CIVIL MISCELLANEOUS

Before R. S. Narula, Chief Justict and Prem Chand Jain, J.

THE FOOD CORPORATION OF INDIA AND ANOTHER,—*Petitioners.*

versus

STATE OF PUNJAB ETC.,—*Respondents.*

Civil Writ No. 4066 of 1073.

May 17, 1975.

Food Corporation Act (XXXVII of 1964)—Essential Commodities Act (X of 1955)—Sections 3(2) (f) and 5—Punjab Rice Procurement (Levy) Order 1958—Clause 3—Central Sales Tax Act (LXXIV of 1956)—Section 2(b)—Arrangement between the Central and State Governments for supply of surplus foodgrains to the Corporation—State Government under such arrangement procuring rice under the Levy Order—Delivery of such rice to the Food Corporation of India for distribution in the deficit States—Corporation paying in advance the price fixed by the Central Government and also establishment charges—State Government—Whether an agent of the Corporation—Corporation—Whether a 'dealer'—Procurement of rice under the levy order—Whether constitutes a sale and therefore taxable.

Held, that by an agency relationship, the agent is invested by law with a facsimile of the principal's own power. In respect of the making of a contract the agent, in effect, acts in such a way that he produces the same result as if the principal had acted personally and the agent had never appeared on the scene at all. The power of the agent when exercised results in liability on the part of the principal and agent alike—though the liabilities differ. The State Government or its officers while procuring rice do not represent the Food Corporation of India. The procurement is on the basis of the Punjab Rice Procurement (Levy) Order 1958 that is promulgated in exercise of the delegated power by the State under section 5 of the Essential Commodities Act 1955. The State during the course of procurement cannot in any manner affect the position of the Corporation by making any contract with the strangers, that is, the dealers or the millers nor can the dealers or the millers have any grouse against the Corporation. Thus while procuring rice under the Levy Order the State Government does not act as an agent of the Corporation. (Para 13).

Held, that under an arrangement between the Central and the State Governments, the Corporation is a recipient of the foodgrains

from the State Governments and to that extent the Corporation is not a dealer. Under the Levy Order, the foodgrains are procured by the State Government and out of the procured foodgrains certain percentage agreed upon between the Central Government and the State Governments is passed on to the Corporation for further distribution or allocation to the deficit States. Price is specified at which rice is to be procured under the Levy Order by the State Government and the same is passed on to the Corporation on that price. The Corporation in respect of the rice procured under the Levy Order has no say at all and is obliged to take rice for sending it on to the deficit States at the prices fixed by the Central Government and that over and above this price, the State Governments are only entitled to the establishment charges and the Corporation has no profit motive. The expression "business" in the definition of 'dealer' contained in section 2(b) of the Central Sales Tax Act 1956 though extensively used is a word of indefinite import and in taxing statutes it is used in the sense of an occupation or profession which occupies the time, attention and labour of a person, normally with the object of making profit and to regard an activity as business there must be a course of dealings either actually continued or contemplated to be continued with a profit motive. The Corporation while carrying out the policy of the Central Government for distributing foodgrains to the deficit States after receiving the same from the surplus States is not doing business with the object of making profit. After the procurement of rice, the Corporation receives its share as agreed upon between the Government of India and the Governments of the respective States. The Corporation has no voice in the matter at all and is only a recipient of the foodgrains from the surplus States. The entire policy is determined at the highest level between the Central Government and the State Governments. So far as the foodgrains under the Levy Order are concerned the Corporation does not act independently. Since the Corporation has no say of any kind in the matter the activity cannot be described as a business. Thus the Corporation is not a 'dealer' within the meaning of Central Sales Tax Act 1956.

(Paras 17 and 18)

Held, that the Act of procuring rice under the Levy Order does not constitute sale or in other words the transaction of sale of rice under the Levy Order by millers and the dealers to the State is not a taxable event. Thus the procurement of rice by the State under the Levy Order does not constitute sale and is therefore not taxable.

(Paras 19 and 22)

Petition under Articles 226/227 of the Constitution of India praying that a writ in the nature of Certiorari, Mandamus, Prohibition or any other appropriate writ, order or direction be issued quashing the assessments dated 28th March, 1973 (Annexure 'F') and the demand notices issued therein and declare that no sales tax

is imposable on any of the transaction right from the stage of procurement or rice from the millers and the licensed dealers by the State Government or its officers upto the stage of delivery of the said procured rice to the depots of the Corporation outside the State of Punjab and commanding the respondents not to recover any sales tax either under the Punjab General Sales Tax Act 1948 or Central Sales Tax Act 1956 in pursuance of the assessment orders (Annexure F) and dmand noices issued thereunder and prohibiting the State Government respondent No. 1 herein or any of its officer including respondent No. 2 herein from demanding any sales tax in pursuance of the said assessment orders (Annexure 'F') and demand notices issued thereunder and to refund to the Corporation the sum of Rs. 1,93,74,565.84 being the sales tax illegally recovered by the Sales Tax Authorities from respondent No. 2 and paid by the Corporation to the respondent No. 2 in pursuance of their demand of reimbursement of that tax.

M. C. Chagla with D. S. Nehra and Arun Nehra, Advocates, *for the Petitioners.*

M. N. Phadke, Advocate with Mr. R. N. Narula, Advocate *for respondents* 1, 4 *to* 10.

JAIN, J.—(1) This judgment and order of ours would dispose of Civil Writs Nos. 4065 and 4066 of 1973 and Civil Writ No. 5660 of 1974 as common question of law arises in all these petitions. In order to appreciate the contentions raised before us certain salient features from Civil Writ No. 4066 of 1973 may be noticed.

