per cent third grade leaves which are qualify mix, generally available in the best units of the State located in Rairakhol and Bolangir districts. If this was accepted as the consumer price that could be obtained by selling the leaves F. O. R., Orissa then taking into account 15 per cent gross profit to the trader and giving further deduction for transport, establishment, etc., at Rs. 25 per quintal, the purchase price which could be claimed as reasonable for Government leaves from the best units would be Rs. 229. The existing purchase price in some unit like Unit No. 1 of Rairakhol area was already Rs. 250 per quintal.

Taking all this into consideration it was agreed at the meeting that the revenue should be tried to be maintained at the same level as during the previous contract period. The Department suggested that the purchasers should be asked to apportion 10 per cent of the processed leaves purchased by them from the agents to the Corporation at their purchase price so that the Corporation could export the leaves to Ceylon and thereby make handsome profit for the Government.

Although the Minister saw the record of the broad conclusions arrived at on the 10th of August, 1971 he remarked that "as regards Rairakhol Division we may await further consideration". According to the deponent this consideration and his ultimate decision never came. In the meanwhile, he asked the deponent and the Under-Secretary to put up proposals immediately for taking policy decision for the remaining units pending the decision about the units to be taken up for departmental working.

On the 9th August 1971, the Under-Secretary submitted a file 7F-30/69 after examining the request of the agent of Unit No. 64 for reduction of the stipulated quantity of this Unit from 2,550 quintals to 1,800 quintals.

The deponent was not convinced that such a gross reduction in the stipulated quantity was warranted in the circumstances of the case and suggested concession only to the extent of excess production in Unit No. 64-A. But on the next day the file was returned to him with the Minister's Order that the stipulated quantity should be reduced to 1,850 quintals and the Minister wanted his order to be issued on the same day. The deponent rang up the Minister to say that it would not be possible to do so on the same day as Finance Department would have to be consulted inasmuch as the deponent felt that the concession amounted to loss of revenue. In his conversation with the Under-Secretary the latter told him that in such cases consultation with the Finance Department was not necessary as reference to file of the precedent case of Unit No. 104 for 1969 would show. The Under-Secretary further told him that sometime back even the Law Department held an erroneous view that income from Kendu leaf business was to be considered as revenue but the file was not shown to him.

On the 12th August 1971, the Under-Secretary put up a further case, namely that of Unit 68-A for reduction in stipulated quantity. He felt that the Under-Secretary's recommendation was justified and endorsed the file to the Minister for orders. However, he found in the office note that a reference had been made to the opinion of the Law Department in file No. 7F-30/69 and the extract of the opinion of Dr. B. N. Misra, Legal Remembrancer who had opined *inter alia,* that in such cases consultation with Finance Department was mandatory inasmuch as reduction meant loss of revenue.

The Under-Secretary when asked to trace the file with the said opinion failed to do so. The deponent thereupon referred the matter for verification by the Kendu Leaves Audit Section but that Section did not point out that there was any procedural lacuna in not consulting the Finance Department. On the 2nd September 1971, the Under-Secretary brought to the deponent the file 7F-30/69 with the orders of Shri R. N. Singh Deo, the Minister, Political & Services Department extracted thereon. That file went to show that according to that Minister, income from Kendu leaf trade was not profit in trade and not revenue

and neither item 19 of the second schedule to the Rules of Business nor Rule 10 (1) (c), thereof was applicable. According to the orders of Minister, Political & Services Department, the deponent endorsed the file to the Minister, Forests, who on the 24th September 1971 ordered that the concession recommended should be granted to the agent.

At the time he recorded his note on the 16th August 1971, the deponent never anticipated any legal difficulty for taking over any unit for departmental working. He, however, felt that the existence of the renewal clause would lead to litigation if renewal was not granted where performance was satisfactory and the unit was settled with another party on tender. The file was sent to the Chief Secretary when he asked that the matter should be further examined and as further examination was possible only after knowing the exact legal implications of the renewal provision, he framed a question for reference to the Law Department for advice.

The file had to be recalled from the Chief Secretary's office at the instance of Minister of Forests. The file never came back to him till the 21st September 1971 when he saw the note of the Minister, dated the 23rd August 1971 and that of the Chief Minister, dated the 29th August 1971.

The opinion of the Legal Remembrancer had the effect of reducing the scope of departmental working to those units only which did not qualify for renewal. The deponent sent the file 7F-69/71 (Part I) to Shri R. N. Singh Deo, who was in charge of the Forest Portfolio during the absence of Shri A. Sahu on tour and the Minister-in-charge marked the file to Shri R. C. Misra, Advocate-General, for his opinion.

Shri R. N. Singh Deo told the deponent on the 6th September 1971 to put up proposals to call for performance report from the D. F. Os. as quickly as possible so that the units could be settled well before the next session after taking a policy decision as advised by the Finance Department.

The deponent did not know that the Minister, Forest Shri A. Sahu had negotiated for any price increase as desired by Chief Minister in his order, dated the 29th August 1971 but he recollected that in another file he had suggested that the Minister may talk to the purchasers and ask them to sell 10 per cent of the leaves at purchase price to the Corporation so as to enable the Corporation to export the leaves and make profit.

A portion of paragraph 19 of the counter affidavit reads "I found that a few days before the return of the file with Government orders for renewal, a number of applications for renewal were filed by agents and purchasers mostly in person, the heaviest receipts being on the 20th and the 21st September 1971. The Minister gave verbal instructions to me on the 21st September 1971 (and said that he had instructed the Under-Secretary also) to examine these applications immediately and put up the same for his orders so that the offers of renewal were given to the agents and purchasers before Puja holidays scheduled to commence from the 26th September 1971. Accordingly, the Under-Secretary put up the individual applications filed to me with his recommendations after examining them with reference to the performance reports from the D. F. Os. and after being satisfied about the performance from the official record I put up the cases endorsing the views of Under-Secretary or giving my different views as the case may be, for the orders of Minister. On the 23rd September 1971, the Under-Secretary Shri A. Satpathy personally brought and showed me the written orders of the Minister (which are found in file No. EC-33/73 of the Home Department) saying that the fair copies of offers may be sent to his residence for delivery. I spoke to the Minister over the phone saying that the procedure ordered by him was unusual and suggested to recall his orders but since he justified saying that there was no violation of any rules or procedural instructions, his orders were complied with."

