the prescribed one. It is a thing of common knowledge that the front portions of hundreds of buildings abutting on the main roads in various sectors are being used for business or commercial purposes which is being done with the tacit consent of the Estate Officer. Had that been not so, the Estate Officer would have to take action against all such transferees because it would not be open to him to pick and choose and operate the provisions of the law and the rules in such a manner that it results in a discriminatory treatment to the hundreds of transferees similarly situated. We would, therefore, hold that the provisions of clauses (g) and (i) of section 41 of the Act would disentitle the plaintiff to claim *ad interim* injunction restraining the defendant from committing a breach in which he has acquiesced or from doing business on the premises for which it was let out or was being carried on from the very inception of the transaction. Accordingly these revisions are allowed, the orders of the learned Additional District Judge set aside and those of the trial Court restored. No costs.

N. K. S.

FULL BENCH

Before; P. C. Jain, C.J., D. S. Tewatia & I. S. Tiwana, JJ.

DEVI DASS GOPAL KISHAN PVT. LTD.,—*Petitioner*

versus

THE STATE OF PUNJAB AND ANOTHER,—*Respondents.*

Civil Writ No. 4883 *of* 1984.

September 26, 1985.

Punjab General Sales Tax Act (XI of 1948)—Sections 2(d), (ff) and (h), 4-B, 5(2)(a)(vi) and schedule 'c'—Registered dealer purchasing goods specified in schedule 'c' from a commission agent who is also a registered dealer—Consideration comprising price of goods and commission thereon paid to the commission agent—Sales tax form XXII also furnished—Acquisition of goods by the registered dealer—Whether could be said to be under a contract of sale—Such acquisition—Whether amounts to a 'purchase'.

Held, that even a Kutcha Arhtia has to be held to be a 'dealer' and the parties who have entered in transaction can be said to be the dealers. If such a dealer purchases the goods from another dealer in his own name on payment of price of the goods, he acquires title to such goods and if thereafter transfers such goods to another dealer for cash or deferred payment or other valuable consideration but not through mortgage, hypothecation, charge or pledge, then such transfer of goods on his part would amount to a sale *qua* him and the acquisition of such goods *qua* the acquiring dealer would amount to a purchase. The amount of consideration received or agreed to be received is totally irrelevant to a determination as to whether the given transaction between the two dealers (that is, between the one who transferred the goods and the other who acquired such goods) is or is not a transaction of 'sale' and 'purchase', that is, it would make no difference that the price charged by the selling dealer from the purchasing dealer was the same, as he had paid to his own selling dealer, or it was less or it was more and if it was more than the price at which dealer agent had purchased, then the amount by which the selling price exceeded the price that he had paid to his own selling dealer is either termed 'commission' or called by any other name by the parties. By virtue of the definition of the expression 'purchase' acquisition of goods by a dealer if the same is not by way of mortgage, hypothecation, charge or pledge amounts to purchase so far as purchasing dealer is concerned and 'sale' so far as the selling dealer is concerned. In view of this, there is no escape from the conclusion that the transaction entered into between the registered dealer and its so called dealer agent, whether a pucca Arhtia or a Kutcha Arhtia or called by any other name, as a result whereof the goods are transferred to the registered dealer by the said dealer agent not by way of mortgage, hypothecation, charge or pledge would amount to a sale of such goods to the registered dealer for the purposes of the provisions of the Punjab General Sales Tax Act, 1948.

(Paras 12 and 18)

State of Punjab and another vs. *The Punjab Copra Crushing Oil Mills L.P.A. No.* 487 *of* 1971 *decided on 7th November,* 1974.

Bhawani Cotton Mills Ltd. vs. *The State of Punjab and another. C.W.* 1591 *of* 1963 *decided on* 23*rd November,* 1965.

Devi Dass Gopal Krishan (P) *Ltd.* vs. *The State of Punjab and another C.W.* 4087 *of* 1977 *decided on* 12*th January,* 1978.

OVER RULED.

Panna Lal Babu Lal vs. *Commissioner of Sales Tax.* 7 *S.T.C.* 722.