Food Corporation of India and its Senior Regional Manager, Punjab, Chandigarh, have filed this petition under Articles 226 and 227 of the Constitution of India for the issuance of an appropriate writ, order or direction quashing the assessment orders (Copy Annexure 'F') and the demand notices and for a declaration that no sales-tax is imposable on any of the transactions right from the stage of procurement of rice from the millers and the licensed dealers by the State Government or its officers upto the stage of delivery of the said procured rice to the depots of the Corporation outside the State of Punjab. A further prayer has been made in the nature of the issuance of a writ of *mandamus* commanding the respondents not to recover any sales-tax either under the Punjab General Sales Tax Act, 1948, or the Central Sales Tax Act, 1956, in

pursuance of the assessment orders (Annexure 'F') and demand notices issued thereunder.

(2) Food Corporation of India (hereinafter referred to as the Corporation) was established under the Food Corporation Act, 1964 (Act No. 37 of 1964) (hereinafter referred to as the Act). On 27th October, 1958, the Governor of the then State of Punjab with the prior concurrence of the Central Government issued an order known as the Punjab Rice Procurement Levy Order, 1958 (hereinafter referred to as the Levy Order).

(3) It is stated in the petition that necessary funds for making the purchases under the Levy Order were made available by the Corporation to the Director of Food and Supplies, State of Punjab, to the extent such funds were required for acquisition of rice to be delivered to the Central Pool, under the supervision and control of the Corporation. The District Food and Supplies Controllers of the State of Punjab used to send to the Director of Food and Supplies, respondent No. 2 herein, daily accounts of purchase of rice made from the licensed dealers and licensed millers and the Director of Food and Supplies, respondent No. 2, in turn, transferred to the Corporation the rice procured for and on behalf of the Corporation along with the sale bills issued by the licensed millers and licensed dealers in his favour. No separate bill was sent either by respondent No. 1 or respondent No. 2 to the Corporation in respect of the stocks of rice delivered or transferred to the Corporation. The State Government through the agency of its Director of Food and Supplies, respondent No. 2, used to make the necessary adjustments against the funds made available to it by the Corporation for the amount spent by them as price of the rice procured for and on behalf of the Corporation and also for the establishment and other incidental expenses incurred for the said procurement. Besides the procurement of rice under the provisions of the Levy Order, the Corporation used to purchase rice directly from the State of Punjab and in all such cases regular sale bills used to be made by the Director of Food and Supplies, respondent No. 2. The acceptance bill also used to be issued by the officers of the State of Punjab after rice was procured from the growers and the millers. In this manner the Corporation purchased rice through the agency of the State Government, that is, respondent No. 2. After the rice was thus procured by the Corporation through the agency of respondent No. 2, necessary adjustments towards the payment of

price out of the advances made by the Corporation used to be made and the unspent balance at the close of the procurement season used to be refunded to the Corporation. Thus the rice was procured directly by the Corporation through the agency of the State Government. The State Government and its officers acted as agents for the Corporation for the purpose of procuring and despatching rice from the State of Punjab. For the service rendered the State Government was reimbursed for the establishment and other charges incurred by it for procurement of rice. The Corporation had to use the agency of the State Government because it was the State Government alone that could procure rice under the Levy Order. The procurement of rice made by the Corporation through the agency of the Punjab State was not a taxable event. It was not a sale of rice by the millers or the dealers to the State Government or to the Corporation and no sales-tax was payable on the transaction of procurement of rice from the millers and the dealers by the Punjab State or its officers and the Corporation. The despatch of rice, which belonged to the Corporation, from the State of Punjab to depots outside the State of Punjab, was also not a taxable event because in effect the Corporation transported its own goods from the State of Punjab to places outside the State of Punjab. A mere transfer of goods by the owner from one place to another does not amount to sale.

(4) It is further averred that the whole scheme of the Levy Order and the activities of purchase of rice for the Central Pool and its distribution in the deficit States in the country would show that neither the Corporation nor the State Government had any profit making motive; prices were fixed by the State Government with the prior approval of the Central Government, at which rice had to be procured. The Corporation was to procure rice from the surplus States for distribution in the deficit States to overcome the acute shortage of rice in those states. The activities undertaken by the State Government and the Corporation thus being only welfare activities for the good of the common man of the country as a whole, cannot make the State Government or its Departments or the Corporation a dealer. In the petition some other reasons have also been mentioned for the proposition that no tax was leviable.

(5) It is also averred that respondents Nos. 4 to 8 made assessments on respondent No. 2 as well as against the Corporation and

the aggregate tax demanded by the authorities was Rs. 1,93,74,565.84. A chart showing the amount of tax yearwise is Annexure 'E' to the petition. The State Government and the Director, Food and Supplies, Punjab, then called upon the Corporation to pay the sales-tax demanded by the Assessing Authority. The Corporation resisted the demand saying that no tax in law could be imposed on any of the transactions and that the levy and imposition of the sales-tax was illegal, void and without jurisdiction. Feeling aggrieved from the assessment order, respondent No. 2 (with great reluctance as has been alleged in the petition) preferred appeals and, during the course of arguments, we were informed by Mr. Chagla that the said appeals have been withdrawn. Copies of the assessment orders have been annexed with the petition as annexures 'F'. It is averred that respondent No. 2 is reluctant and is in no mood to prosecute the appeals with the result that the present writ petition has been filed calling in question the legality and propriety of the assessment orders and the demand notices issued for the recovery of the sales-tax.

(6) Written Statement has been filed on behalf of respondents Nos. 1 and 4 to 10 by Shri G. S. Sekhon, Excise and Taxation Officer, in the shape of an affidavit in which, besides raising a preliminary objection, the material averments made in the petition have been controverted. Replication has been filed in the shape of an affidavit by the Senior Regional Manager (incharge), Punjab Region, Chandigarh, on behalf of the petitioners in which the stand taken in the petition has been reiterated. Respondents Nos. 1 and 4 to 10 also chose to file a reply to the replication in the shape of an affidavit of Shri G. S. Sekhon which has been placed on the record.