It is difficult to accept the truth of most of the statements in this paragraph. As has already been noted the Department had started processing the applications on the 20th September 1971. The Under-Secretary's notes were all typewritten, most of them in bunches in carbon copies wherein the figures had been left blank by the typist. The Secretary did not add a single word by way of comment of his own and merely endorsed them to the Minister Shri A. Sahu who in his turn made an only endorsement reading "agreement may be executed as already ordered". The version of suggestion to the Minister for recall of his orders is not corroborated by the noting on the file.

In another portion of his affidavit Shri Sundararajan stated that the order of the Minister on a separate sheet of paper recorded on the 23rd September 1971 was shown to him towards the evening of that day and that the Under-Secretary had already complied with his orders. One fails to see how in the light of what has come out the Secretary could have talked to the Minister and suggested the recall of his orders.

In paragraph 40 of his counter affidavit the Secretary dealt at greater length with the orders of Minitser, Forests, dated the 23rd September 1971 about sending of fair copies of the orders to his residence for delivery to the purchasers and agents. It is hardly necessary to note them.

It is not necessary to deal with the explanation given either by the Secretary or the Under-Secretary on the question of delay in renewal in 16 Units mentioned in the State's affidavit. The Secretary's case is that he had examined the cases in the light of the recommendation of the Kendu Leaf Probe Committee. With regard to Units 82-A, 82-B and 82-C the deponent states that these three units were cases which had been referred to the Kendu Leaf Probe Committee and the deponent suggested that the Industries Department should be consulted but the Minister granted the concession applied for basing his decision on a general recommendation of the Committee (the Probe Committee) and saying that the request of the agent had been examined in the note of the Under-Secretary and found to be justified.

The arguments put up on behalf of Shri Sahu may now be noted.

In the fore front of his arguments on behalf of Shri Sahu Counsel Shri S. C. Ray submitted relying on a dictum of justice Khanna Commission of Inquiry—already referred to—that if a Minister was acting upon the advice of his Secretary and subordinates no blame should attach to him and Shri Sahu was not deviating from the above course in the matters which have been made the subject-matter of the complaints against him. So far as the renewal of the agreements for 1972 is concerned the above principle has no application. It was the Minister Shri Sahu who sidetracked the Cabinet policy of nationalisation adopted in May, 1971 by directing more than once that the Secretariat was "to enquire into details and report" and that the tentative conclusion arrived at on the 4th August 1971 that Rairakhol Division should be worked departmentally "should await further consideration". It was the Minister who directed the opening of a new file to take the policy decision regarding the settlement of the balance area to be left over after the earmarking of certain divisions to be worked departmentally and by the Forest Corporation when no decision had been finally reached about the divisions to be so worked. It was Shri Sahu who was responsible for the suggestion of the Chief Secretary on the 18th August 1971 not being followed up. He took the file

personally to the Chief Minister after disagreeing with the note of the Chief Secretary on the 23rd August 1971 so that the Chief Minister never had the facts placed before him in terms of the suggestion of the Chief Secretary according to normal routine. On his own admission he had given directions to the department to call for reports about performance of the agents and purchasers long before they could be properly judged. He had summoned the agents and purchasers to Bhubaneswar immediately after his return from Japan so that orders for renewal could be given to them. He directed that such offers should be given at once. He handed over a loose sheet of paper to Shri Satpathy on the 23rd September 1971 ordering him to see that his directions were carried out immediately so that they would take delivery of the same from his residence. He passed all these orders without caring to look at the opinion of the Legal Remembrancer and Advocate-General himself.

In all the above process it was the Minister who was chalking out the line of action. Whatever his personal assessment of the situation Shri Sundararajan blindly accepted whatever was dictated even at the cost of making himself play a part subordinate to that of the Under-Secretary.

So far as the grant of concession to agents and reduction of stipulation for collection of leaves were concerned Shri Sahu completely ignored the happenings of December, 1970 and January, 1971, took no notice of the comments of the Secretaries in 1970 about consultation with the Finance Department and passed orders which were detrimental to the State Exchequer.

The preliminary objection that there was discrimination in Shri Sahu's case as compared to the case of Shri Mohapatra and Shri Singh Deo has no substance. As already dealt with in detail Shri Sahu did not suggest in his note on the 23rd August 1971 that under the agreements in force Government was bound to renew the same where performance was satisfactory and that the programme for even partial nationalisation of the trade would depend on the fate of the applications for renewal. The points made out in his note to the Chief Minister were as follows :

(1) The Chief Secretary was wrong in suggesting increment in rates at the time of renewal. Fresh terms and conditions could be stipulated only on mutual agreement and not unilaterally. Moreover any increase in the existing purchase price might necessitate a corresponding increase in the agents' charges resulting in no extra profit to the Government.

(2) Fresh tender for one year would not bring in extra revenue to the State Exchequer. On the other hand, there was possibility of the revenue dropping down as pointed out by the Secretary.

(3) The suggestion of the Secretary to renew the agreements for one year more on the existing terms and conditions instead of going in for a risky experiment of fresh tender should be accepted since it had been decided to extend gradually the area for departmental working from year to year.

(4) Renewals of agreements would not be granted in the case of units which would be ear-marked for departmental working for the year 1972.

