Food Corporation of India

Vs

State of Kerala

Civil Appeals Nos. 675-678 of 1975

(CJI A. M. Ahmadi, Sujata V. Manohar, K Venkataswami JJ)

28.01.1997

JUDGMENT

VENKATASWAMI, J.

1. Leave granted in all the special leave petitions.

2. In all these cases, common questions of law arise and arguments were also addressed on that footing and consequently, they are disposed of by this common judgment. The principle common question of law that arises for consideration can be broadly stated as follows :

> "Whether the Food Corporation of India (hereinafter called 'the FCI') is liable to pay sales/purchase tax to the States while purchasing foodgrains or in distributing fertilizers pursuant to orders issued under Section 3 of the Essential Commodities Act, 1955 ?"

3. There is a difference of opinion among the High Courts on this question. A Division Bench of the Allahabad High Court (Lucknow Bench) has taken the view that the FCI is liable to pay purchase tax in the light of the provisions of the U. P. Sales Tax Act, 1948 (hereinafter called "the Act"). A Division Bench of the Punjab and Haryana High Court, however, has taken view that the FCI is not liable to pay tax, on the purchase of foodgrains. We may at once state here that the Lucknow Bench of the Allahabad High Court in taking the view that the FCI is liable to pay tax after elaborately dealing with the case-law up to the date of the judgment has come to a conclusion that the decision of this Court in Chhitter Mal Narain Das v. CST [(1970) 3 SCC 809] in view of subsequent decisions of larger Benches of this Court does not hold good. The Division Bench of the Punjab and Haryana High Court, however, has taken exactly the opposite view holding that the decision of this Court in Chhitter Mal case [(1970) 3 SCC 809] holds goods notwithstanding subsequent decisions of this Court and on that basis held that the FCI was not liable to pay tax. The Andhra Pradesh and Kerala High Courts while dealing with the liability of the FCI to pay tax on the distribution of fertilizers have taken the view that the FCI is liable to pay tax. It is under this background, arguments were advanced before us supporting and opposing the view taken by this Court in Chhitter Mal case [(1970) 3 SCC 809].

4. Undoubtedly this Court Chhitter Mal case [(1970) 3 SCC 809] positively has taken a view that there was no sale within the meaning of the definition of the word "sale" under Section 2(h) of the U. P. Sales Tax Act, 1948 when stocks of wheat were supplied by the appellants (in that case dealers in foodgrains) in compliance with the provisions of the U. P. Wheat Procurement (Levy) Order, 1959 to the Regional Food Controller. Armed with that decision of this Court, Mr. Thakur, learned

Senior Counsel, addressed elaborate arguments distinguishing the subsequent decisions of larger Benches of this Court projecting a "liberal interpretation" of the definition of "sale" occurring in various State statutes and tried to persuade us to us to hold that the ratio laid down by this Court in Chitter Mal case [(1970) 3 SCC 809] is no longer good law.

5. As an illustrative of this cases, we would like to refer to the facts in the common judgment of the Lucknow Bench of the Allahabad High Court in WP No. 2077 of 1986 (corresponding to CA No. 2532 of 1987) and then apply the same to other cases.

6. The facts as noticed by the High Court in the common judgment are given below in brief.

7. The Food Corporation of India is a "Corporation" incorporated under the Food Corporation Act, 1964 (Central Act No. 37 of 1994). As one of its functions it maintains a national pool of foodgrains. The different States have to make their contributions to this pool. The States issued different orders under the Essential Commodities Act known by different names as Levy Orders, Procurement Orders or Requisition Orders, for purchasing part of the produce or stocks of the foodgrains in question from farmers or milers. The procurement is made through different agencies. On obtaining the required quantity of the foodgrains, it is purchased by the Food Corporation of India from the State Government for the purpose of maintaining the national pool of foodgrains. The Sales Tax Department of U.P. sought to levy purchase tax upon the Food Corporation of India on the point it makes purchases from the State of U.P. The Food Corporation of India denied its liability to pay the said tax.

8. Although the purchase made by the FCI from the State is a second sale or purchase in view of Explanation II to Section 3-D(1) of the U. P. Sales Tax Act, it is deemed to be the first purchase. Explanation II was added with retrospective effect by U. P. Act No. 23 of 1976. It is specifically in respect of purchase of foodgrains in pursuance of orders made under Section 3 of the Essential Commodities Act. Explanation II reads as follows :

> "Explanation II. - For the purpose of this sub-section, in relation to purchases of foodgrains in pursuance of any orders made under Section 3 of the Essential Commodities Act, 1955 including any purchase in excess of the levy share, the purchase first made by a dealer from the State Government or its purchasing agent shall be the first purchase of such foodgrains and the tax shall accordingly be levied at the point on such dealer."

9. An additional tax was also payable at the rate of five per cent over the turnover by the dealer whos yearly turnover exceeded rupees ten crores as provided under section 3-F of the U.P. Sales Tax Act, which now stands omitted by U.P. Act No. 4 of 1982 with effect from 7-8-1981. Section 3-F as it existed was as follows :

> "3-F. Every dealer liable to pay tax under this Act, the aggregate of whose total turnover of purchase of goods notified under sub-section (1) of Section 3-D, the turnover of sales liable to tax under sub-section (2) of Section 3-D and the total turnover of sales of all other goods in any assessment year exceeds rupees two lakhs, shall, in addition to the said tax, pay for that assessment year an additional tax at rate of one per cent, of his turnover liable to tax :
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> Provided that in case of foodgrains, the rate of additional tax payable by any dealer,

the aggregate of whose turnover of purchases or both, as the case may be, liable to tax, exceeds rupees ten crores in an assessment year shall be five per cent."

10. Since the turnover of the FCI has been more than ten crores, it was also required to pay additional tax for the period Section 3-F remained in operation.

11. The appellant has challenged the validity of Explanation II to Section 3-D(1) of the U.P. Sales Tax Act as well as that of Section 3-F of the Act on the ground that the said provisions are discriminatory, arbitrary and unreasonable.