DISSENTED FROM

Case admitted to Full Bench by the Motion Bench consisting of Hon'ble Mr. Justice D. S. Tewatia and Hon'ble Mr. Justice S. P. Goyal, dated 10th January, 1985.

Amended Petition under Article 226 of the Constitution of India praying that the following reliefs be granted:—

(i) *a writ in the nature of a writ of certiorari be issued calling for the records of the Assessing Authority relating to the order dated the 12th of December, 1984, annexure 'P.6', and after a perusal of the same, the order dated the 12th of December, 1984, Annexure 'P.6', be quashed;*

(ii) *a writ in the nature of a writ of mandamus be issued directing the Assessing Authority, Respondent No. 2, to summon the commission agents from whom the petitioner has acquired the goods sought to be subjected to purchase tax in the year 1978-79, as witnesses on behalf of the Department in the presence of the petitioner and allow the petitioner to cross-examine these witnesses before finaliing the assessment for this year;*

(iii) *any other suitable writ, direction or order that this Hon'ble Court may deem fit in the circumstances of this case be issued;*

(iv) *an* ad-interim *order be issued directing the Assessing Authority, Respondent No. 2, not to finalise the assessment of the petitioner for the year 1978-79 pending the decision of this writ petition;*

(v) *the petitinoner be exempted from serving prior notices of motion on the Respondents; and*

(vi) *costs of the petition be awarded to the petitioner.*

Anand Swarup Sr. Advocate with Manoj Swarup Advocate, *for the Petitioner.*

D. S. Brar, A.A.G. (Punjab), *for the respondent.*

JUDGMENT

D. S. Tewatia, J.

(1) As to whether the purchase by a registered dealer of goods specified in Schedule 'C' to the Punjab General Sales Tax Act, 1948,

hereinafter referred to as the Act, attracting levy of purchase tax on the last purchaser from a registered dealer, who is claimed by such purchasing dealer to be his commission agent amounts to a 'purchase' as defined in clause (ff) of section 2 of the Act and such purchasing dealer is liable to pay purchase tax if he happens to be the last purchaser, is the question of some significance that falls for consideration in this case.

(2) The import of the aforesaid legal proposition in so far as the present case is concerned is to be judged in the light of the facts that are not in dispute and can be stated thus: Messrs Devi Dass Gopal Krishan Private Limited, the petitioner-company, hereinafter referred to as the petitioner, carries on the business of cotton ginning and oil-seeds crushing and is a registered dealer under the Act, as also under the Central Sales Tax Act, 1956, hereinafter referred to as the Central Act; that the cotton and oil-seeds are both specified in Schedule 'C' to the Act; that the petitioner on its own showing had been purchasing goods specified in Schedule 'C' from registered dealers said to be commission agents after furnishing to them sales-tax form XXII on payment of consideration comprising of price of goods and 1½ per cent of commission amount thereon; that right from the year 1961 onwards no assessment of the petitioner has been finalised; that for the assessment years 1973-74 and 1974-75 the petitioner took up the stand before the assessing authority that the acquisition of Schedule 'C' goods by it from its commission agents, who are also registered dealers, did not amount to a purchase, as the same had to be treated as an acquisition under a contract of agency and not under a contract of sale; and that since the assessing authority had already made its intention clear to follow the procedure of getting the statements of commission agents on cyclostyled proformas and finalise the assessment relying on such statements and declining to summon the commission agents either as witnesses of the Department or as witnesses of the assessee-petitioner in spite of a written request for summoning the commission agents, the petitioner approached this Court on the writ side in Civil Writ petition No. 4087 of 1977 which was decided on 12th January, 1978. The contention advanced before the Division Bench was that the assessing authority, *inter alia*, could not refuse to summon the commission agents as its witnesses and finalise the assessment on the basis of evidence collected behind the petitioner's back, in view of the provisions of section 11 of the Act under which a dealer has a right to produce or cause to be produced any evidence

in support of the returns filed by him. The stand that the respondent took before this Court was that the petitioner had not adduced any evidence to show that the transfer of goods to it by the commission agents was as a result of contract of agency and not of a sale. The Bench took the view that the assessee had a right to summon the commission agents in order to prove that the acquisition of goods by it from the commission agents was under a contract of agency and, therefore, it directed the assessing authority to fix a date giving a reasonable time to the dealer to produce its evidence and thereafter to decide the case.