The Chief Minister's note endorsing the views of Shri Sahu could not, therefore, be said to amount to accepting the principle that agreements regarding all the units would be subject to a renewal. Shri Sahu did not point out that the Cabinet decision of inaugurating nationalisation of the trade would be affected by a general renewal of agreements and naturally the Chief Minister had nothing to say on this point. The only question to be settled was the one of policy for the area which would be left over after the ear-marking of the units for working departmentally or through the Forest Corporation. In other words, the choice lay between renewing the agreements with the existing agents and purchasers or calling for fresh tenders for one or two years. This is what the Finance Department wanted to be settled and this was the apparent motive behind the opening of the file on the 13th August 1971 relating to the policy decision. The Chief Minister's note can only be described as settling the question in favour of renewal in preference to calling for tenders. There was thus no question of discrimination against Shri Sahu as compared to Shri Mohapatra.

It was next submitted on behalf of Shri Sahu that by renewing the agreements Shri Sahu had committed no wrong. It was argued that the policy decision taken by the Cabinet on the 15th January 1969 was that there should be settlement for a three year period with a provision for renewal of the lease after the said period or for such further time as Government might decide and it was this policy which was responsible for the substantial increase in revenue of the Government as compared to that derived in years prior to 1969. In asmuch as the

Law Department's opinion was that it was obligatory on Government to renew the agreements in all cases where no fault could be found with the performance of the agent or the purchaser no exception could be taken to Shri Sahu's action in ordering renewal of the agreements. Shri Sahu, it was said, was acting according to the Cabinet policy of 1969 and the Law Department's opinion. As regards the settlements made in the month of September, it was argued that inasmuch as the Finance Department had indicated that policy decision in the matter should be taken early so that the units were all settled well before the commencement of the season.

Shri Sahu if was submitted could not be blamed because he had taken the decision well ahead of the period of expiry of the agreements. There is no substance in this argument inasmuch as the next season was due to commence in March, 1972 so that there was a fairly wide gap of nearly three months before the terminus of the season 1971 which was the 31st December of that year in the case of agents and the 15th January 1972 in the case of purchasers and the commencement of the new season. Settlement in September, 1971 at a time when the performance of the last two quarters ending on the 31st October 1971 and 31st December 1971 was not known and could not be known was directly contradictory to the terms of the agreement. It was argued, however, on behalf of Shri Sahu that the agents and the purchasers were all informed that although orders for renewal were being made out Government would not honour the same in case the performance of any of them turned out to be unsatisfactory. Such a warning was wholly uncalled for and was irrelevant for the purpose of working out the agreements in force. As finalising the transactions in September was contrary to the agreements and as such not sanctioned by law if Shri Sahu and Shri Singh Deo as also the Secretary Shri Sundararajan were alive to their duties the only policy which they could have followed would have been to direct reports of performance to be prepared as at the end of the year and thereafter sanctioned renewal in the cases where applications for renewal has been made in terms of the agreements and performance found satisfactory. The argument based on the policy decision of 1969 is naive and fallacious.

Neither Shri Sahu nor the Secretary Shri Sundararajan ever cared to ponder over the fate of the Cabinet decision of May 1971 (which was binding on all the Ministers and Secretaries) and the decision arrieved at in the Legislative Assembly Chamber of the Minister on the 4th August 1971 before taking steps for

the renewal of the agreements. It was the duty of both them to have considered the matter in the light of the said decision and to have placed the whole matter before the Cabinet with intimation that nationalisation could not commence in the year 1972 in view of the opinion of the Law Department and of the earlier Cabinet decision of January, 1969.

It was also necessary for them to refer the matter to the Finance Department under Rule 10(1) of the Rules of Business. In his anxiety to settle all the units by giving them to the existing agents and purchasers Shri Sahu lost all sence of propriety. Immediately after coming back from Japan without even troubling to look at the opinions expressed by the Law Department and the Advocate-General he gave orders that agreements should be renewed in all cases in which he had already given such directions. As already noted the agents and purchasers went in large numbers to the Secretary on the 20th and 21st September 1971 and told him that they had come as directed by the Forest Minister. Not stopping there the Minister wrote out an order on a sheet of paper and personally made it over to the Under-Secretary Shri Satpathy to see that his order was executed at once. Such was the zeal of Shri Satpathy that he complied with the orders even before he put the Secretary Shri Sundararajan wise about it. The Minister's direction that orders for renewal should be sent to his residence for being handed over to the agents and purchasers illustrate the hole and corner fashion in which the entire scheme was carried out.

The further points sought to be made by Counsel for Shri Sahu that the Minister had not overlooked the interest of the State inasmuch as he extracted a promise from the purchasers to make over 5 per cent of their purchase to the Orissa Forest Corporation, is without any merit. As has been already noted from April, 1971 the Forest Department was alive to the obligation of the Orissa Forest Corporation to supply 35,000 quintals of Kendu leaves to the National Small Industries Corporation of Ceylon and Shri Sundararajan had also stressed on this aspect. The departmental notes about the renewals of the agreements made out on the 21st September 1971 also bear this out.

It was argued on behalf of Shri Sahu that as no issue had been raised with regard to the delay in the issue of orders of renewal in the sixteen cases mentioned in the State's affidavit, the Commission ought not to make any report thereon. The

complaints made in the State's affidavit and the explanation put-forth by Shri Sahu have already been considered. Nothing much turns on this excepting that it illustrates the arbitrary way of dealing with applications by the Minister. No explanation is given as to why the application of the Orissa Forest Corporation for appointment as agents in some of the units was not granted. The Commission was informed that the Minister was the head of the Corporation. If so, his conduct is inexplicable inasmuch as he was aware that Orissa Forest Corporation had entered into an agreement for supply of a large quantity of Kendu leaves to Ceylon. In one case his explanation was that he had through pressure of work omitted to deal with the application promptly. This is rather strange inasmuch as in September, 1971 all his energies were devoted to renew the agreements before the Puja holidays. Again in some cases although the applications for renewal were in order and recommended both by the Under-Secretary and the Secretary he delayed the orders for grant of renewal by making queries which do not appear to have been called for. It is almost certain that there was no such scanning in the cases in which renewals were ordered on September, 23rd and 24th.