12. In addressing the arguments challenging the view taken by the Lucknow Bench of the Allahabad High Court, Mr. Thakur, learned Senior Counsel placed before us the following six propositions for our decision :

(1) That levy procurement of foodgrains pursuant to levy orders issued under Section 3 of the Essential Commodities Act by the Government of Uttar Pradesh are not "sales" within the meaning of Entry 54, List II of the Seventh Schedule to the Constitution of India. The legislation authorising such imposition, proceedings and recovery of sales tax is wholly ultra vires the said Entry 54 of the Constitution of India. Levy procurement in effect is compulsory acquisition by the State in exercise of powers of the State under "eminent domain".

(2) That Explanation II added to Section 3-D(1) of the U. P. Sales Tax by Act No. 23 of 1976 is vires Entry No. 54 since it assumed, by fiction of law, the existence of sale, even when there is none, by the State of U. P. and its nominees in favour of the Food Corporation of India and thereafter declare that fictional sale to be the first sale for the purpose of levy of sales tax.

(3) That Food Corporation of India for the procurement from 1968 to 1976 had been bearing the burden of sales tax on the first purchase made by the Regional Food Controllers by reimbursing the same to them. The tax being single-point tax, the same could not be levied twice. Explanation II retrospectively levies sales tax at more than one point. It is impermissible under the provisions of the U. P. Sales Tax Act.

(4) That Section 3-F which levied surcharge of 5% on dealers whose turnover in foodgrains Exceeded Rs. 10 crores was arbitrary and discriminatory and hit by Article 14, particularly when the same was made effective retrospectively from 1-4-1975.

(5) That the 46th Amendment to the Constitution which came into force from 2-2-1983 was made retrospective only in a limited sphere and not covering the legislation affecting the appellants.

(6) That the interest calculated by the respondents is not payable and, therefore, in any case the respondents have no right to recover the same.

13. From the judgment of the High Court, we do not find any discussion on Proposition 6. We therefore, presume no such plea was taken or if taken no such plea was argued before the High Court. Therefore, we do not propose to deal with that proposition. Regarding Proposition 5, this was not seriously pursued by either side warranting any decision on that.

14. The principal argument appears to be that levy procurement did not amount to a sale and, therefore, the same was not taxable under the U. P. Sales Tax Act, 1948. To put it differently the argument was that the levy procurement is a compulsory acquisition and therefore, falls outside the purview of Entry 54 of List II of the Seventh Schedule to the Constitution of India. Consequently, the levy procurement is not at all taxable under the U. P. Sales Tax Act. After referring to the relevant provisions in the Essential Commodities Act, 1955 and the levy control orders, it was pointed out that the persons holding stocks of foodgrains are required compulsorily by force of the statutory orders to part with the foodgrains in favour of the State Government or its nominee and such procurement constitutes clearly a case of compulsory acquisition rather than a sale as popularly understood. Elaborating this aspect, it was submitted that there was absolutely no contract between the seller and buyer and failure to comply with the procurement orders will result in the prosecution and ultimate punishment at the hands of the law-enforcing agency apart from the power to enter upon the premises, search, seize the foodgrains and confiscate the same. Under those circumstances, it was contended that the transactions of levy procurement cannot be treated as a sale within the purview of Entry 54 List II of the Seventh Schedule. In the case of millers, they have to part with a specified portion of rice, milled from the paddy given by farmers. Though the millers have no right or title over the paddy, they cannot resist the procurement pursuant to the levy order. In the absence of any volition on the part of the miller, no sale could be attracted to such transaction. It is also contended that there is no consensus in levy procurement. After referring to the decision of this Court in New India Sugar Mills Ltd. v. CST [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459] and Chhitter Mal case [(1970) 3 SCC 809] the learned Senior Counsel submitted that the cases subsequent to these two decisions taking different view are all under regulatory orders and as such distinguishable and the ratio laid down therein will have no application to the procurement under levy orders which amounts to compulsory acquisition. According to the learned, there is nothing left to be decided for the parties and everything is determined in the levy orders. Even the place of delivery of the foodgrains is fixed by the control orders. Even if there is any small matter left to the discretion of the parties, the same being unimportant, insignificant and peripheral, cannot be said to be determinative of the existence of the consensus. According to the learned Senior Counsel, it is the consensus, which is a vital aspect for determining the character of the transaction. The levy orders leave no option to the seller but to sell compulsorily to the State Government or its nominee. There is no, discretion left to the parties in regard to price or any other matter and, therefore no area is left out for the parties to operate unlike matters coming under regulatory orders. According to the learned Senior Counsel, Chhitter Mal case [(1970) 3 SCC 809] has rightly laid down the law when it held that the levy procurement is a compulsory acquisition and not a sale. After referring to the transactions under regulatory orders transactions under levy control orders, the learned Senior Counsel has summarised his submissions on the first proposition as follows :

> "That the transactions of levy procurement are a class by themselves and are wholly distinguishable from the cases where the sale and purchase is regulated by statutory authorities in exercise of the powers available to them under respective legislations. Whereas in the case of levy orders, there is absolutely no area left for consensual agreement in the case of regulatory orders, only statutory controls were imposed for identification of a class of people who would be eligible either to sell or to purchase goods in keeping with the welfare policy of the State. Those are not the cases in which the failure to part with the goods results in the commission of an offence which is punishable nor does the failure give corresponding right to the authorities to seize and confiscate the goods and impose penalties as prescribed under the control orders. Therefore, it cannot be contended that a compulsory acquisition of foodgrains

by the Government in exercise of its sovereign powers should constitute a sale so as to attract the liability under the Sales Tax Act. The transactions entered into in exercise of the power under the levy order between the millers and the dealers on the one hand and the State on the other hand, and thereafter between the States and the Corporation i.e. FCI and then between the Corporation and the States was one composite process which owed its origin to the arrangements arrived at between the State Governments and the Central Government under which the States were required to contribute to the Central pool which in turn passes on to the deficit States through the agency of the Corporation. As such, the process was an integrated process and was not at all bifurcable or divisible into one or other transaction. Totality of the facts clearly established that it was not a case where there was any sale of foodgrains. It was a case of compulsory taking over of a particular percentage of foodgrains from licensed dealers and millers on payment of an amount of compensation which too was fixed by the Central Government and not by the State Government although the same is notified by the State Government. Not only centres at which the foodgrains were deliverable were prescribed by the State Government, the payment of compensation was also predetermined by the orders themselves. The centers for each area were also fixed. There was, therefore, no area where the parties could have any volition".