(7) Before I advert to the merits of the controversy, it may be observed that Civil Writ No. 4066 of 1973 and Civil Writ No. 5660 of 1974 have been filed against the State of Punjab, while Civil Writ No. 4065 of 1973 has been preferred against the State of Haryana. In the cases relating to the State of Punjab, the main stand on behalf of the State is that the Corporation is liable to re-imburse the State for the tax which it has to pay on the purchase of rice from the millers or dealers under the Levy Order and that the Corporation is also liable to pay tax on the sales made by it to the other States after purchasing rice from the State of Punjab.

(8) So far as the State of Haryana is concerned, there is no dispute that rice was procured for the Corporation but the incidence of tax is only so far as it relates to inter-State sales, that is, after the procurement of the rice for the Corporation, when the same is sold to the other States. Mr. Chagla, Senior Advocate, learned counsel for the Petitioners, contended that the procurement was made by respondents Nos. 2 and 3 as agents of the Food Corporation of India and hence the assessment, if at all, could have been made on the Corporation and not on respondents Nos. 2 and 3. In the alternative, it was submitted by the learned counsel that if it is held that in the strict legal sense respondents Nos. 2 and 3 were not the agents of the Corporation, then also on the basis of the material available on the file, the Corporation is entitled to a finding in its favour that there was an arrangement between the Corporation and the States under which respondents Nos. 2 and 3 procured rice for the benefit and use of the Corporation.

(9) On the other hand, Mr. Phadke, Senior Advocate, learned counsel for the State and the Assessing Authorities (except respondents Nos. 2 and 3) vehemently contended that the procurement was not made by respondents Nos. 2 and 3 as agents of the Corporation and that the plea of the Corporation that respondents Nos. 2 and 3 were the agents of the Corporation or that under some arrangement rice was procured for the Corporation, is wholly devoid of any legal basis.

(10) On the respective contentions of the learned counsel for the parties, the first question that arises for determination is, whether the procurement of rice was made by respondents Nos. 2 and 3 as agents of the Corporation.

(11) In order to substantiate the plea of Agency, Mr. Chagla, learned counsel, submitted that it was admitted by respondents Nos. 2 and 3 during the assessment proceedings that they had been acting as agents of the Food Corporation of India. Our attention was drawn to Annexure 'F-10", wherein it has been stated thus :

> "It has been argued on behalf of the dealer by Shri Jaswant Singh, Assistant Accounts Officer of the Directorate of Food & Supplies, Punjab, who appeared before the undersigned on 27th November, 1972 that these purchases were

made under the Rice Procurement (Levy) Order, 1958 and they have been purchasing as an agent of the Food Corporation of India."

Again, in the same order, it has been stated as follows:—

"The second argument put forth by the assessee is that he has been acting as an agent of the Food Corporation of India; therefore, he is not liable to pay tax in respect of purchases and sales of rice procured under the Rice Procurement (Levy) Order, 1958, on behalf of the Food Corporation of India."

Reference was also made to the assessment order, copy Annexure "F-12", wherein again it has been stated thus :—

"It has been argued on behalf of the dealer that these purchases were made under Rice Procurement (Levy) Order, 1958 and they have been purchasing as an agent of the Food Corporation of India."

The learned counsel submitted that it is not only in the orders of the Assessing Authority that the aforesaid stand was taken, but even while filing appeal against the order of the Assessing Authority, in the grounds of Appeal, the plea of Agency was specifically taken. The learned counsel drew our attention to the specific grounds which read as under :—

"(i) That the assessee (appellant) is acting as an agent of the Food Corporation of India for the procurement of rice for them under the Levy Order. Procurement is done with the funds of the F.C.I., Principal and necessary accounts thereof are rendered to them after making payments to the traders. For the services rendered as an agent only administrative charges are got from the principal (FCI) and Government funds are not involved.

(ii) That the procedure of issue of form ST XXII by the appellant using the registration numbers of the Food Corporation of India being the principal in respect of procurement of rice on their behalf of the traders covering such purchases was duly settled with the approval of the Excise

and Taxation Department. Copies of the relevant papers are enclosed in this behalf ;

(iii) * * * *

(iv) * * * Thus, it is clear that Punjab Government having no peculiar interest and investment in the matter is only acting as an agent, getting remuneration for the services rendered by it as such, and getting supply of goods to the principal against its investment. ... ...

(v) * * * Moreover, the Punjab Government only being an agent was not required to reflect the procurement of rice in its quarterly returns of turn-over since such transaction of procurement having already been shown by the Principal in its own returns.

(vi) * * * *

(12) In order to further strengthen his contention, the learned counsel submitted that respondents Nos. 2 and 3 did not have the courage of controverting the plea of Agency as no written statement has been filed on their behalf and as such on the basis of the admission of respondents Nos. 2 and 3, who are the officers of the State, a finding in favour of the Corporation could straightaway be returned that the procurement was made by respondents Nos. 2 and 3 as agents of the Food Corparation of India.

(13) In order to test the correctness of the contention of Shri Chagla, it has first to be seen as to what is the legal import of the word 'Agency'. At the outset it may be observed that it would not at all be necessary to deal with the law of Agency in *extenso* for the purpose of deciding the issue before us and it would be sufficient to keep in mind the simple generally known definition of 'Agency', which may be summarised, thus :

'Agency' is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as

> to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

In the Digest of English Law an agent has been defined as follows :—

> "a person who has authority express or implied to act on behalf of another person (the 'principal') and to bind that other person by his acts or defaults."