With regard to the concessions given to agents by waiver of shortfall compensation and by refixation of the stipulated number of bags by scaling the same down Shri Sahu relied on past precedents and the report of the I. C. Mishra, Probe Committee. As already indicated the said report was never accepted by the Government and should have formed any basis for grant of relief by the Minister. It is surprising that such concessions and waiver of compensation were being allowed even after the events of December, 1970 when Shri Singh Deo and Shri Mohapatra were obliged to put their orders in abeyance and thereafter revoke them with regard to the rebates in purchase price.

Whenever any agent raised a dispute by asking for scaling down the number of bags to be collected, the matter should have been referred to arbitration. Shri Sundararajan, the Secretary never mentioned this to the Minister. Moreover Shri Sundararajan knew or atleast had formed his own opinion that a reference to the Finance Department was necessary but he never made any such recommendation. The view of Shri R. N. Singh Deo as Minister in charge of Political & Services portfolio that these matters should be dealt with administratively and did not concern revenue of the State was

wholly arbitrary and utterly mistaken. Inasmuch as the revenue of the State from Kendu leaf business would depend on the quantity of leaves agreed to be collected by the agents any proposal for scalling down the same would affect the finances of the State and would also amount to relinquishment of revenue and being contrary to the mandatory language of Rule 10(1) it was not open to any Minister to disregard the same. Shri Singh Deo deliberately ignored the opinion of the Law Department rendered in the case of units 70, 70-A on the 31st March 1971. It was argued both on behalf of Shri Sahu and Shri Sundararajan that Rule 4 of the Rules of Business read with item 15 of the first schedule to the rules relating to allocation of business among the departments went to show that it was for the Political & Services Department to interpret and frame the rules. The argument on the face of it is misconceived. The business of Government had to be transacted in the departments specified in the schedule. Item 15 of the first schedule reading "Rules of Business" appertains to the Political & Services Department but this does not mean that the Rules of Business as laid down in Rule 10 could be ignored at the will and pleasure of the Political & Services Department. Item 15 of the first schedule only means that it was within the competence of the Political & Services Department to frame the Rules of Business or to frame alterations thereto if any occasion arose therefor. The Rules of Business were made by the Governor of Orissa in exercise of the powers conferred by clause 3 of Article 166 of the Constitution of India and under Rule 13 of the Rules of Business it was the duty of the Secretary of each Department to see that the rules were carefully observed and when there occurred any material departure from them, it was his duty to bring the matter to the notice of the Minister-in-charge and the Chief Secretary.

Instruction 46 "regarding business of the Government issued under Rule 14 of the Rules of Business" shows that all administrative Departments must consult the Law Department on the construction of statutes, Acts, Regulations and Statutory Rules, Orders and Notifications as also any general legal principles arising out of the above. Shri Singh Deo disregarded the opinion of the Law Department without any justification.

Shri Sahu's statement in his counter-affidavit that the Cabinet decision on the 15th January 1969 regarding the principle for fixation of the stipulated quantity was arrived at "in a most hasty

manner" and "in fact proved to be over ambitious in case of number of units" is irresponsible and unwarranted and he should not have by-passed the said principle in an irregular manner. As has already been seen, there was a certain amount of indefiniteness inherent in the Cabinet decision for fixation of the number of bags. It would appear however that no grievance was made about the formula in about 170 out of 180 units in which the Kendu leaf areas were divided. In any event the matter should have been made a subject-matter of arbitration and thereafter referred to the Finance Department. If any modification of the formula was to be made, it should have been referred to the Cabinet. All these safeguards and checks were ignored and the Cabinet decision of 1969 flouted because the Secretary had recommended scaling down in particular cases and the Minister thought that the stipulation should be refixed on the basis of such recommendation.

The refixations and the remissions granted to the agents of the units 82-A, 82-B and 82-C for the years, 1969 and 1970 were irregular and illegal as has been already noted. The Commission does not feel it necessary to go into the merits of the cases individually either with regard to refixation or remission in view of its findings in the case of Shri Singh Deo and Shri H. P. Mohapatra.

CHAPTER XV

Conclusion in cases of Shri A. Sahu, Shri S. Sundararajan and Shri A. Satpathy

In view of the above the answers to the issues in case of Shri A. Sahu, Shri Sundararajan and Shri Satpathy are as follows :

1. (a) The procedure followed in renewing the agreements for the year 1972 was neither legal nor proper.

   (b) The opinion of the Law Department regarding the rights of the agents and purchasers was taken prior to such renewal in September, 1971 but the Minister did not look into those opinions before he ordered renewal and before the renewals of 23rd and 24th September 1971 were granted.

   (c) Under Rule 10(1) of the Rules of Business, it was necessary to consult the Finance Department in regard to the renewals, even if they were obligatory.

   (d) In some cases renewals of agreements were made even though the D. F. Os. had not reported satisfactory performance. The renewals were made after the defaults had been made good. Under the agreement executed anybody whose performance was found not to be satisfactory did not qualify for for the right to make an application for renewal and Government should not have considered such cases merely because defaults had been made up. More so, because there were other applicants in the field and Government was not obliged to renew where defaults had been committed in the past.

   (e) The orders for renewal were made on the existing terms and conditions without fresh tender and without giving any opportunity to intending traders. As has

already been noted, the Commission is unable to accept the correctness of the opinion of the Legal Remembrancer and of the then Advocate-General rendered in September 1971. With respect, it appears that both of them committed an elementary mistake in their approach to the question. Unless it was obligatory on Government to renew on existing terms and conditions, and the Commission finds that it was not, it was the duty of the Government to call for fresh tenders and give an opportunity to all intending traders to bid as was laid down in Rash Bihari Panda's case. The affidavits do not show what the market price was at the time when renewals were made but the avidity with which the agents and purchasers secured the orders for renewal leads to the inference that there was a considerable margin of profit to the purchasers and the agents were also quite satisfied with the remuneration fixed.