15. The learned Senior Counsel appearing for the States in support of the common judgment under appeal and other judgments submitted that the transactions under levy orders are definitely "sales" and there was no compulsory acquisition of property as contended by the learned Senior Counsel for the appellants. According to them, there is an area of consensual arrangement between the parties and the element of volition is not completely excluded under the levy orders. It is their further submission that the decision in Chhitter Mal case [(1970) 3 SCC 809] stands practically overruled and, therefore, it is no more good law in view of latter decisions of larger Benches of this Court. Though an argument referring to 46th Amendment of the Constitution was faintly raised, it was not pursued seriously. To support the contention, reliance was placed on the following judgments : Vishnu Agencies (P) Ltd. v. CTO [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449; 42 STC 31]; Salar Jung Sugar Mills Ltd. v. State of Mysore [(1972) 1 SCC 23 : (1972) 2 SCR 228]; State of Punjab v. Dewan's Modern Breweries Ltd. [(1979) 2 SCC 210 : 1979 SCC (Tax) 94 : (1979) 43 STC 454]; Coffee Board v. Commr. of Commercial Taxes [(1988) 3 SCC 263 : 1988 SCC (Tax) 308]; Oil and Natural Gas Commission v. State of Bihar [(1976) 4 SCC 42 : 1976 SCC (Tax) 432 : (1977) 1 SCR 354].

16. To substantiate the argument that there was an element of volition though minimal between the parties in the transactions under consideration, reliance was placed on the observations of the Full Bench of the Allahabad High Court in CST v. Ram Bilas Ram Gopal [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424]. Though those observations did not find approval by the bench which decided the Chitter Mal case [(1970) 3 SCC 809], the same found approval by the later larger Bench which decided the Vishnu Agencies case [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 49 : 42 STC 31]. We shall refer to the relevant portions of the abovesaid Full Bench passage at the appropriate place. In addition to that, reliance was also placed on certain portions in the pleadings (to which also we shall make reference at the appropriate place) to the effect that the FCI has not always accepted the foodgrains procured under levy orders and there were occasions when the FCI rejected certain stocks on the ground that they were not up to the quality prescribed. This also, according to the learned Senior Counsel negatives the contention of the learned Senior Counsel for the appellants that the entire transaction was a single integrated process. The learned Senior Counsel

submitted that the Lucknow Bench of the Allahabad High Court was fully justified in holding that the transactions are exigible to tax under the States Sales Tax Act and also in holding that the judgment of this Court in Chitter Mal case [(1970) 3 SCC : 809] stands practically overruled.

17. We will first deal with this principal point as the other points depend upon the answer to this principal point.

18. We prefer to take up the decision in Chitter Mal case [(1970) 3 SCC : 809] for consideration. As pointed out already in Chitter Mal case [(1970) 3 SCC : 809], the issue was whether the supplies made to the Regional Food Controller under the U. P. Wheat Procurement (Levy) Order, 1959 are sales within the meaning of "sale" under Section 2(h) of the U. P. Sales Tax Act and, if so, are the assessees liable to pay sales tax on the price for wheat supplied to the Regional Food Controller. We must at once point out that the Food Corporation of India was not a party to that case. The assessee in that case was a dealer in foodgrains who supplied wheat to the Regional Food Controller, a nominee of the U. P. Government for procuring wheat under the Levy Order. The learned Judges, it is apparent from the judgment, were very much influenced by the view expressed in New India Sugar Mills case [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459] in arriving at a decision that those supplies were not sales and, consequently, not exigible to tax. It is pertinent to point out that in Chitter Mal case [(1970) 3 SCC : 809] itself, the learned Judges have noticed that certain amount of volition was left between the parties. However, it was felt that volition was not sufficient to make the transaction contractual. While referring to a Full Bench judgment of the Allahabad High Court in CST v. Ram Bilas Ram Gopal [AIR 1970 All 518; 24 STC 508 : 1969 All LJ 424] this Court in Chitter Mal case [(1970) 3 SCC : 809] has observed in paras 8 and 9 as follows : (SCC pp. 813-14)

> "8. The High Court relied upon the following observations in Ram Bilas Ram Gopal case [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424) :
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> 'Analysing clause 3 of the Levy Order it is clear that a licensed dealer is obliged to sell to the State Government fifty per cent of the wheat held in stock by him at the commencement of the Order, and thereafter fifty per cent of the wheat daily procured or purchased by him beginning with the date of commencement of the Order until such time as the State Government otherwise directs. The price at which the wheat is sold is the maximum price fixed in the Wheat (Uttar Pradesh) Price control Order, 1959, as notified by the Government of India. Delivery of the wheat has to be given by the dealer to the Regional Food Controller or a person authorised by him in that behalf. The dealer has no option but to sell the specified percentage of wheat to the State Government. The State Government has also no option but to purchase fifty percent of the wheat held in stock by the dealer at the commencement of the Levy Order. As regards the wheat procured or purchased daily by the dealer particular thereafter, it is open to the State Government to say that from any particular date it will not purchase any or all of the specified percentage of wheat. Therefore, as regards that wheat the Levy Order leaves it open to one of the parties, namely, the State Government to decide when it will stop purchasing wheat from the dealer. That in substance is clause 3 of the Levy Order and it embodies the total sum of obligations imposed on the dealer and the State Government. All other details of the transaction are left open to negotiation. It leaves it open to the parties to negotiate in respect of the time and mode of payment of the price, the time and mode of delivery of wheat, and other conditions of the contract.'

> Clause 3 of the order compels the licensed dealer to deliver to the Controller or his authorised agent every day 50 per cent of the wheat procured or purchased by him. There is no scope for negotiations there. Assuming that the Controller may designate the place of delivery and the place of payment of price at the controlled rate, and the licensed dealer acquiesces therein, or even when in respect of those two matters there is some consensual arrangement, in our judgment, supply of wheat pursuant to clause 3 of the order and acceptance thereof do not result in a contract of sale. The High Court observed that :
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> ".... whatever compulsive or coercive force is used to bring about a transaction under clause 3 of the Levy Order, it must be traced to legislation. It cannot be attributed to the State Government as a party to the transaction. This, then, is clear. There is nothing in the Levy Order which can be accused of vitiating the free consent of the parties as defined under Section 14 of the Indian Contract Act, when entering into the contract of sale.'

But these observations assume a contract of sale which the order does not contemplate. If there be a contract, the restrictions imposed by statute may not vitiate the consent. But the contract cannot be assumed.