(3) The appellate authority while dealing with appeal No. 147 of 1976-77 in the case of M/s. Jagdambe Oil Mills *v.* The State of Punjab, took the view that summoning of commission agents would not be necessary in the event of it being established that the rate of commission was lower than the rate of purchase tax and the dealer had furnished declaration in sales tax form XXII to the commission agents, and that its reason for so holding was that in the above situation the rate of commission on which decision hinged already stood debited in the books of the appellant itself and no other material from the commission agents was being relied upon and for the purpose of establishing the factum of issuance of declarations in sales tax form XXII also, it again would not be necessary to summon commission agents, as appellant dealer itself had to be confronted with them and none else was therefore required to be examined.

(4) That while dealing with the case of the petitioner for the year 1977-78, the assessing authority adopted the aforesaid reasoning of the Sales Tax Tribunal and completed the assessment which order the petitioner had challenged in appeal.

(5) That in regard to the assessment year 1978-79 the assessing authority appeared to be determined to follow the same course as it did in the case of the assessment for the year 1977-78, as is evident from letter dated 17th September, 1984, annexure P. 3, namely, relying upon verifications made by various Excise and Taxation Officers and Assistant Excise and Taxation Officers holding charge of the districts in Punjab regarding the nature of transactions between the petitioner and its commission agents and refusing to summon the commission agents either as witnesses of the Department or as witnesses on behalf of the petitioner and thus declining to follow the procedure indicated by the Division bench in Civil

Writ Petition No. 4087 of 1977 decided on 12th January, 1978, the petitioner instead of waiting for the finalisation of the assessment by the assessing authority and taking recourse to the statutory remedy approached this Court on the writ side which the motion Bench admitted to Full Bench doubting the correctness of the Division Bench decision rendered in Civil Writ No. 4087 of 1977 decided on 12th January, 1978, and that is how the matter is before us.

(6) Mr. Anand Swaroop, learned counsel for the petitioner, has claimed the ratio of the Supreme Court decision in *Bhawani Cotton Mills Ltd.* v. *The State of Punjab and another,* (1) as furnishing the bedrock for the foundation of the petitioner's case that acquisition of goods by a registered dealer from a commission agent, who is also the registered dealer, on payment of consideration, which comprised of the price at which the goods had been purchased by the said agent dealer plus certain more amount which was termed to be 'commission' of the said registered dealer, could be under a contract of agency, in which case it would not amount to a sale and thus last purchasing dealer in this case would be the commission agent and not his principal, that is, the petitioner. Consequently, the petitioner had a right to establish before the assessing authority that the acquisition of goods by it from the dealer in question was under a contract of agency which did not amount to a sale. Mr. Anand Swaroop also relied upon an unreported decision of this Court rendered in (2) (*The State of Punjab and another* v. *Messrs The Punjab Copra Crushing Oil Mills, Jullundur*) decided on 7th November, 1974, in addition to judgment of the Allahabad High Court in *Panna Lal Babu Lal* v. *Commissioner of Sales Tax, U.P., Lucknow,* (3).

(7) Before examining the merit of the contention it would be desirable first to remove a misconception about the ratio of the case of *Bhawani Cotton Mills Ltd.* (supra). Their Lordships in that case did not lay down any such law, as claimed by the counsel for the petitioner. The judgment of their Lordships starts at page 320. Before that, what is reproduced is the Division Bench judgment of this Court which judgment was appealed against in the Supreme Court and was in fact set aside by the latter Court. Before their Lordships only two questions were raised: (1) whether the second

(1) 20 S.T.C. 290.
(2) L.P.A. No. 487 of 1971, decided on 7th November, 1984.
(3) 7 S.T.C. 722.

proviso to section 5(1) and clause (vi) of section 5(2)(a) of the Act were opposed to any of the relevant provisions of the Central Act, and (2) whether the notification issued by the State Government under section 5 of the Act on 26th September, 1961 was valid.