2. The manner in which the renewals were made can only lead to an inference that they were not made *bona fide*. The Minister Shri Sahu never considered for a moment whether the interest of the Government would be best served by the renewals. Whatever his motive his aim throughout was to make a present of the renewals in favour of the existing agents and purchases on existing terms and conditions.

3. It follows from the above that Shri Sahu abused his official power and position in the matter of renewal of the said agreements. He should have looked into the opinions of the Legal Remembrancer and the Advocate-General and referred the matter to the Cabinet before allowing the Cabinet decision to nationalise to go by the board. In any event he should not have ordered any renewal until after the close of the 1971 season and until he was satisfied in the case of each particular agent and purchaser that he had faithfully carried out the terms and conditions of the agreement. The furtive manner in which the renewals were ordered by itself condemns the Forest Minister.

4. This was not pressed and consequently no report on this is called for.

5.(a) In view of the opinion of the Commission on the question of grant of concessions and exemptions in the case of Shri R. N. Singh Deo and Shri H. P. Mohapatra, it must be held that the orders of Shri Sahu granting concessions and exemptions in favour of agents of units 82-A, 82-B, 82-C, 70, 70-A, 68-A, 64. 66 and 53-A between August, 1971 and February, 1972 were neither lawful nor proper.

(b) The above orders caused substantial loss of public revenue as quantifide in the States' affidavits. They were neither made *bona fide* nor in public interest.

6. This was not pressed and need not be gone into.

7. The orders granting concessions to the agents and purchasers caused considerable loss of revenue. Such loss has been quantified in the affidavit of the State against Shri Sahu.

8. The procedure followed in granting such concessions were neither lawful nor proper.

Shri Singh Deo played a very minor role in the matter of renewal of the agreements in September, 1971. Besides being mainly responsible for Shri Sundararajan's calling for reports about performance of agents and purchasers by September 15, 1971—long before the expiry of the periods for which performance had to be judged—he does not appear to have taken any active part. His dictum regarding disposal of applications by agents for reduction in the figure of the stipulated number of bags, etc., as Minister of Political & Services Department, etc., on the 25th August 1971 without the consultation with the Finance Department was patently unlawful and arbitrary.

So far as Shri Sundararajan's case is concerned, the Advocate-General relied on the State's affidavit which was common from paragraphs 1 to 46 to the case against Shri Sahu. As to the duties and responsibilities of a Secretary he relied on a statement

of Sir Warren Fisher, the permanent head of the Treasury in England quoted by H. M. Seervai at page 1035 of his book on the Constitutional Law of India :

> "Determination of policy is the function of Ministers and once a policy is determined, it is the unquestioned and unquestionable business, of the civil servant to strive to carry out that policy with precisely the same energy and precisely the same good will whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time it is the traditional duty of civil servants, while decisions are being formulated, to make available to their political chiefs all the information and experience at their disposal, and to do this without fear or favour, irrespective of whether the advice thus tendered may accord or not with the Minister's initial view. The presentation to the Minister of relevant facts, the ascertainment and marshalling of which may often call into play the whole organisation of a Department, demands of the civil servant the greatest care. The presentation of inferences from the facts equally demands from him all the wisdom and all the detachment he can command. The preservation of integrity, fearlessness and independence of thought and utterance in their private communion with Ministers of the experienced officials selected to fill the top posts in the Service is an essential principle in enlightened Government as whether or no Ministers can accept advice thus frankly placed at their disposal, and acceptance or rejection of such advice is exclusively a matter for their judgment—it enables him to be assume that their decisions are reached only after the relevant facts and the various considerations have, so far as the machinery of Government can secure, been definitely brought before their minds".

The main point emphasised by the learned Advocate-General against Shri Sundararajan was that he failed to take proper initiative which as a departmental head it was for him to take. It was his duty to advise the Minister fearlessly and impartially about the course of action to be adopted without submitting to any irregular conduct or steps suggested by the Minister. It was his duty to advise that the Rules of Business of the Government

were adhered to and it was also his duty to take the opinion and the advice of the Law Department before expressing his own opinion in a serious matter like the obligation of the Government to renew the agreements. The specific complaints about the conduct of the Secretary borne out and justified by the facts were:

(1) The Finance Department's suggestion in their note of the 28th June 1971 that units for departmental working and working by the Orissa Forest Corporation should be carved out in the first instance to be followed by chalking out a policy decision with regard to the balance area was never worked out.

(2) The Cabinet decision to inaugurate the nationalisation of the trade from 1972 was jettisoned from the very first. After the 16th August 1971 Shri Sundararajan never mooted the question of nationalisation in any of his notes. Instead he remarked that the question of renewal in the agreement for at least one year would be justiciable. This opinion of his and his recommendation that the orders of the Chief Minister on the applications for renewal would be enough as this did not amount to any change in the existing Kendu leaf policy already approved by the Council of Ministers were not only wrong but improper.

(3) His suggestion that the D. F. Os. concerned should be asked to receive applications for renewals from the existing agents and purchasers and forward them with their recommendation well before the end of the year—which he latter modified to September 15, 1971—so that renewal agreements could be executed in January, 1972 was not lawful or correct inasmuch as performance could only be judged as on the 31st December 1971 in the case of agents and 15th January 1972 in the case of purchasers.

(4) According to paragraph 38 of Shri Sundararajan's affidavit he changed his proposal for the D. F. Os. to submit performance report from the end of October, 1971 to the 15th September 1971 at the dictate of Shri R. N. Singh Deo and wrote out his new proposal and

pasted the same over his earlier proposal. This places him in very bad light and shows him up as a person with no independence in his character befitting a Secretary. He should have left his earlier recommendation remain on the file and made a later one showing clearly that he was doing so under the order of the Minister.