9. We may refer to certain decisions of this Court on which reliance was placed at the Bar. In New India Sugar Mills case [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459], under the Sugar and Sugar Products Control Order, 1946, a scheme was devised for equitable distribution of sugar. The consuming States intimated to the Sugar Controller of India their requirements of sugar and the factory owners sent statements of stocks of sugar held by them. The Controller made allotments to various States and addressed orders to the factory owners directing them to supply sugar to the States in question in accordance with the despatches instructions from the State Governments. Under the allotment orders, M/s. New India Sugar Mills Ltd., Bihar, despatched stocks of sugar to the State of Madras. The State of Bihar treated the transaction as a sale and levied tax thereon under the Bihar Sales Tax Act, 1947. The tax-payer contended that the supplies of sugar, pursuant to the directions of the Controller, did not result in sales, and that no tax was exigible on such transactions. A majority of the Court observed that despatches of sugar pursuant to the directions of the Controller were not made in pursuance of any contract of sale. There was no offer by tax-payer to the State of Madras, and no acceptance by the latter; the tax-payer was under the Control Order compelled to carry out the directions of the Controller and it had no volition in the matter. Intimation by the State of its requirements of sugar to the Controller or communication of the allotment order to the assessee did not amount to an offer. Nor did the mere compliance with despatch instructions issued by the Controller, which the assessee had not the option to refuse to comply with, amount to acceptance of an offer or to making of an offer. A contract of sale of goods postulates a voluntary arrangement regarding goods between the contracting parties. It was held that in the case before the Court there was no such voluntary arrangement."

19. The above judgment came up for consideration inter alia in Vishnu Agencies case [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449 : 42 STC 31]. That decision was given by a Bench of seven learned Judges. The learned Judges in the first place did not approve the ratio laid down in New India Sugar Mills case [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459] and further did not approve the view taken in the Chitter Mal case [(1970) 3 SCC : 809] disagreeing with the observations of Allahabad Full Bench case. The learned Judges observed as follows : (SCC p. 543, para 36)

> "We would, however, like to clarify that though compulsory acquisition of property would exclude the element of mutual assent which is vital to a sale, the learned Judges were, with respect, not right in holding in Chitter Mal [(1970) 3 SCC 809] that even if in respect of the place of delivery and the place of payment of price, there could be a consensual arrangement, the transaction will not amount to a sale (p. 677) (SCC p. 814). The true position in law is as stated above, namely, that so long as mutual assent, express or implied, is not totally excluded the transaction will amount to a sale. The ultimate decision in Chhitter Mal [(1970) 3 SCC : 809] can be justified only on the view that clause 3 of the Wheat Procurement Order envisages compulsory acquisition of wheat by the State Government from the licensed dealer. Viewed from this angle, we cannot endorse the Court's criticism of the Full Bench decision of the Allahabad High Court in CST v. Ram Bilas Ram Gopal [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424] which held while construing clause 3 that so long as there was freedom to bargain in some areas the transaction could amount to a sale though effected under compulsion of a statute. Looking at the scheme of the U. P. Wheat Procurement Order, particularly clause 3 thereof, this Court in Chitter Mal [(1970) 3 SCC : 809] seems to have concluded that the transaction was, in truth and substance, in the nature compulsory acquisition, with no real freedom to bargain in any area. Shah, J. expressed the Court's interpretation of any clause 3 in no uncertain terms by saying that 'it did not envisage any consensual arrangement'."

20. We may also usefully extract a passage from the separate but concurring judgment of Beg, C.J. as he then was. The same reads as follows : (SCC pp. 549-50, para 48)

> "It is true that a considerable part of the field over which what are called 'sales' take place under either regulatory orders or levy orders passed or directions given under statutory provisions is restricted and controlled by these orders and directions. If, what is called a 'sale' is, in substance, mere obedience to a specific order, in which the so-called 'price' is only a compensation for the compulsory passing of property in goods to which an order relates, at an amount fixed by the authority making the order, the individual transaction may not be a 'sale' although the compensation is determined on some generally fixed principle and called 'price'. This was, for example, the position in New India Sugar Mills v. CST [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459]. That was a case of a delivery according to an order given by the Government which could amount to a compulsory levy by an executive order although there was no legislative 'levy order' involved in that case. On the other hand, in CST v. Ram Bilas Ram Gopal [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424], the order under consideration was actually called a levy order, but the case was distinguishable from New India Sugar Mills v. CST [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459] on facts. It was held in the case of Ram Bilas [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424] that the core of what is required for a 'sale' was not destroyed by the so-called 'levy' order which was legislative. It is true that passages from the judgment of Pathak, J. in the case Ram Bilas Ram Gopal [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424] were cited and specifically disapproved by a bench of this Court in Chhitter Mal Narain Das v. CST [(1970) 3 SCC 809]. But, perhaps the view of this Court in Chitter Mal Narain Das v. CST [(1970) 3 SCC : 809] goes too far in this respect. It is not really the nomenclature of the order involved, but the substance of the transaction under consideration which matters in such cases."

21. In Dewan's Breweries case [(1979) 2 SCC 210 : 1979 SCC (Tax) 94 : (1979) 43 STC 454] the question for consideration was whether the supplies of Indian-made foreign liquor by distilleries and brewery company from its wholesale depots to permit-holders on the permit issued by the Excise and Taxation Officer are sales and liable to sales tax under the Punjab General Sales Tax Act, 1948. The contention was that there was no sale at all as the prices were fixed by the competent authorities and dealers had to charge the fixed price from its retailers holding licences and dealers had to charge the fixed price from its retailers holding licences and there was no volition in the distribution of liquor which was received from the manufacturing concern at Jammu. This contention was negatived by the Court. In the course of the argument, attention of the learned Judges was invited to Chitter Mal case [(1970) 3 SCC 809]. In that connection, the learned Judges observed as follows :