(8) The question as to whether acquisition of goods by a registered dealer from another registered dealer on payment of certain commission over and above the price of the goods paid in turn by such registered dealer (commission agent) to his selling dealer could or could not be treated as a purchaser, or, in other words, whether the acquisition of such goods could be under a contract of agency and not necessarily a transaction of sale, was neither argued before the Court nor their Lordships expressed any opinion whatsoever on that question. Hence, the learned counsel for the petitioner was not right in arguing that the question of law posed for consideration before the Full Bench stood covered by a binding decision of the apex Court rendered in *Bhawani Cotton Mills Ltd.'s case* (supra).

(9) Mr. Anand Swaroop then sought to adopt the reasons given by the aforesaid Division Bench of this Court for allowing the petition, as arguments on his behalf in support of the contention advanced by him.

(10) The relevant portion of the Division Bench judgment is in the following terms: (Civil Writ No. 1591 of 1963, decided on 23rd November, 1965):

> "The next point which requires determination and which has been raised in some of the writ petitions, e.g., Civil Writ No. 344 of 1964, etc., is that the purchase tax should have been assessed in the hands of the commission agents through whom the purchases had been made and not in the hands of the petitioners. The term 'dealer' has been defined by section 2(d). According to the explanation (2) therein, 'a factor, a broker, a commission agent, a dealer agent, and auctioneer or any other mercantile agent.....who carries on the business of selling, supplying or purchasing goods and who has in the customary course of business, authority to sell goods belonging to principals or to purchase goods on their behalf is a dealer'. In the above petition the assessee made an attempt to summon certain parties from whom the purchases had been made

for the purpose of showing that they were registered dealers who had supplied cotton seeds to the petitioners by purchasing the same from third parties. It was alleged there was no privity of contract between the petitioners and the third parties and the latter never knew that the commission agents were making purchases for the petitioners. The commission agents despatched the goods to the petitioners and transferred title in them not in pursuance of any contract of sale but on account of a contract of agency. The relationship between the commission agents and the petitioners was that of agents and principal and not that of seller and purchaser. It was urged before the assessing authority that when the goods were purchased by the petitioners by employing certain other persons as commission agents and such agents had purchased the goods from third parties and supplied them to the petitioners, it were the commission agents who were liable for payment of the purchase tax and not the petitioners because the transactions of purchase between the commission agents and the third parties were independent and complete as between them. These contentions did not find favour with the assessing authority. Reliance has now been placed on *Messrs Panna Lal Babu Lal* v. *Commissioner of Sales Tax*, (4) in which it has been held that a commission agent when he agrees to work for his principal for obtaining the goods which the principal wants, undertakes a duty which he has to discharge by purchasing the goods required and supplying them to his principal. The transfer of the goods purchased by him is an act done in discharge of his duty as agent. The contract between the principal and the commission agent is not one of sale but of agency. Such transactions cannot, therefore, be assessed under the Sales Tax Act. The ratio of this decision is that the contract between the principal and the commission agent is not one of sale. In other words, when the goods pass to the principal from the commission agent, that cannot be regarded as a transaction of sale. In the cases which are being disposed of by us, it is purchase tax which is being levied and not sales tax and, therefore, it has to be

(4) 7 S.T.C. 722.

decided on whom the incidence of such a tax should fall. In arguments what has been emphasised on behalf of the petitioners is the rule which flows from section 230 of the Indian Contract Act. According to it, there shall be a presumption that an agent can personally enforce contracts entered into by him on behalf of his principal and he is personally bound by them where the agent does not disclose the name of his principal. The presumption is rebuttable and where the contract is in writing the whole of the contract is for that purpose to be examined. Then there is the case of that class of agents which is called Pakka Arhtia. Mackeod, J. (as he then was) observed in *Chhogmal* v. *Jainarayan,* (5), that the legal relationship between the client and the Arhtia is that of a vendor and purchaser, whether the contract is written or oral. It is well-settled that a Pakka Arhtia, though a commission agent, is *qua* the persons entering into forward contracts in the position of a principal. He is liable to both parties for the performance of the contract. The position of a Pakka Arhtia is analogous to that of a *del credere* agent who incurs only a secondary liability towards the principal, and whose legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of insolvency or something equivalent. He is himself vitally interested in the performance of the contract that has been entered into through him [see Indian Contract Act by A. C. Dutt, Third Edition (1951) at page 906].