(5) His conduct at the time of the renewal of the orders on the 23rd and 24th September was wholly unbecoming a Secretary of the Department. Instead of protesting to the Minister that the order of September 23, 1971 should not have been made over to Shri Satpathy over his head and carried out without his knowledge he endorsed the file in a manner which would lead one to infer that action on the Minister's orders were yet to be taken and he, the Secretary, was directing the department to carry out orders still to be executed.

(6) The statement in his affidavit to the effect there was nothing in the rules against the course ordered by the Minister is naive and misleading to a degree. It should have struck him at once that the Minister was taking upon himself the duties and functions which normally belonged to the Secretariate in a questionable manner. The direction given by the Secretary that the procedure indicated by the Minister should be followed despite its being rather odd amounted to recording a falsehood. Why it become necessary for the Minister to hand over the orders for renewal personally to the agents and purchasers at his residence when normally the work could be performed by a clerk has not been explained by any body. Again why the Minister was so anxious to avoid a rush of people in the Secretariat corridor by drawing them away to his residence remains a mystery.

(7) He never followed up the action suggested by the Chief Secretary on the 18th August 1971. He never took care to enquire into the matter and did not sent the file to the Chief Secretary when he got it back with the legal advice on the 21st September 1971. He marked the file 7F-69/71 to the Chief Secretary but

he again kept it back at the instance of the Minister, Forest. The file remained with the Minister, Forest, from the 25th September 1971 to the 6th October 1971 and it was not sent to Chief Secretary even thereafter.

(8) With regard to the alteration in the figure of stipulation in various units he never advised reference of the matter to the Finance Department as it was his duty to do. He never cared to look up the files of the recent past and make himself familiar with the notings of Shri A. K. Ray and Shri P. S. Habeeb Mohammed. Instead he was guided by what Shri Satpathy had told him. It was his duty even after Shri Singh Deo, Minister, Political & Services portfolio had given his dictum on 25th August 1971 to record his independent view that under the Rules of Business consultation with the Finance Department was imperative.

Counsel for Shri Sundararajan argued that his client had throughout acted *bona fide* and in the interest of the State and had not committed any irregularity or impropriety. It was submitted on his behalf : (1) On the 4th of August 1971, he recorded fairly the result of the discussion held in the Assembly Chamber of the Minister, (2) no exception could be taken to his views expressed on the 16th August 1971 that the renewals might be justiciable, (3) after receipt of the opinion of the Law Department and of the Advocate-General it became clear that renewals were obligatory, (4) as the revenue of the State was being kept intact Rule 10 of the Rules of Business was not attracted. (5) agreements were not executed on 23rd and the 24th September 1971 but only settlements were being made so that the persons concerned would be able to have fresh agreements executed in their favour after expiry of the then current period of the agreements, (6) the question of consulting the Finance Department in the case of concessions or alterations in the stipulation about the number of bags did not arise after the decision of the Political and Services Department on the 25th August 1971, (7) Government incurred no loss by renewal as revenue was maintained at the same level and (8) the recommendations made for variation in the stipulation were justified on the merits of each case.

The facts of the case as against Shri Sundararajan have already been throughly examined. It must be said that he was not directly or primarily responsible for the renewal of agreements in 1971, but he omitted to point out to the Minister the proper procedure to be followed. A Secretary cannot be blamed if he gives his honest views on any subject even if it turns out ultimately that his view was not correct. When therefore, he opined on the 4th of August, 1971 that calling for fresh tenders for one year would be a risky experiment it could not be said that he was expressing a view which was not possible to take. But he should not have been so free with his opinion on the question of law regarding renewal. It appears that all along he followed the guidance given by his Under-Secretary Shri Satpathy. It was the Under-Secretary who was giving him the lead in all matters. In matters of policy he should have given his independent views and should not have left it to the Under-Secretary to express his views first and toe the line thrown out. It is worthy of note that in all the various notes made by Shri Sundararajan he never expressed a view contrary to that of Shri Satpathy. He relegated himself to such a backward position that the Minister by-passed him when giving his order on 23rd of September, 1971. The files of all the units in which renewal was ordered on the 23rd and 24th of September, 1971 show, as already noted, that Shri Sundararajan was acting merely as a conduit pipe. He never added one line to the notes of Shri Satpathy. The Commission has already indicated that the files merely passed through the hands of Shri Sundararajan. It is extremely doubtful and it is difficult to believe that he had or could have checked the notes of the Under-Secretary with respect of all the 86 units which passed through his hands on those two dates. He was aware that the transactions on the 23rd and 24th September, 1971 were grossly irregular and that is why when the emergency Peon Book was summoned for from the new Chief Minister's office in June 1972 he went out of his way to give an explanation to Shri B. M. Padhi, Secretary to the Chief Minister by his letter dated the 21st June 1972 when none were called for.

Shri Sundararajan has not been able to give any satisfactory explanation as to why he did not take up with the Minister, the question of partial nationalisation of the Kendu Leaf Trade from 1972. He should have realised this in September, 1971 if not before, and brought this matter to the notice of the Forest

Minister and should also have apprised the Chief Secretary about it for the purpose of the Chief Minister's attention being drawn thereto.

He allowed his own views to be suppressed by that of the Minister in-charge without any protest. This is clear from his conduct with regard to calling for reports from the D. F. Os. on the 6th of September, 1972.

Both Shri Sahu and Shri Sundararajan tried to explain their lapse in non-observance of the Rules of Business by reference to past precedents in the matter of concessions and exemptions. If the old files had been studied or if the Rules of Business been given a proper interpretation both the Secretary and the Minister should have adopted a different course. In any event past precedents cannot override clear directions to the contrary in the Rules of Business.

In view of the above the answers to the issues in the case of Shri Sundararajan are as follows :

Issue 1(a), (b) and (c) in the case of Shri Sundararajan are the same as those in the case of Shri Sahu and those have already been disposed of. So far as Issue 1(d) is concerned Shri Sundararajan had made recommendations for renewal of the agreements on the existing terms and conditions. He should not have done so before getting legal opinion on the point. In making such recommendation he was only following the guidelines laid by his Under-Secretary, and do not appear to have come to any independent conclusion of his own.