> "This case, in our opinion, is squarely covered by a recent decision of this Court delivered by a Bench of seven Judges in Vishnu Agencies (P) Ltd. v. CTO [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449 : 42 STC 31]. The High Court in the case of Jagatjit Distilling and Allied Industries Ltd. [Jagatjit Distilling and Allied Industries Ltd. v. State, (1971) 24 STC 709 (P&H)] had mainly relied upon two decisions of this Court to hold that the transactions in that case were not sales. The said decisions are New India Sugar Mills Ltd. v. CST [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459] and Chhitter Mal Narain Das v. CST [(1970) 3 SCC : 809]. In the case of Vishnu Agencies [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449 : 42 STC 31], the former case was considered in paras 37 to 39 of AIR volume at pp. 463-464 (pp. 51-52 of 42 STC) and it was held that the view expressed in the majority judgment was not good law and the one contained in the minority judgment was approved. Chhitter Mal case [(1970) 3 SCC 809] was also considered in paras 44-45 at page 467 (pp. 56-57 of 42 STC) and it was distinguished on the ground that the said decision 'can be justified only on the view that clause 3 of the Wheat Procurement Order envisages compulsory acquisition of wheat by the State Government from the licensed dealer'. But then the criticism in that case of the Full Bench decision of the Allahabad High Court in CST v. Ram Bilas Ram Gopal [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424], 'which held while construing clause 3 that so long as there was freedom to bargain in some areas the transaction could amount to a sale though effected under compulsion of a statute' was not endorsed. It is, therefore, plain that to that extent Chitter Mal case [(1970) 3 SCC 809] is also not good law. The decision of the High Court in Jagatjit case [Jagatjit Distilling and Allied Industries Ltd. v. State, (1971) 24 STC 709 (P&H)] is no longer good law."

22. In Coffee Board v. Commr. of Commercial Taxes [(1988) 3 SCC 263 : 1988 SCC (Tax) 308] this Court had occasion to consider more or less an identical issue. In that case also arguments identical to the one advanced before us on behalf of the appellants, were advanced. This Court repelled such arguments. As this case dealt with an issue more or less similar to the one on hand, we propose to extract liberally from this judgment. The question involved in that case was as to the exigibility of tax on sale, if there be any, by the growers of coffee to the Board. The principal features of the legislation connected therewith as noticed in that judgment were : (SCC pp. 270-71, para 6)

> "(a) Compulsory registration of all lands planted with coffee (Section 14 of the Coffee Act). (b) Mandatory delivery of all coffee grown in the registered estates except the quantities permitted by the Board to be retained for domestic consumption

> and for seed purposes, [see Section 25(1) of the Coffee Act]. Estates situated in remote areas specified in the notification issued by the Central Government under the proviso to Section 25(1) of the Coffee Act are exempt from this provision. (c) Seizure by the Board of Coffee wrongly withheld from the pool. Prosecution for failure to deliver and confiscation of quantity not delivered. (d) Delivery to be effected at such times and at such places as designated by the Board [Section 25(2)]; the extinguishment on delivery of all rights of the growers in respect of the coffee delivered to the Board excepting the right to receive payment under Section 34 of the Act [Section 25(6)]. (e) Sale of coffee in the pool by the Board in the domestic market and for export through auctions and other channels in regulated quantities and at convenient intervals [Sections 26(1)]. (f) Payment to growers in such amounts and at such times as decided by the Board (Section 34). The payment to be made on the basis of the value as determined by the price differential scale [Section 24(4)], and in proportion to the value of such coffee to the total realisations in the pool [Section 34(2)]. (g) Sale or contracts to sell coffee by growers in the years in which internal sale quota was not allotted were prohibited by Section 17 of the Act. All contracts as void by Section 47 of the Act."

23. The contention in that case was that there was no sale and it was nothing but a compulsory acquisition of the coffee by the Coffee Board. In repelling that contention, this Court in the said case observed as follows : (SCC pp. 274-75, paras 18-19)

> "18. In 1996 this Court, in the case of State of Kerala v. Bhavani Tea Produce Co. Ltd. [AIR 1996 SC 677 : (1996) 59 ITR 254] (a unanimous decision of a Bench of five learned Judges) which arose under the Madras Plantations Agricultural Income Tax Act, 1955, held that when growers delivered coffee under Section 25 of the Act to the Board all their rights therein were extinguished and the coffee vested exclusively in the Board. This Court observed that when growers delivered coffee to the Board, though the grower 'does not actually sell' the coffee to the Board, there was a 'sale' by operation of law. This was in connection with Section 25 of the Act. The court, however, did not hold that there was a taxable 'sale' by the grower to the Board in the year in question. The sale, according to this Court in that case took place in earlier years in which the Agricultural Income Tax Act did not operate. All the States in which coffee is grown and all the persons concerned with the coffee industry, it is asserted on behalf of the Additional Solicitor General, understood this decision as laying down that the 'sale by operation of law' mentioned therein only meant the 'compulsory acquisition' of the coffee by the Coffee Board.

19. We are, however, bound by the clear ratio of this decision. The Court considered this question : 'Was there a sale to the Coffee Board ? ' at page 99 of the Report and after discussing clearly said the answer must be in the affirmative. It was rightly argued, in our opinion, by Dr. Chitale on behalf of the respondents that the question whether there was sale or not or whether the Coffee Board was a trustee or an agent could not have been determined by this Court, as it was done in this case unless the question was specifically raised and determined. We cannot also bypass this decision by the argument of the learned Additional Solicitor General that Section 10 of the Act had not been considered or how it was understood by some. This decision in our opinion concludes all the issues in the instant appeal."