By the agency relationship, the agent is invested by law with a facsimile of the principal's own power. In respect of the making of a contract the agent, in effect, acts in such a way that he produces the same result as if the principal had acted personally and the agent had never appeared on the scene at all. The power of the agent when exercised results in liability on the part of the principal and agent alike—though the liabilities differ. Keeping in view this tentative brief description of 'agency', I pose a question to myself whether on the alleged facts in the petition (though controverted by the contesting respondents), the test of 'agency', as it is understood in strict legal sense, is satisfied ? In my view, the answer has to be in the negative. The State or its officers, while procuring rice, do not represent the Food Corporation of India. The procurement is on the basis of the Levy Order that was promulgated in exercise of the delegated power, by the State under section 5 of the Essential Commodities Act. While procuring rice, the State does not represent the Corporation nor does it act as an agent of the Corporation. The State during the course of procurement cannot in any manner affect the position of the Corporation by making any Contract with the strangers, that is, the dealers or the millers nor can the dealers or the millers have any grouse against the Corporation. It is correct that before the Assessing Authority the stand taken by the officers of the State was that the procurement was made by them as agents of the Corporation and so also there is a positive admission on oath in the grounds of appeal in that respect; but these factors by themselves would not warrant a finding in favour of the Corporation that the officers procured rice as agents of the Corporation, if such a view is not legally tenable. On the basis of the admission alone, I am not inclined to hold that there is a relationship of principal and agent between the Corporation and the officers of the State in the strict legal sense. In this view of the matter, the contention of

Mr. Chagla that there is relationship of principal and agent between the Corporation and the State and its officers, is repelled.

(14) This brings me to the contention of Mr. Chagla, which was advanced in the alternative, that even if in the strict legal sense the State and its officers were not agents of the Corporation, then also, under the Levy Order, the procurement was made for the Corporation and in that way the State procured rice for the Corporation and there was no direct sale in favour of the State Government or its officers by the dealers or the millers. But I do not propose to deal with this contention at this stage which, if necessary, would be considered in the later part of the judgment. At this stage I am adverting to his other two contentions on which the fate of this case hinges. It was sought to be argued by Mr. Chagla that for the purpose of this transaction, the petitioner is not a dealer nor are respondents Nos. 2 and 3, that the procurement of rice under the Levy Order is not a taxable event as it is not a sale and that the transaction between the State Government or its officers and the Corporation is not a sale and is merely a transfer of rice procured under the Levy Order.

(15) Before dealing with these contentions certain field has to be cleared and for that purpose it would be necessary to advert to the object and purpose for which the Corporation was created and also to the aims and objects of the Essential Commodities Act and the Levy Order. The Food Corporation of India is a statutory body and was established under the Food Corporation Act, 1964 (Act No. 37 of 1964). Prior to the Corporation, the functions of procurement of rice, paddy and other foodgrains through the agency of the Surplus State Governments and the distribution of the foodgrains so procured, was being done by the Government of India. The object of establishing the Food Corporation of India, besides other reasons, was to transfer the work relating to the storage, movement, distribution and sale of foodgrains, which was being performed by the Regional Directorate under the Food Department of India. By establishing Corporation, it was treated to be an essential and important subject in the implementation of Government food policy and the Corporation was treated to be first organised attempt to take up State trading in foodstuffs on an appreciable scale.

(16) Reference may also be made to the Essential Commodities Act, 1955 (10 of 1955). This Act was enforced in order to provide in

the interest of general public for the control of the production, supply and distribution of, and trade and commerce in certain commodities. Section 3 of this Act gives power to control, production, supply, distribution, etc. of essential commodities and in order to carry out this purpose, power is given to the Central Government to issue an order if in its opinion it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices or for securing any essential commodity for the defence of India or the efficient conduct of military operations. Clause (f) of sub-section (2) of section 3 would be relevant for our purpose and reads as under :—

> "for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or a State Government or to such other person or class of persons and in such circumstances as may be specified in the order."

Section 5 provides that the Central Government may by notified Order, direct that the power to make orders or issue notification under section 3, shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by — (a) such officer or authority subordinate to the Central Government; or (b) such State Government or such officer or authority subordinate to the State Government as may be specified in the directions. In exercise of this delegated power under section 5, the Government of the State of Punjab issued the Punjab Rice Procurement (Levy) Order, 1958, and clause 3 of the same is in the following terms :—

(1) Every licensed miller shall sell to the State Government at the controlled prices,—

(a) 75 per cent of the quantity of rice held in stock by him at the commencement of this order; and

(b) 95 per cent of the total quantity of Bold Group Rice and 90 per cent of the total quantity of Slender Group Rice (as mentioned in Schedule I) produced or manufactured by him in his rice mill, every day beginning with the date of commencement of the Punjab Rice

Procurement (Levy) (First Amendment) Order, 1972 until such time as the State Government otherwise directs.

(2) Every licensed dealer shall sell to the State Government at the controlled prices :—

(a) 75 per cent of the quantity of rice held in stock by him at the commencement of this order; and

(b) 95 per cent of the total quantity of Bold Group Rice and 90 per cent of the total quantity of Slender Group Rice (as mentioned in Schedule I) got milled by him every day out of his stock of paddy beginning with the date of commencement of the Punjab Rice Procurement (Levy) (First Amendment) Order, 1972 until such time as the State Government otherwise directs:

Provided that nothing contained in this sub-clause shall apply to the units and institutions certified by the Punjab Khadi and Village Industries Board to be engaged in the production of hand-pounder rice.

(3) The rice required to be sold to the State Government under sub-clauses (1) and (2) shall be delivered by the licensed miller or the licensed dealer to the Director or to such other person as may be authorised by the Director to take delivery on his behalf.

(4) The State Government may, by general orders notified in the Official Gazette, vary the percentage of rice required to be sold to the State Government under this order.

(5) Notwithstanding anything contained in the foregoing sub-clauses the State Government may, by notification, specify the varieties of rice which are required to be sold to the State Government under this clause and may likewise specify the varieties of rice which are not required to be so sold."