Issue 2 is the same as Issue 4 in the case of Shri Sahu and this was not pressed.

Issue 3—While it cannot be said that Shri Sundararajan abused his legal position and power in making recommendation for renewal on the existing terms and conditions he was ill advised to do so and should have sought for legal advice even before August 16, 1971.

Issue 4(a)—In making the recommendations for granting concessions and exemptions between August, 1971 and February, 1972 Shri Sundararajan followed the advice of the Minister, P. & S. Department. He was not obliged to do so and should have pointed out to the Minister the opinion of the Law Department to the contrary and should not have made any recommendations before the Minister directed him how he was to act. The recommendations were neither lawful nor in public interest. Throughout he showed a lack of initiative and courage to express his views independently.

Issue 4(b)—The procedure followed in regard to grant of concessions and exemptions was certainly not lawful or proper. In all such matters the Secretary should have recommended (1) consultation with the Finance Department and (2) placing the matter of variation of the stipulation for collecting leaves mentioned in the agreements before the Cabinet.

Issue 5 is the same as Issue 6 in Shri Sahu's case and needs no answer.

Issue 6—Recommendations for grant of concessions and exemptions did cause loss of revenue as mentioned in the State's affidavit.

The Commission feels constrained to remark that the attitude of Shri Sundararajan and his conduct were throughout not such as are to be expected from a Secretary of a Department. It is not for a Secretary to follow the lead of a subordinate officer or anticipate what would please the Minister and shape his opinion accordingly. He should take a detached and objective view of the facts of a case and place all matters fairly before the Minister, pointing out the pros and cons of the case. The Commission was much impressed by the note of Shri Habeeb Mohammed where he directed action to be taken in terms of the decision of the Chief Minister Shri Singh Deo and Forest Minister Shri Mohapatra recording at the same time his own views about the non-observance of the Rules of Business. Shri Sundararajan's conduct falls for below that standard. Shri Sundararajan appears throughout to have ignored the interest of the State and to have adopted a policy which was likely to be favoured by the Minister.

In the affidavit of the State in the case of Shri Satpathy, reference was made to the matter of grants of rebates, concessions and exemptions in the figure of stipulation as also the renewal of the agreement in September, 1971. These, however, have been referred in detail already. It has been noted that Shri Satpathy's views was differed from by the Secretary Shri A. K. Ray. Shri Satpathy changed his views with regard to grant of concessions after Shri Sahu became the Minister even though he had at first recommended their rejection. In forming the policy decisions he appears to have played a more important role than that of the Secretary Shri Sundararajan. It would appear that he could foresee the views which would be to the liking of the Minister and shaped his own views accordingly.

In more than one instance he received instructions directly from the Minister Shri Sahu without prior reference to the Secretary and followed the instructions. In all this, however, it was the Minister, who was principally to blame. The Under-Secretary had no direct responsibility in any of the matters and his duty, if any, was to collect facts and figures and place the same before the Secretary to enable him to advise the Minister properly. It was none of his duty to advise on the policy to be adopted by the Minister nor was it his business to suggest that action should be taken in terms of the report of I. C. Misra Probe Committee. Neither under the Rules of Business nor under the instructions under the said rules did he occupy any official position which enabled him to make such recommendation or try to formulate the policy to be adopted by the Minister.

In Shri Satpathy's case the allegations about grants of concessions, stipulation and recommendations regarding renewal of agreements are the same as those made in the case of Shri Sundararajan. Shri Satpathy's position did not entitle him to make any recommendations but throughout he gave his opinions freely including questions of law which were totally beyond his jurisdiction.

The short affidavit of Shri Satpathy shows that he had throughout been receiving orders and instructions from the Minister and started action thereon before the Secretary knew anything thereof. His Counsel argued that under the Rules of Business and instructions thereunder an Under-Secretary has no official position and as such no blame should attach to him for anything which may be found contrary to the said Rules or any suggestion made by him. The attention of the Commission was drawn to pages 18 and 19 of the Orissa Secretariat Instructions.

The duties of an Under-Secretary as delineated therein has no reference to any policy which Government may pursue. His work is almost entirely ministerial and supervisory confined to maintenance of efficiency within the Department, allocation of work to the staff, etc.

In view of the report of the Commission in the case of Shri Sundararajan, the case against Shri Satpathy loses its importance as he had hardly any official position to speak of. In making recommendation for concession, etc., or in suggesting that the agreements should be renewed in 1972 he was acting as an interloper assuming a position which was not his. The answers to the issues are as follows :

Issue 1—In his official capacity if any, Shri Satpathy had no right to recommend concessions and exemptions in favour of agents and his recommendation in such matters was improper. In all such matters he usurped jurisdiction when he had none.

Issue 2—As has already been noted the procedure followed in the matter of grant of rebates, concessions and exemptions was neither lawful nor correct.

Issue 3—It was no part of Shri Satpathy's duty to make any recommendations for renewal of agreements on the existing terms and conditions. Neither was he called upon to give his views on the question of law. His recommendations were all without jurisdiction. But as he had no official power or position in this regard it cannot be said that he abused any such position although his action was improper.

Issue 4—This was not pressed.

Issue 5—The recommendation made by Shri Satpathy did not directly cause any loss to the State and it was the orders of Minister which were responsible therefor.

POST SCRIPT

The Commission must record its thanks to the very able assistance rendered by the Secretary and the staff under him. But for their assiduity in laying hold of the original files and tracing the portions relevant to the inquiry the work of the Commission in unravelling the truth would have been far more onerous than it actually proved to be. Whatever help was sought for from them was always promptly rendered.