24. While referring to the Vishnu Agencies case [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR

1978 SC 449 : 42 STC 31], the following was observed in that case : (SC pp. 278-90, paras 26, 28, 43, 46).

> "26. All parties drew our attention to the decision in the case of Vishnu Agencies (P) Ltd. [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449 : 42 STC 31]. There the Court was concerned with the Cement Control Order and the transactions taking place under the provisions of that control order. The Cement Control Order was promulgated under the West Bengal Cement Control Act, 1948 which prohibited storage for sale and sale by a seller and purchase by a consumer of cement except in accordance with the conditions specified in licence issued by a designated officer. It also provided that no person should sell cement at a higher price than the notified price and no person to whom a written order had been issued shall refuse to sell cement 'at a price not exceeding the notified price'. Any contravention of the order became punishable with imprisonment or fine or both. Under the A. P. Procurement (Levy and Restriction on Sale) Order, 1967, (Civil Appeals Nos. 2488 to 2497 of 1972) every miller carrying on rice milling operation was required to sell to the agent or an officer duly authorised by the Government, minimum quantities of rice fixed by the Government at the notified price, and no miller or other person who gets his paddy milled in any rice mill can move or otherwise dispose of the rice recovered by milling at such rice mill except in accordance with the directions of the Collector. Breach of these provisions became punishable. It was held dismissing the appeals that sale of cement in the former case by the allottees to the permit-holders and the transactions between the growers and procuring agents as well as those between the rice millers on the one hand and the wholesalers or retailers on the other, in the latter case, were sales exigible to sales tax in the respective States. It was observed by Beg, C.J. that the transactions in those cases were sales and were exigible to tax on the ratio of Indian Steel and Wire Products Ltd. [Indian Steel & Wire Products Ltd. v. State of Madras, AIR 1968 SC 478 : 21 STC 138], Andhra Sugars Ltd. [Andhra Sugars Ltd. v. State of A. P., AIR 1968 SC 599 : 21 STC 212] and Karam Chand Thappar [State of Rajasthan v. Karam Chand Thappar & Bros. (Coal Sales) Ltd., AIR 1969 SC 343 : (1969) 23 STC 210]. In cases like New India Sugar Mills [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459], the substance of the concept of a sale itself disappeared because the transaction was nothing more than the execution of an order. The Chief Justice emphasised that deprivation of property for a compensation called price did not amount to a sale when all that was done was to carry out an order so that the transaction was substantially a compulsory acquisition. On the other hand, a merely regulatory law, even if it circumscribed the area of free choice, did not take away the basis character or core of sale from the transaction. Such a law which governs a class obliges a seller to deal only with parties holding licences who may buy particular or allotted quantities of goods at specified prices, but an essential element of choice was still left to the parties between whom agreements took place. The agreement, despite considerable compulsive elements regulating or restricting the area of his choice, might still retain the basis character of a transaction of sale. In the former type of cases, the binding character of the transaction arose from the order directed to particular parties asking them to deliver specified goods and not from a general order or law applicable to a class. In the latter type of cases, the legal tie which binds the parties to perform their obligations remains contractual. The regulatory law merely adds other obligations,

such as the one to enter into such a tie between the parties. Although the regulatory law might specify the terms, such as price, the regulation is subsidiary to the essential character of the contract must agree upon the same thing in the same sense. Agreement on mutuality of consideration, ordinarily arising from an offer and acceptance, imports to it enforceability in courts of law. Mere regulation or restriction of the field of choice does not take away the contractual or essentially consensual binding core or character of the transaction. Analysing the Act, it was observed that according to the definition of 'sale' in the two Acts the transactions between the appellants in that case and the allottees or nominees, as the case may be, were patently sales because in one case the property in the cement and in the other property in the paddy and rice was transferred for cash consideration by the appellants. When the essential goods are in short supply, various types of orders are issued under the Essential Commodities Act, 1955 with a view to making the goods available to the consumer at a fair price. Such orders sometimes provide that a person in need of an essential commodity like cement, cotton, coal or iron and steel must apply to the prescribed authority for a permit for obtaining the commodity. Those wanting to engage in the business of supplying the commodity are also required to possess a dealer's licence. The permit-holder can obtain the supply of goods, to the extent of the quantity specified in the permit and from the named dealer only and at a controlled price. The dealer who is asked to supply the stated quantity to the particular permit-holder has no option but to supply the stated quantity of goods at the controlled price. Then the decisions in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. [AIR 1958 SC 560 : (1958) 9 STC 353] and New India Sugar Mills v. CST [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459] were discussed and the correctness of the view taken in the former case was doubted and the majority opinion in the latter case was overruled.

28. Since all persons including the Coffee Board are prohibited from purchasing/selling coffee in law, there could be no sale or purchase to attract the imposition of sales/purchase tax it was urged. Even if there was compulsion there would be a sale as was the position in Vishnu Agencies [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449 : 42 STC 31]. This Court therein approved the minority opinion of Hindayatullah, J. in New India sugar Mills v. CST [AIR 1963 SC 1207 : (1963) 14 STC 316 : 1963 Supp (2) SCR 459]. In the nature of the transactions contemplated under the Act mutual assent either express or implied is not totally absent in this case in the transactions under the Act. Coffee-growers have a volition or option, though minimal or nominal to enter into the coffee-growing trade. Coffee-growing was not compulsory. If any one decides to grow coffee or continue to grow coffee, he must transact in terms of the regulation imposed for the benefit of the coffee-growing industry. Section 25 of the Act provides the Board with the right to reject coffee if it is not up to the standard. Value to be paid as contemplated by the Act is the price of the coffee. Fixation of price is regulation but is a matter of dealing between the parties. There is no time fixed for delivery of coffee either to the Board or the curer. These indicate consensuality which is not totally absent in the transaction.

43. .... The true principle or basis in Vishnu Agencies case [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449 : 42 STC 31] applies to this case. Offer and acceptance need not always be in an elementary form, nor does the law of contract or of sale of goods require that consent to a contract must be express. Offer and acceptance can be spelt out from the conduct of the parties which cover not only their acts but omissions as well. The limitations imposed by the Control Order on the normal right of the dealers and consumers to supply and obtain goods, the obligations imposed on

the parties and the penalties prescribed by the order do not militate against the position that eventually, the parties must be deemed to have completed the transaction under an agreement by which one party binds itself to supply the stated quantity of goods to the other at a price not higher than the notified price and the other party consents to accept the goods on the terms and conditions mentioned in the permit or the order of allotment issued in its favour by the concerned authority.

46. Because coffee is grown on the estate, the owner of the land can be presumed to have consented to surrender his produce to the Board it was submitted. But the surrender is thus clearly an act of volition. The planting of the seeds of a coffee plant by a grower can be regarded as his act of volition in respect of the surrender to the Board of the coffee yielded by the plant."