(17) There is no dispute that the Corporation has been registered as a 'dealer'. What was contended by Mr. Chagla, was that the

Corporation had two capacities, viz; (1) when it makes purchases directly from the State Government or other persons and (2) when it acts as recipient of foodgrains acquired under the Levy Order, from the surplus States in pursuance of the agreement arrived at between the Government of India and the other States. So far as the first capacity is concerned, it is not disputed that the Corporation was liable to pay tax. It may however, be observed that we are not concerned with that capacity of the Corporation in the present case, as the stand of the Corporation is that under an arrangement between the Central and the State Governments, which is binding on the State Governments, the Corporation is recipient of the foodgrains from the State Governments and to that extent the Corporation was not a dealer. According to the learned counsel, what actually happens is that under the Levy Order, the foodgrains are procured by the State Governments and out of the procured foodgrains certain percentage agreed upon between the Central Government and the State Goverments is passed on to the Corporation for further distribution or allocation to the deficit States. According to Mr. Chagla, the price is specified at which rice is to be procured under the Levy Order by the State Government and the same is passed on to the Corporation at that price, that the Corporation, in respect of rice procured under the Levy Order, has no say at all and is obliged to take rice for sending it on to the deficit States at the price fixed by the Central Government, that over and above the price, the State Governments are only entitled to the establishment charges and that the Corporation has no profit motive so far as this transaction is concerned. In our view, there is considerable force in this contention of the learned counsel. The definition of 'dealer' as given in the Central Sales Tax Act, is in the following terms:—

> " 'dealer', means any person who carries on the business of buying or selling goods, and includes a Government which carries on such business."

(18) As observed by their Lordships of the Supreme Court in *The State of Andhra Pradesh* v. *H. Abdul Bakshi and Bros.* (1), the expression "business" though extensively used is a word of indefinite import, that in taxing statutes it is used in the sense of an occupation or profession which occupies the time, attention and labour of a person, normally with the object of making profit, and that to

(1) (1964) 15 S.T.C. 644.

regard an activity as business there must be a course of dealings either actually continued or contemplated to be continued with a profit motive. Thus the question that straightway arises for consideration is whether the Corporation while carrying out the policy of the Central Government in distributing foodgrains to the deficit States after receiving the same from the surplus States, is doing business with the object of making profits, and to my mind the answer has to be in the negative. The State Government under the delegated power has issued the Levy Order. There can be no gainsaying that if the power had not been delegated, then the State Government had no jurisdiction to issue the Levy Order. The Central Government has delegated the power only in order to secure the fulfilment of their policy decision of distribution of foodgrains in the deficit States. After the procurement of rice, the Corporation receives its share as agreed upon between the Government of India and the Governments of the respective States. The Corporation has no voice in the matter at all and is only a recipient of the foodgrains from the surplus States. The entire policy is determined at the highest level between the Central Government and the State Governments. Under that policy, the State Governments are required to part with a specific percentage of the procured foodgrains at a specified price to the Corporation. The price is also not paid by the States; rather it is paid by the Corporation in advance to the States. The States are only entitled to charge certain establishment charges. The Corporation after receiving the foodgrains, passes it on to the deficit States at the same price at which it was procured plus some other sundry charges. So far as the foodgrains under the Levy Order are concerned, the Corporation does not act independently. If a dealer has no say of any kind in the matter, I fail to understand how such a transaction can have any profit motive. It will be a travesty of facts to call it a business so far as the distribution of foodgrains to deficit States by the Corporation is concerned.

(19) Further I find that the act of procuring rice under the Levy Order does not constitute 'sale' or, in other words, the transaction of sale of rice under the Levy Order by the millers and the dealers to the State of Punjab is not a taxable event. A similar question arose before their Lordships of the Supreme Court in *Chittar Mal Narain Das* v. *Commissioner of Sales Tax, U.P.* (2). The

(2) (1970) 26 S. T. C. 344.

facts of that case were that the appellants who were dealers in food-grains, supplied to the Regional Food Controller diverse quantities of wheat in compliance with the provisions of the U.P. Wheat Procurement (Levy) Order, 1959. The Sales Tax Officer levied tax under the U.P. Sales Tax Act on the aggregate of the price of wheat after rejecting the contention raised by the appellants that the wheat supplied was not sold by them to the Controller. In appeal the Assistant Commissioner (Judicial), Sales Tax, held that the turnover resulting from the supplies of wheat was not taxable since there was no 'sale' within the meaning of the U.P. Sales Tax Act, 1948. The order of the Assistant Commissioner was confirmed by the Additional Judge (Revisions), Sales Tax. The Additional Judge (Revisions) Sales Tax, referred the following questions to the High Court of Allahabad for opinion:—

(1) Whether the sales 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) the U.P. Sales Tax Act ?

(2) Whether in the circumstances of the case, the assessees are liable to pay sales tax on the sales made to the Regional Food Controller under the provisions of the U.P. Wheat Procurement (Levy) Order, 1959 ?

(20) The High Court of Allahabad answered the questions in the affirmative. Thereafter, the matter was taken up before their Lordships of the Supreme Court by special leave. Clauses 3 and 4 of the U.P. Wheat Procurement (Levy) Order, 1959, were in the following terms:—

(3) (1) Every licensed dealer shall sell to the State Government at the controlled prices :

(a) Fifty (50) per cent of wheat held in stock by him at the commencement of this order; and

(b) Fifty (50) per cent of wheat procured or purchased by him every day beginning with date of commencement of this Order and until such time as the State Government otherwise directs.

...

(2) The wheat required to be sold to the State Government under sub-clause (1) shall be delivered by the licensed

dealer to the Controller or to such other person as may be authorised by the Controller to take delivery on his behalf.

4. (1) Any Enforcement Officer may, with a view to securing compliance with this Order or to satisfying himself that the Order has been complied with :

(i) enter with such assistance as may be necessary any premises where he has reason to believe that wheat is procured, purchased or stocked ;

(ii) ask of any person all necessary questions ;

(iii) examine any books or documents ;

(iv) search any premises, vehicles, vessels and air-craft and seize wheat in respect of which he has reasons to believe that a contravention of the Order has been, is being, or is about to be committed and thereafter take or authorise the taking of all measures necessary for securing the production of stocks so seized in a court and for their safe custody, pending such production..."