It has been necessary to advert to the various situations that can arise as a result of the contract entered into between the commission agents and their principles because without a complete investigation of the entire terms of the contract and the course of dealings between the parties the assessing authority would not be in a position to determine on whom the purchase tax should be levied. In these, of the cases which are being decided by us where this matter was specifically raised before the assessing authority it was necessary that a proper enquiry should have been made after giving an opportunity to the

(5) (1913) 20 I.C. 882.

assessees to determine as to who would be liable to pay the purchase tax. If the commission agents were found liable, then it would not be open to the assessing authority to impose that tax on their principals. No hard and fast rule can be laid down and this matter has naturally to be left for decision on the merits of each case. The assessing authority was certainly wrong in taking the view as has been done in some of the cases, e.g., Civil Writ No. 344 of 1964, that it was not necessary to examine the parties from whom the assessees had purchased cotton seeds in order to determine the liability for purchase tax. The view that acquisition of cotton seeds was purchased by the assessee who was liable to pay tax on its purchase price and that the dealers from whom the assessee purchased cotton seeds could claim exemption under section 5(2)(a) (vi) of the principal Act to avoid double taxation was apparently erroneous. It is necessary for the assessing authority to determine in each case who is liable to pay purchase tax without being entitled to claim any exemption and once the liability is determined or tax has been paid by that assessee the goods cannot be subjected to the levy of tax in the hands of any subsequent dealer....."

A perusal of the aforesaid observations of the Division Bench would show that it was highlighted on behalf of the petitioner that the presumption flowing from section 230 of the Indian Contract Act that an agent can personally enforce contracts into by him on behalf of his principal and he was personally bound by them where the agent did not disclose the name of his principal, was rebuttable, and where the contract was in writing, the whole of the contract was for that purpose to be examined. Reference was also made to a decision of Bombay High Court in *Chhogmal* v. *Jainarayan*, (6), in which Macleod, J. (as he then was) observed 'that the legal relationship between the client and the Arhtia is that of a vendor and purchaser, whether the contract is written or oral'.

(11) We are of the view that *inter-se* rights and liabilities of an agent and his principal under any "trade custom" or as based on the terms of section 230 or any other provisions of the Indian Contract

(6) (1013) 20 I.C. 992.

Act or those of the Sale of Goods Act, 1930 are totally irrelevant to the determination of the question as to whether the acquisition by a registered dealer of goods from another registered dealer is by way of purchase or not. In our opinion, the transaction in question has to be judged for the purpose of sales tax law in question on the terms and provisions of the said statute. In other words, one would have to see as to whether the given transacton to be termed as sale transaction satisfied the requirement of expression 'sale' as defined by the given statute and similarly, the acquisition of goods as a result of the said transaction tantamounts to be a 'purchase' as defined by the said statute.

(12) The three expressions 'dealer', 'purchase' and 'sale' have been defined in clauses (d), (ff) and (h) respectively of section 2 of the Act and are in the following terms:

"2. In this Act unless there is anything repugnant in the subject or context—

* * * * * *

(d) 'Dealer' means any person including a Department of Government who in the normal course of trade sells or purchases any goods in the State of Punjab, irrespective of the fact that the main place of business of such person is outside the said State and where the main place of business of any such person is not in the said State, 'dealer' includes the local manager or agent of such person in Punjab in respect of such business.

Explanation.—(1) A co-operative society or club or any association which sells or supplies goods to its members or purchases goods specified in Schedule C is a dealer within the meaning of this clause.

(2) A factor, a broker, a commission agent, a dealer's agent, an auctioneer or any other mercantile agent by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling, supplying or purchasing goods and who has in the customary course of business, authority

to sell goods belonging to principals or to purchase goods in their behalf is a dealer.

(3) For the purpose of this clause, 'Government will include the Central Government or the Government of any other State.