G. K. MITTER

29-8-74

ANNEXURE I

OFFICE OF THE COMMISSION OF INQUIRY GOVERNMENT OF ORSSA

NOTIFICATION

Bhubaneswar, dated the 16th May, 1973

No. 2/COI.—Whereas the Government of Orissa in exercise of the powers conferred by Section 3 of the Commission of Inquiry Act, 1952 have in notification No. 44-EC., dated the 22nd February 1973 of the Home Department, Bhubaneswar, appointed the Commission of Inquiry, consisting of Shri G. K. Mitter, Retired Judge of the Supreme Court of India, to inquire into, determine and report in respect of the following matters, namely :—

1. (a) Whether the orders made by Government in 1970 granting rebate to purchasers and agents of Kendu leaves, the implementation of which were subsequently kept in abeyance, were proper, lawful, *bona fide* and justified in the circumstances and whether the orders were in public interest ;

   (b) Whether the aforesaid orders would have resulted in loss of revenue, if implemented ;

   (c) Whether the procedure followed in granting the rebate was correct and proper.

2. (a) Whether the renewal of agreements in 1971 in favour of the existing purchasers and agents for the year 1972 on existing terms and conditions without calling for fresh tenders and without giving any opportunity to intending traders to give their offers was lawful, proper, *bona fide* and in public interest ;

   (b) Whether the State suffered any loss in revenue on account of renewal of agreements in the aforesaid manner ;

(c) Whether the procedure followed for grant of renewal of agreements in favour of the existing purchasers and agents was correct and proper ;

(d) Whether any undue favour or advantage was shown or given or received by any person or persons.

3. Whether Shri R. N. Singh Deo, the Chief Minister of Orissa in 1970, Shri Haraprasad Mohapatra, Minister of Forests in 1970 and Shri Ainthu Sahu, Minister of Forests in 1971, 1972 and/or any other person or persons committed any illegality, irregularity, impropriety and/or abused his or their official position and power in respect of grant of rebate to certain Kendu Leaf purchasers and agents in 1970 and/or in respect of grant of renewal of agreements in favour of all existing agents and purchasers for the year 1972 and whether by their acts or conduct or otherwise, they have put the State to financial loss and if so, the extent of their misdemeanour and responsibility.

Now, therefore, this Notification is being issued by and under the orders of the Commission to all persons, Offices, Departments, Organisations acquinted with or concerned directly or indirectly or interested in the facts pertaining to the points under inquiry to appear either in person or through Counsel or authorised representative on the 6th June 1973 at 10-30 A.M. in the office of the Commission of Inquiry at Orissa Legislative Assembly Secretariat Compound, Bhubaneswar where the procedure of the Commission shall be settled and such further direction as may be deemed necessary issued. In default of appearance of the agoresaid date and hour, no person or persons may be allowed to take further part in the proceeding except for good cause shown to the satisfaction of the Commission.

By order of the Commission of Inquiry.

B. C. KANUNGO

16-5-73

Secretary to Commission of Inquiry,
Bhubaneswar

OFFICE OF THE COMMISSION OF INQUIRY, GOVERNMENT OF ORISSA, BHUBANESWAR

NOTIFICATION

Bhubaneswar, the 6th June, 1973

No. 42/COI.—Whereas the Government of Orissa have made certain amendments in their terms of reference to the Commission of Inquiry set up in their Notification No. 44-EC., dated the 22nd February 1973 of the Home Department consisting of Shri G. K. Mitter, Retired Judge of the Supreme Court, in Notification No. 278-EC., dated the 4th June 1973, this notification is published for information of all concerned that the Commission will enquire into, determine and report in respect of the following matters, namely :

1. (a) Whether the orders made by Government during the period from the 1st April 1970 to the 31st March 1972 granting rebate, concessions and purchasers including orders which were subsequently revoked, were proper, lawful, *bona fide* and justified in the circumstances and whether the orders were in public interest ;

   (b) Whether the aforesaid orders have resulted and/or would have resulted if implemented, in loss of revenue ;

   (c) Whether the procedure followed in granting the rebate, concessions and exemptions was lawful, correct and proper.

2. (a) Whether the renewal of agreements in 1971 in favour of the existing purchasers and agents for the year 1972 on existing terms and conditions without calling for fresh tenders and without giving any opportunity to intending traders to give their offers, was lawful, proper, *bona fide* and in public interest;

   (b) Whether the State suffered any loss in revenue on account of renewal of agreements in the aforesaid manner ;

   (c) Whether the procedure followed for grant of renewal of agreements in favour of the existing purchasers and agents was lawful, correct and proper.

3. Whether the then Chief Minister, Shri R. N. Singh Deo, and the then Forest Ministers, Sarvashri Haraprasad Mohapatra and Ainthu Sahu and/or any other public servant committed any illegality, irregularity, impropriety and/or abused his or their official position and power in respect of grant of rebate, concessions and exemptions to certain Kendu Leaf purchasers and agents during the period from the 1st April 1970 to the 31st March 1972 and/or in respect of grant of renewal of agreements in favour of all existing agents and purchasers for the year, 1972 and whether by their acts or conduct or otherwise, they have put the State to financial loss and if so, the extent of their misdemeanour and responsibility.

4. Whether any Minister or any public servant received any illegal gratification and/or derived any pecuniary or other benefits in connection with the Kendu Leaf transactions of the period from the 1st April 1970 to the 31st March 1972.

Any person, office, Department, Organisation acquainted with or concerned directly or indirectly or interested in the facts pertaining to the points under inquiry may appear either in person or through Counsel or authorised representative within three weeks from the date of publication of this Notification in the offices of the Commission of Inquiry in the Orissa Legislative Assembly Secretariat compound, Bhubaneswar on any working day between 10-30 A.M. to 4-30 P.M. and file affidavits as laid down by the Commission of Inquiry in its order, dated the 6th June 1973.

By order of Commission of Inquiry

B. C. KANUNGO

6-6-73

Secretary to Commission of Inquiry

OGP—MP-X (Home) C-10—1,500—3-10-1974