(21) From a bare perusal of these clauses it would be clear that the same are in *pari materia* with the clauses of the Levy Order with which we are concerned in the present case. While dealing with clauses 3 and 4, their Lordships of the Supreme Court observed as follows:—

"Obligation to deliver wheat of the quantity specified arises out of the statute. The Order takes no account of the volition of the licensed dealers and, until the State Government directs otherwise, of the Controller or the authorised officer. The Order imposes an obligation upon the licensed dealer who is defined in clause 2(d) as meaning a person holding a valid licence under the U.P. Food-grains Dealers Licensing Order, 1959, to deliver the quantities of wheat specified in the Order. The State Government is directed by the Order to pay for the wheat supplied at the controlled rate. The source of the obligations to deliver the specified quantities of wheat

and to pay for them is not in any contract, but in the statutory Order. In our judgment clause 3 sets up a machinery for compulsory acquisition by the State Government of stocks of wheat belonging to the licensed dealers. The Order, it is true, makes no provision in respect of the place and manner of supply of wheat and payment of the controlled price. It contains a bald injunction to supply wheat of the specified quantity day after day, and enacts that in default of compliance the dealer is liable to be punished, it does not envisage any consensual arrangement. It does not require the State Government to enter into even an informal contract. A sale predicates a contract of sale of goods between persons competent to contract for a price paid or promised : a transaction in which an obligation to supply goods is imposed, and which does not involve an obligation to enter into a contract cannot be called a 'sale', even if the person supplying goods is declared entitled to the value of goods, which is determined or determinable in the manner prescribed. Assuming that between the licensed dealer and the Controller, there may be some arrangements about the place and manner of delivery of wheat, and the payment of "controlled price", the operation of clause 3 does not on that account become contractual."

(22) Thereafter reference as made to the various judicial pronouncements and ultimately it was held that there was no contract between the assessees and the State pursuant to which goods were sold within the meaning of U.P. Sales Tax Act. Accordingly, the appeals were allowed and the order of the Allahabad High Court was set aside and the answer to the two questions, mentioned above, was returned in the negative. The facts of the case in hand are exactly similar to those of *Chittar Mal's case* and the ratio of that decision squarely applies to the facts of the present case. Applying the law laid down in *Chittar Mal's case* (supra), I have no alternative, but to hold that there was no contract between the millers or the dealers and the State of Punjab or its officers pursuant to which rice was sold with the result that the transaction was not a taxable event and respondents Nos. 2 and 3 could not be made liable to purchase tax by the Assessing Authority.

(23) Mr. Phadke, Senior Advocate, vehemently contended that the Corporation was a dealer and that the transaction between the miller

or the dealer and respondents Nos. 2 and 3 constituted 'sale' and brought out, the following facts in support of that proposition:—

(a) That the Corporation has registered itself as a dealer voluntarily ;

(b) That the Corporation has been filing declaration in forms S.T. XXII ;

(c) That on the basis of these declarations, assessment orders have been made against which appeals have been filed :

(d) That the Corporation purchases foodgrains and thereafter sells the same to others ;

(e) That it was admitted by the Corporation during the course of assessment proceedings that they had purchased rice from the provincial reserve ;

(f) That there is no foundation for creating the artificial capacities that for one transaction it is a dealer, while with regard to another transaction, it is not a dealer ;

(g) That after the purchase of the goods from the dealer or the miller, complete title vested in the State and the State can be divested of that title only when there is a sale in favour of the Corporation ;

(h) That the foodgrains are transferred to the Corporation as a result of an agreement arrived at between the Government and the Corporation ;

(i) That even in this writ petition the Corporation talks of payment of price to the Government ;

(j) That there is no legal compulsion on the Corporation to buy the foodgrains nor is there any obligation cast on the State Governments to sell ;

(k) That there is no pleading that the property though belonging to the Government, has passed on to the Corporation as a result of compulsory acquisition.

(24) It was also contended by Mr. Phadke, that even if it is assumed that the first transaction is not a taxing event, then also the Corporation is liable to be taxed for the transaction between the Government and the Corporation, as the Corporation is a last purchaser in the State.

(25) Mr. Phadke, further sought to argue that *Chattar Mal's case* (supra) did not apply to the facts of the case in hand, that it was within the ratio of the decision in *Salar Jung Sugar Mills Ltd.* v. *State of Mysore and others*, (3), and that if it is held that *Chattar Mal's case* (supra) applied to this case, then the same stood overruled by their Lordships of the Supreme Court in *Salar Jung's case* (supra).

(26) After giving my thoughtful consideration to the entire matter, I have not been able to presuade myself to agree with the contentions advanced by Mr. Phadke. The facts in *Salar Jung's case* (supra) were as follows:

(27) All the States in which sugarcane was grown for the purpose of manufacturing sugar used to levy cess on surgarcane brought into the premises of sugar factory. The Supreme Court in *Diamond Sugar Mills v. State of U.P.* (4) held that section 3 of the U.P. Sugarcane Cess Act, 1956, which empowered the Governor of the State to impose cess on entry of sugarcane into the premises of a factory did not fall within entry 52 of List II and as there was no entry in the State List or in the Concurrent List in which the said Act could fall, it was beyond the legislative competence of the State Legislature. The decision of the Supreme Court was given on 13th December, 1960. The Sugarcane Cess (Validation) Act, 1961, was passed by Parliament validating the imposition or collection of cess on sugarcane under several State enactments before the commencement of the Validation Act of 1961. The Mysore State Legislature imposed tax on sugarcane purchased by sugar factories. By Mysore Act No. 11 of 1961, which came into force on 1st October, 1961, sugarcane was included at serial No. 11-A in the Third Schedule to the Mysore Sales Tax Act, 1957. As a result of the amendment Salar Jung Sugar Mills were subjected to levy of tax on purchase of sugarcane and this levy was challenged by the appellants by filing writ petitions but the same were dismissed. The appellants obtained a certificate from the Mysore High Court and

(3) (1972) 29 Sales Tax Cases 246.