* * * * * *

(ff) 'purchase' with all its gramatical or cognate expressions, means the acquisition of goods specified in Schedule C or of goods on the purchase whereof tax is payable under any provision of this Act for cash or deferred payment or other valuable consideration otherwise than under a mortgage, hypothecation, charge or pledge.

* * * * * *

(h) 'sale' means any transfer of property in goods other than goods specified in Schedule C for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge;

Explanation.—(1) A transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale.

* * * * * *

* * * * * *

* * * * * *"

Their Lordships in *Commissioner of Sales Tax U.P.* v. *Bishamber Singh Layaq Ram,* (7), while dealing with the scope of the definition 'dealer' as given in section 2(c) of the U.P. Sales Tax Act (15 of 1948), hereinafter referred to as the U.P. Act, in order to

(7) 47 S.T.C. 80.

see as to whether a Kutcha Arhtia is a dealer in terms of the said definition, held as under :

> "It is plain, on an examination of the language as it stood at the material time, from the definition of 'dealer' in section 2(c) that even a selling or purchasing agent is within that definition. A person to be a 'dealer' in that definition must be engaged in the business of buying and selling goods in Uttar Pradesh whether for commission, remuneration or otherwise. The explanation to section 2(c) brought within the definition of 'dealer' not only a commission agent, a factor, a *del credere* agent or any other mercantile agent by whatever name called and whether of such description or not, but also a broker, an auctioner as well as an Arhtia. The use of the words 'through whom the goods are sold or purchased' in the explanation is significant, and they must be given their due meaning. Thus, the definition of 'dealer' in section 2(c) is wide enough to include a selling or purchasing agent of whatever name or description. The term 'Arhtia' is wide enough to include a Kutcha Arhtia.
>
> If the explanation to section 2(c) of the Act were not there, perhaps it could be said that a Kutcha Arhtia is merely an agent who helps cultivators who bring their produce to the market for sale, to find buyers, assist them in weighment and secure to them payment of price, but the assessee here certainly does not answer that description. That apart, the explanation clearly brings within the definition of 'dealer' in section 2(c) a Kutcha Arhtia....."

Section 2(c) of the U.P. Act defines the 'dealer in the following terms:

> "2(c) 'Dealer' means any person or association of persons carrying on the business of buying or selling goods in Uttar Pradesh, whether for commission, remuneration or otherwise.....
>
> *Explanation.*—A factor, a broker, a commission agent or Arhtia, a *del credere* agent, an auctioneer, or any other mercantile agent by whatever name called,

> and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying or selling goods on behalf of his principals, or through whom the goods are sold or purchased shall be deemed to be a dealer for the purposes of this Act."

A comparison of the two provisions would show that these are in *pari materia* with each other. Therefore, there is no escape from the conclusion that even a Kutcha Arhtia has to be held to be a 'dealer' and the parties who have entered into a transaction can be said to be the dealers. If such a dealer purchases the goods from another dealer in his own name on payment of price of the goods, he acquires title to such goods and if thereafter transfers such goods to another dealer for cash or deferred payment or other valuable consideration but not through mortgage, hypothecation, charge or pledge, then such transfer of goods on his part would amount to a sale *qua* him and the acquisition of such goods *qua* the acquiring dealer would amount to a purchase. The amount of consideration received or agreed to be received is totally irrelevant to a determination as to whether the given transaction between the two dealers (that is, between the one who transferred the goods and the other who acquired such goods) is or is not a transaction of 'sale' and 'purchase', that is, it would make no difference that the price charged by the selling dealer from the purchasing dealer was the same, as he had paid to his own selling dealer, or it was less or it was more and if it was more than the price at which dealer agent had purchased, then the amount by which the selling price exceeded the price that he had paid to his own selling dealer is either termed 'commission' or called by any other name by the parties.

(13) In view of the aforesaid interpretation, it has to be held that the Division Bench judgment rendered in (*The Punjab Copra Crushing Oil Mills' case*—supra), with respect, does not lay down the correct law and is expressly overruled, more particularly because the Division Bench decided that case under a misconception of the fact that their Lordships of the Supreme Court in *Bhawani Cotton Mills Ltd.'s case* (supra) had pronounced upon the question of law in question. That the decision of the Division Bench was influenced by the aforesaid consideration is

evident from the following observations of the Bench in the aforesaid L.P.A.