25. In Oil and Natural Gas Commission case [(1976) 4 SCC 42 : 1976 SCC (Tax) 432 : (1977) 1 SCR 354] this Court referred the arguments similar to the one advanced before us and repelled the same in the following manner : (SCC pp. 45-46, paras 11-13)

> "The Commission is described by the Solicitor General to be a statutory body which has no option either with regard to the production or supply and the directions and decisions of the Government leave no choice with the Commission in regard to supplies.
>
> This Court in Salar Jung Sugar Mills Ltd. v. State of Mysore [(1972) 1 SCC 23 : (1972) 2 SCR 228] laid down the following propositions : First, statutory orders regulating the supply and distribution of goods by and between the parties under control orders in a State do not absolutely impinge on the freedom to enter into contract. Second, directions, decisions and orders of agencies of the Government to control production and supply of commodities, may fix the parties to whom the goods are to be supplied, the price at which these are to be supplied, the time during which these are to be supplied and the persons who have to carry out these directions. In such cases it cannot be said that compulsive directions rob the transactions of the character the of agreement. The reason is that the transfer of property which constitutes the agreement in spite of the compulsion of law is neither voidable. It is not as a result of coercion. The statute supplies the consensus and the modality consensus is furnished by the statute. There is privity of contract between the parties.
>
> The other third, fourth and sixth propositions are these. Third, such a transaction is neither a gift nor an exchange nor a hypothecation nor a loan. It is a transfer of property from one person to another. There is consideration for the transfer. There is assent. The law presumes the assent when there is transfer of goods from one to the other. Fourth, a sale may not require the consensual element and that there may, in truth, be a compulsory sale of property with which the owner is compelled to part for a price against his will and the effect of the statute in such a case is to say that the absence of the transferor's consent does not matter and the sale is to proceed without it. In truth, transfer, is brought into being which ex facie in all its essential characteristics is a transfer of sale. Fifth, delimiting areas for transactions or denoting parties or denoting price for transactions are all within the area of individual freedom of contract with limited choice by reason of ensuring the greatest good for the greatest number of achieving proper supply at standard or fair price to eliminate the evils of hoarding and scarcity on the one hand and ensuring availability on the other. Sixth, after all the transactions in substance represent the outgoing of the business

and the price would come into computation of profits."

26. One other important aspect to be noted is that though the main judgment of this Court in Vishnu Agencies case [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449 : 42 STC 31] dealt with West Bengal Cement Control Act by the same reasonings, this Court has rejected similar arguments relating to transactions under the A. P. Paddy Procurement (Levy) Order. In other words, the ratio laid down by this Court in respect of control orders was applied to the issues raised under levy orders. Therefore, the distinction sought to be made by the learned counsel appearing for the appellant that the subsequent judgments of larger benches of this Court are relating to control orders and they do not apply to levy orders is without substance. We have noticed that the latter trend in the judgments of this Court in particular the Coffee Board case [(1988) 3 SCC 263 : 1988 SCC (Tax) 308] was not making out any serious distinction between the transactions under the control orders on the one hand and they levy orders on the other.

27. We would also like to emphasise one other relevant factor at this stage which has also been noticed by the High Court. Placing reliance on the averments in para 13 of the counter-affidavit filed on behalf of the FCI, the learned counsel appearing for the State before the High Court pointed out that it was open to the FCI to reject the foodgrains offered by the State Government if the FCI thought that the foodgrains did not conform to the standard of quality as required by it. The relevant averment made in para 13 of the counter-affidavit was to the effect that the FCI had rejected 142 MT of wheat which was offered by the State Government. This shows that the FCI had reserved the right to accept or reject the offer of the State. This also negatives the contention of the learned counsel appearing for the appellants that the transaction in question is one single integrated process and there is no break in it.

28. On facts and in the light of observations of the Full Bench of the Allahabad High Court (supra) we are satisfied that some area of consensual arrangement and some field for volition is left untouched by the legislations in all disputed transactions. The disputed transactions are sales, may be, under the compulsion of a statute. Nevertheless, they are sales exigible to tax. Whatever coercive force is used to bring about the transactions, the same must be traced to legislation and not to the State Government as a party to such transactions.

29. We, therefore, answer the principal common point holding that the levy procurement is a sale/purchase and therefore, falls within the purview of Entry 54 List II of the Seventh Schedule to the Constitution. The States were competent to levy sales/purchase tax on such transactions. In the light of the rulings of this Court referred to above in detail, we are unable to agree with the submission of the learned Senior Counsel for the appellants that there was no area left for consensual agreement in the parties to the procurement transactions. The view taken by the Full Bench of the Allahabad High Court in Ram Bilas Ram Gopal case [AIR 1970 All 518 : 24 STC 508 : 1969 All LJ 424] is the correct view, and the High Court of Allahabad (Lucknow Bench) was right in applying the same in the judgment under appeal. We also hold that the view of the Punjab and Haryana High Court challenged before us in some of these cases taking a different view does not lay down the correct law. To put the matter beyond controversy, we hold, with respect, that the decision in Chitter Mal case [(1970) 3 SCC 809] is no longer good law in the light of later Bench decisions of this Court referred to above.

30. Now coming to the second proposition regarding the constitutionality of Explanation II added to Section 3-D(1) of the U. P. Sales Tax Act, it must be answered against the assessee following our answer to Proposition 1 and in favour of the Revenue. We have held that the transactions in question

are all sales and exigible to tax under the State Sales Tax Act. The contention that the Explanation newly added was ultra vires Entry 54 List II of the Seventh Schedule to the Constitution, on the assumption that the disputed transactions are not sales and, therefore, by a fiction the impugned explanation cannot deem a sale which is not a sale, is without substance. The learned counsel fairly concedes that it is open to the State Legislature to shape a point at which tax is levied. It may be equally permissible to the Legislature to treat a particular sale or purchase as the first sale or purchase, but it cannot by legislative device or fiction of law make something as a sale/purchase which in fact is not. This argument has to fail in view of our answer to Proposition 1 in favour of the Revenue. We therefore, do not find any substance in Proposition 2 advanced by the learned Senior Counsel for the appellants.

31. Regarding the third proposition concerning retrospective effect and consequently, compelling the appellants to pay tax twice on the same transaction, the learned counsel appearing for the State has filed a written note explaining the position in the following manner :

> "2. From 15-11-1971 to 18-5-1973, on the one hand the State Government and its agencies were liable to pay tax their purchase and on the other hand the Food Corporation of India was also liable to pay tax on its purchase as tax on foodgrains was at all points of purchases. Therefore, Explanation II of Section 3-D(1) of the U. P. Sales Tax Act which deals only with first purchase does not affect this period.
>
> From 2-9-1976 to 30-4-1977 tax on foodgrains was at the point of sale to consumer. Explanation II of Section 3-D(1) of the U. P. Sales Tax Act, which deals only with first purchase does not affect this period. However, if any tax has been levied upon the Food Corporation of India for this period, it is on account of their failure to supply the requisite forms etc. whereupon the liability under the law devolves on them. There is no challenge specifically to any such assessment.