(4) A.I.R. 1961 S.C. 652.

filed appeals in the Supreme Court. At the time of hearing, the appellants raised three principal contentions—

(i) That there was no mutual assent between the appellants and the growers of sugarcane in regard to supply of sugarcane by the growers and the acceptance by the factories and, therefore, there was no purchase and sale of sugarcane ;

(ii) That the appellants were not dealers within the meaning of section 2(k) of the Mysore Sales Tax Act ; and

(iii) That the levy of tax on purchase of sugarcane at different rates in different States was discriminatory and in violation of Article 14 of the Constitution.

After formulating the aforesaid questions, my Lord the Chief Justice of India, who delivered the judgment, noticed various provisions of the relevant statutes and the Sugarcane Control Order and the various decisions given by their Lordships of the Supreme Court, and ultimately observed as follows:—

"The agreement between the factory owner and the sugercane grower furnishes the guide to ascertain the real character of the transaction between the parties. These are the features, The factory agrees to buy. The grower agrees to sell. It is true that 95 per cent of the sugarcane will be sold. The parties have the choice to increase the quantity above 95 per cent. The quantity to be brought and sold is cultivated or to be cultivated by the grower. The delivery is to be at the factory. Delivery will be in such lots, on such dates and at such time as shall be agreed upon. The mode of delivery may also be within the scope of agreement. The price will be the controlled price. The grower can bargain for higher price. The sugarcane grower can ask for payment in advance. Payment may be in cash or in kind. The Sugarcane will be accepted after inspection. There is scope for rejection of goods. Various colums in the agreement indicate the villages where sugarcane is to be cultivated and the names of the varieties of sugarcane to be

cultivated. The last two columns are estimated quantity offered to be delivered and the period of delivery. All these features indicate with unerring accuracy that there is offer, inspection, and appropriation of goods to the contract. The goods will be accepted by the factory after inspection and price will be paid on delivery. The mutual assent is not only implicit but is also explicit.

Another feature in the agreements in the present case is that the goods are unascertained. The agreements speak of inspection of goods. Inspection and appropriation of unascertained goods indicates not only freedom in the formation but also in the performance of contracts. Unascertained goods are distinct from specific or ascertained goods in the sense that future goods include goods not yet in existence or goods in existence but not yet acquired by the seller. It is safe to say that future goods for purposes of passing of property can never be specific. Future goods if and when sufficiently identified might be specific goods. Unascertained goods are not defined by the Sale of Goods Act but they fall into three main categories. First, goods to be manufactured or grown by the seller which are necessarily future goods. Second, generic goods for example, 100 tons of sugarcane or the like which must also be future goods where the seller does not own sufficient goods of the description in question to appropriate to the contract. The third category is an unidentified part of a specific whole, for example 1,000 tons of sugarcane out of a particular lot of 5,000 tons of sugarcane. In the present case sugarcane was to be grown by the grower. Delivery was to be made thereafter. The goods were to be inspected and then paid for. Therefore, in the present case, it would be a sale of unascertained goods. Under section 23 of the Indian Sale of Goods Act when there is a contract of sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. Then again, under section 23 of the Indian Sale of Goods Act where there is a contract for the sale of unascertained or future goods by description when the goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller, with the assent of the buyer

> or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. It is this unconditional appropriation which will pass the property. Again, under section 23 of the Indian Sale of Goods Act where the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal he is deeemd to have unconditionally appropriate the goods to the contract. Therefore, in the present case the goods were to be ascertained by identification, delivery, inspection and unconditional appropriation.

These foregoing features indicate that the transaction in the present case constituted sale within the meaning of sale in section 2(t) of the Mysore Sales Tax Act, 1957. Sale is defined in section 2(t) as follows :—

> "'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge."

(28) The Control Orders are to be kept in the forefront for appreciating the true character of transactions. It is apparent that the area is restricted. The parties are determined by the Order. The minimum price is fixed. The minimum quantity of supply is also regulated. These features do not complete the picture. The entire transaction indicates that the parties agree to buy and sell. The parties choose the terms of delivery. The parties have choice with regard to obtaining supply of a quantity higher than 95 per cent of the yield. The parties can stipulate for payment in advance as well as in cash. A grower may not cultivate and there may not be any yield. A factory may be closed or wound up and may not buy sugarcane. A factory can reject goods after inspection. The combination of all these features indicates that the parties entered into agreement with mutual assent and with volition for transfer of goods in consideration of price. Transactions of purchase and sale may be regulated by schemes and may be liable to restrictions as to the maner or mode of sale. Such restrictions may become necessary by reason of co-ordination between production and distribution in planning the economy of the country. The contention

of the appellants fails. The transactions amount to sales within the meaning of the Mysore Sales Tax Act."

(29) From a perusal of the observations, reproduced above, it would be clear that features on the basis of which it was held that the transactions constituted sales are quite distinct from the features of the Levy Order with which we are concerned as would be evident from the following comparative table:—

COMPARATIVE TABLE

Features in the Salar Jung's case	*Features in the present case*
1. Under the Control Order the sugarcane growers and the factory were required to enter into an agreement for supply and purchase of sugarcane.	No provision for entering into any mutual agreement and no provision in the Levy.
2. The parties had the choice to increase the quantity above 95 per cent.	Order from which any features similar to the ones in *Salar Jung's*
3. The delivery was to be at factory.	case can be spelled out.
4. The delivery would be in such lots, on such dates and at such time as shall be agreed upon.	
5. Mode of delivery may also be within the scope of agreement.	
6. Grower can bargain for higher price.	
7. Sugarcane grower can ask for payment in advance.	
8. Payment may be in cash or kind.	
9. The goods were to be accepted by the factory after inspection and price to be paid on delivery.	

(30) Mr. Phadke tried in vain to persuade us by contending that under the Levy Order there was freedom of contract within the meaning of *Salar Jung's case* on the basis of the following points:—

(1) The dealer or miller may agree to take price lesser than the controlled price by entering into an agreement with the State Government and the Government may also agree to take lesser quantity of rice and thus make more rice available to the dealer to be sold in the market.

(2) The date, the time and place of the delivery is to be settled by agreement between the parties.

(3) Parties may agree that the State may purchase lesser quantity of rice.