> "So far as the appeal filed by the assessee is concerned, the question involved is whether the purchase of cotton seeds made by the commission agents would be liable to purchase tax in the hands of the assessee or the commission agents would be liable. This question was considered by the Supreme Court in *Bhawani Cotton Mills Ltd.* v. *The State of Punjab and another,* (8). It was observed that it was necessary to advert to the various situations that can arise as a result of the contract entered into between the commission agents and their principals because without a complete investigation of the entire terms of the contract and the course of dealings between the parties, the Assessing Authority would not be in a position to determine on whom the purchase tax should be levied. It was further observed that no hard and fast rule can be laid down and that the matter would have to be left for decision on the merits of each case. It was also mentioned that the Assessing Authority was wrong in taking the view that it was not necessary to examine the parties from whom the assessees had purchased cotton seeds in order to determine the liability for purchase tax. These observations and the ratio of the decision in *Bhawani Cotton Mills' case* are fully attracted to the present case as here also the Assessing Authority, when requested to examine the commission agents, declined to do so on the ground that no useful purpose would be served by examining the commission agents. This view of the Assessing Authority is clearly erroneous and is not in consonance with the dicta of the Supreme Court in *Bhawani Cotton Mills' case.* In view of this, the appeal of the assessee would have to be allowed....."

We also further, hold that if the Division Bench judgment in *Bhawani Cotton Mills Ltd.* v. *The State of Punjab and another,* (9), on the given point is considered to be still holding the field despite

(8) 20 S.T.C. 290.

(9) (C.W. 1591 of 63) decided on 23rd November, 1965.

it being set aside by the Supreme Court on an appeal in *Bhawani Cotton Mills Ltd.'s case* (10), then, with respect, it does not lay down the correct law and is overruled.

(14) We also record our respectful dissent from *Panna Lal Babu Lal's case* (supra), as, in our opinion, it does not lay down the correct law. Here too, the learned Judges, who constituted the Division Bench, have based their conclusion that the transfer of goods by the assessee agent to his constituent did not constitute sale so as to attract sales tax on the sale price of the goods so transferred on the turn over of the assessee agent, on the customary relationship of agent and principal and their *inter se* duties and liabilities, besides the definition of 'sale' as given in the sale of Goods Act, which circumstances, in fact, as already observed, in our view, are not relevant to the determination of the question as to whether a given transaction constituted a 'sale' or 'purchase', as the case may be—'sale' so far as it concerns the selling dealer and 'purchase' *qua* the purchasing dealer. For a finding to that effect, one has only to see as to whether the transacting parties were dealers as defined in the Act and whether the goods were transferred by one dealer to the other dealer and the acquiring dealer had acquired those goods from the other dealer for consideration and otherwise than by way of mortgage, hypothecation, charge or pledge.

(15) Turning now to the facts of the present case, it may be observed that the petitioner is admittedly a registered dealer, that the goods that he acquired were those which are specified in Schedule 'C', and that by virtue of the provisions of section 4-B of the Act the same are liable to purchase tax to be paid by the last purchaser.

(16) A dealer in order to show that he is not the last purchaser of the given goods and claims deduction from his turnover in terms of section 5(2)(a)(vi) of the Act, which is in the following terms, has to furnish to the assessing authority a declaration in sale-tax form XXII given to him by the purchaser dealer showing, *inter-alia*, that the purchasing dealer is a registered dealer:

> "5(2) In this Act, the expression 'taxable turnover' means that part of dealer's gross turnover during any period

(10) 20 S.T.C. 290.

which remains after deducting therefrom—

(a) his turnover during that period on—

* * * * * *

(vi) the purchase of goods which are sold not later than six months after the close of the year, to a registered dealer or in the course of inter-State trade or commerce or in the course of export out of the territory of India:

Provided that in the case of such a sale to a registered dealer, a declaration, in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is furnished by the dealer claiming deduction,

* * * * *."