3. For the period commencing from 1968-69 and afterwards (excluding the period 15-11-1971 to 18-5-1973 and 2-9-1976 to 30-4-1977) provision of Explanation II of Section 3-(D) (1) is applicable because this Explanation II in Section 3-D(1) has been inserted with complete retrospective effect by the U. P. Sales Tax (Amendment and Validation) Act, 1976 (U. P. Act. No. 23 of 1976) published on 20-5-1976. Therefore, the Food Corporation of India had been taxed rightly because under the provision of Explanation II of Section 3-D(1), the tax is collected only at one point viz. from the Food Corporation of India. Credit is however given where the Food Corporation of India furnishes proof that it has already paid tax to Food Department (RFCs) and its agencies and they (Food Department and its agencies) have deposited that tax. By this procedure assessing authority has given credit of the following sums :

> #----------Year Amount of Tax (Rs.)----------1969-70 931249.921971-72 2132428.631972-73 8059065.00 ---------- Total 11122743.55 ----------##
>
> In future also if the Food Corporation of India gives the proof that it has paid further tax to the Food Department (RFCs) and its agencies and they have deposited that tax to Sales Tax Department (excluding the period between 15-11-1971 to 18-5-1973 because in this period tax was not at all points purchases) the above procedure will be followed and after verification benefit of the deposit of tax will be given to the Food

Corporation of India.

Thus, there is no question of multiple taxation for any period other than 15-11-1971 to 18-5-1973."

32. In view of the above, the appellants can work out their remedy before the authorities concerned in accordance with law. There is nothing to be decided by this Court.

33. Now coming to the fourth proposition, the grievance appears to be that the appellant has been singled out for harsh treatment and there was no other dealer in foodgrains in the State of U. P. whose annual turnover would exceed Rs. 10 crores. It is now well settled that it is within the competency of the State Legislature to classify the dealers and to impose surcharge upon those who were placed in one category taking into consideration their economic superiority. A classification on the basis of gross turnover was held by this Court in the earlier case as reasonable one vide Hoechst Pharmaceuticals Ltd. v. State of Bihar [(1983) 4 SCC 45 : 1983 SCC (Tax) 248 : AIR 1983 SC 1019].

34. We do not think that we should spend more time on this as the High Court had dealt with this issue fairly elaborately and we see no reason to differ from the view taken by the High Court. Accordingly, the fourth proposition also is answered against the appellant. We have already dealt with the fifth and sixth propositions.

35. There is a group of special leave petitions preferred by millers. They challenged before the High Court the demand of market fee under the U. P. Krishi Utpadan Mandi Adhiniyam, 1964 on rice. The basis of their challenge was that there was no sale to demand the market fee when the rice was procured under the levy orders. According to the appellants in these matters there was compulsory acquisition of stocks under the levy orders and therefore, there was no sale. In the earlier paras, we have dealt with and have arrived at a finding that the disputed transactions are sales. The same view was taken by the High Court and consequently, the writ petitions filed by the millers were dismissed. We affirm the view of the High Court.

36. The Food Corporation of India have distributed fertilizers to the State Governments/their nominees under the Fertilizer (Control) Order. The levy of sales tax on such distribution of fertilizers was challenged by the Food Corporation of India. The High Courts of Andhra Pradesh and Kerala upheld the levy and aggrieved by that, the Food Corporation of India have filed civil appeals. The argument advanced before the High Courts on behalf of the FCI was that in the distribution of fertilizers, the FCI was discharging a statutory obligation vested in it under the Control Order and there is no element of volition or consensus of agreement in those transactions. This was negatived by the High Courts holdings that there is no provision in the Control Order excluding the exercise of volition or the freedom of contract totally. Only the price of fertilizers was controlled, quoted standard has been prescribed for mixture of fertilizers and persons carrying on the business of selling fertilizers are required to obtain licences. It was also noticed by the High Court that there was no statutory compulsion in the matter of sale or purchase of fertilizers and parties are left to enter into consensual contractual agreement in the exercise of their volition subject only to the restrictions regarding price fixation, quota requirements etc.

37. We have in the earlier paras noticed that the appellants have conceded that there are sales in the transactions falling under control orders. The challenge was only regarding transaction falling under levy orders. We have held that the transaction falling under levy orders would amount to sales.

Therefore, we have no difficulty or hesitation in approving the view taken by the High Court that the activity of distribution of fertilizers amounts to sale exigible to sales tax.

38. We have noticed in the course of the discussion that the Punjab and Haryana High Court has taken a different view and we have also held that the view taken by the Punjab and Haryana High Court was not the correct one. The State of Punjab aggrieved by the decision of the Punjab and Haryana High Court has filled appeals. Our discussion concerning the six propositions would equally apply to the appeals filed by the State of Punjab and one additional point arises in the appeals filed by the State of Punjab, namely, whether the gunny bags used in the course of the disputed transactions as a packing material are liable to be included in the taxable turnover or not ? The Punjab and Haryana High Court held that the gunny bags in these transactions are not exigible to tax as the contents, namely, rice/paddy are not liable to tax as there was no sale at all. An additional ground given by the High Court was that there was nothing to show whether there was any agreement between the parties for the sale of gunny bags. Now that we have held that the disputed transactions are exigible to tax, one reason given by the High Court as mentioned above, cannot be supported. Further, the facts are not clear regarding the agreement. In the circumstances, we consider that the matter has to be left open to be decided by the Assessing Officer while finalising the assessment in the light of the judgment.

39. In the result all the civil appeals except Civil Appeals Nos. 890, 892, 893 and 1995 of 1987 filed by the State of Punjab and Haryana are dismissed. The appeals filed by the State Punjab and Haryana are allowed as indicated above. There will be no order as to costs.

Judgment delivered on January 28, 1997

The issue as to who has to pay the market fee has been argued and answered by the High Court but was argued before us. Hence, it was not decided. Therefore, the civil appeals arising out of SLPs (C) Nos. 8772-74 of 1987, 6775, 7477, 7477, 8541 and 13131 of 1991 and 15719 of 1994 preferred by the Rice Millers will be posted for further arguments on this issue in the Court.