(4) The time and the manner of payment is also to be settled by mutual agreement. Government can give advance payment while the dealer may agree to defer payment.

(5) The manner of transporting the goods from the dealer's place to the place of the delivery is also to be mutually agreed between the parties.

(6) There is also power of rejection on the part of the Government if rice does not conform to the quality prescribed in Schedule I.

(7) The obligation of the miller and the dealer to sell the goods under the Levy Order is in essence not compulsory or statutory at all. When the licensed dealer applies and takes out the license, he does so with eyes open and undertakes to comply with all the conditions of the license which include compliance with the conditions of any Levy Order the State may promulgate under the Essential Commodities Act.

(8) There is freedom for miller and dealer not to mill paddy and manufacture rice and for dealer not to buy any rice.

(31) From a perusal of the aforesaid points it would be clear that the similarity sought to be drawn is meaningless and a futile attempt was made in order to bring the present case within the four corners of *Salar Jung's case*. It may be observed at the out set that there is no provision for entering into an agreement under the Levy Order and hence the points of similarity based on agreement lose their force. Further there is no power with the Government to reject the goods as such a question does not arise under the Levy Order. The rice of the quality prescribed in Schedule I has to be taken. In case of rice, which does not fall within Schedule I, the same would not be covered by the Levy Order and the State Government would have no jurisdiction to procure the same. Further I do not agree with Mr. Phadke that the obligation of the miller and the dealer to sell the goods under the Levy Order was in essence not compulsory and statutory at all and that it was only when the dealer applied and took out a licence that he was to comply with all the conditions of the licence which included compliance with the condition of any Levy Order. It is under the Levy Order that an obligation is cast on the dealer to sell the goods and to comply with the terms of the Levy Order, failing which he was liable to prosecution.

(32) It is correct that the Corporation has got itself registered as a dealer, but that fact by itself would not lead to the conclusion that the Corporation is liable to be taxed for the transactions under which it receives foodgrains by virtue of the Levy Order. The Corporation had to get itself registered as a dealer as it had been entering in the market for doing its independent business in which profit motive is involved. I do not agree with Mr. Phadke, that once a person gets himself registered as a dealer, then he is liable to pay tax and that it is not permissible to scrutinise if a particular transaction entered into by such a dealer is liable to be taxed or not. It should be a transaction which has to bear the incidence of taxation and if the dealer can satisfy that a particular transaction is not liable to tax, then the said transaction has to be ignored. It is correct that the Corporation had filed declarations in form ST-XXII and that on the basis of those declarations, assessment order had been made; but again this act of the Corporation would not operate as estoppel nor would it preclude the Corporation from agitating that the authorities had no jurisdiction to assess tax on a particular transaction as the same would not legally be done. The crux of the whole matter is that the transactions entered into in exercise of

the powers under the Levy Order between the miller and the dealer on the one hand and the State on the other and thereafter between the State and the Corporation and then between the Corporation and the other States is one composite process which owes its origin to the arrangement arrived at between the State Government and the Central Government under which the States are required to contribute to the Central pool certain percentage of foodgrains which in turn is passed on to the deficit States through the agency of the Corporation. In this transaction there is no profit motive at any stage nor do the goods vest in the State Government in the sense that it can bargain with the Corporation and dictate its terms, nor does the Corporation act as a dealer in the legal sense when it passes on these goods to the other States.

(33) In this view of the matter, I find that in the present case there is no freedom of contract within the meaning of *Salar Jung's case*, that the element of mutual assent implicit or explicit was non-existent and hence the transactions in the present case do not constitute 'sales', that respondents Nos. 2 and 3 or the State were not liable to pay tax on the transactions which came into being under the Levy Order, that the Corporation does not act as a dealer when it sends the goods to the other States and that no profit motive is involved in the transactions entered into between the Coropration and the deficit States.

(34) At this stage I cannot refrain from observing that a very curious and unfortunate type of controversy has been raised by the two States and the Corporation which is a semi-Government body. The Corporation was established for the purpose of carrying out the policy of the Central Government. The work which was being done earlier to 1964 by the Government of India, is now being performed by the Corporation. If under the Levy Order the foodgrains would have been passed on by the State Governments to the Central pool without raising any such controversy, I fail to understand how by the intervention of the Corporation, the controversy could justifiably be raked up. By raising this controversy, lot of public money has been spent on litigation which could hardly be deemed proper or even necessary.

(35) In all fairness to Mr. Phadke, the preliminary objection that was raised by him is also adverted to. It was sought to be argued by Mr. Phadke that the points involved in these writ petitions should not be determined as the decision of those points involves going into the disputed questions of fact and that the petitioner has availed of the alternate remedy by filing appeals wherein all these questions would be decided. According to the learned counsel in such a situation, the petitioner should not be allowed to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. I am afraid, there is no force in this preliminary objection. From the discussion on merits it would be apparent that the question of jurisdiction of the authorities to impose tax and the liability of the petitioner to pay the same is involved and the same has been decided on the basis of the admitted or patent facts. In this situation no useful purpose would have been served to allow the parties to go on litigating at the public expense indefinitely. On the basis of the facts alleged in the writ petitions and in the situation in which due to the attitude of the State Government, the Corporation has been put, there was every justification for the Corporation to have approached this Court under Article 226 of the Constitution. The preliminary objection thus has no merit.

(36) For the reasons recorded above, I allow these writ petitions (C.Ws. 4065 and 4066 of 1973 and 5660 of 1974), with costs and quash—

(i) the assessment order, Annexure 'F' and the demand notices issued thereunder in Civil Writ No. 4066 of 1973 ;

(ii) the notices, Annexures P-1 and P-2, and the demands created by respondent No. 5, Annexures P-3 and P-4, in Civil Writ No. 5660 of 1974; and

(iii) the assessment orders, Annexure 'F' and the demand notices issued thereunder in Civil Writ No. 4065 of 1973.

Counsel fee Rs. 500 in each case.

R. S. NARULA, Chief Justice.—I agree.

N. K. S.

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