It is not in dispute in the present case that the petitioner had not only paid the price of goods to the dealer alleged to be the commission agent which allegedly comprises of the price which the alleged agent had paid to his selling dealer plus 1½ per cent above that amount (a fact established from the books of account of the petitioner), but had also delivered to the dealer agent declaration in sales tax form XXII.

(17) As observed above, the petitioner had not only acquired the goods from its alleged dealer agent on payment of consideration, but had also furnished to the said dealer a declaration in sales tax form XXII in order to enable the alleged selling agent to claim deduction from his turn over of the amount represented by the given transaction and consequently escape from the payment of the purchase tax on such amounts.

(18) By virtue of the definition of the expression 'purchase' acquisition of goods by a dealer, if the same is not by way of mortgage, hypothecation, charge or pledge, amounts to purchase so far as the purchasing dealer is concerned and 'sale' so far as the selling dealer is concerned. In view of this, there is no escape from the conclusion that the transaction entered into between the

petitioner and its so-called dealer agent, whether a Pucca Arhtia or a Kutcha Arhtia, or called by any other name, as a result whereof the goods are transferred to the petitioner by the said dealer agent not by way of mortgage, hypothecation, charge or pledge, would amount to a sale of such goods to the petitioner for the purpose of the provisions of the Act. When such is the case, that is, if acquisition of given goods by the petitioner otherwise than by way of mortgage, hypothecation, charge or pledge, is not in dispute, then it would not be necessary at all to examine, as already observed, the terms of the contract, whether written or oral, entered before or after the given transaction between the petitioner and the dealer agent. In other words, unless the petitioner alleges that the goods in question had been acquired by it from another dealer as a result of mortgage, hypothecation, charge or pledge, the petitioner would not at all be permitted to lead evidence of any kind to establish that the transaction as a result of which it had acquired the goods was not a transaction of sale and hence did not amount to a 'purchase' of such goods. Such an assessee dealer, however, would be liable to pay purchase tax on the purchase value of such acquired goods, unless he establishes a claim for deduction of the amount representing the value of such acquired goods from his turnover in terms of section 5(2)(a)(vi) of the Act by furnishing to the assessing authority declaration in sales tax form XXII, for otherwise such a dealer would be treated to be the last purchaser and thus liable to pay purchase tax.

(19) Since admittedly (on the basis of the fact disclosed by the books of account of the petitioner) the goods in question had been acquired by the petitioner on payment of consideration, so the transaction in question, as already observed, between the selling dealer (alleged to be the commission agent) and the petitioner amounts to a transaction of 'sale' and it was not the claim of the petitioner before the assessing authority or even here that it had acquired the goods as a result of mortgage, hypothecation, charge or pledge from its selling dealer (that is, the alleged commission agent), the assessing authority rightly declined to summon any commission agent either as a witness of the Department or as a witness of the petitioner.

(20) Before parting with the judgment, it may also be observed that if implication of the judgment of this Court rendered in Civil

Writ No. 4087 of 1977, annexure P.1, is that an assessee was entitled to examine his selling dealers (commission agents) to establish that the acquisition of goods by the asessee from the said dealer was as a result of transfer under a contract of agency or that it is necessary for the assessing authority even to examine such a claim, if put forward by the assessee, then, with respect, the Division Bench does not lay down the correct law and to that extent is overruled.

(21) For the reasons aforementioned, we find no merit in the writ petition and dismiss the same with Rs. 1,000 by way of costs.

Prem Chand Jain, C.J.—I agree.

I. S. Tiwana, J—I agree.

N. K. S.

FULL BENCH

Before D. S. Tewatia, J. V. Gupta and I. S. Tiwana, JJ.

HARI MITTAL, ADVOCATE,—Petitioner.

versus

B. M. SIKKA,—*Respondent.*

Civil Revision No. 1108 of 1983.

December 2, 1985.

East Punjab Urban Rent Restriction Act (III of 1949)—Sections 11 & 13—Residential building let out for non-residential purposes without the permission in writing of the Rent Controller—Landlord —Whether could seek ejectment of the tenant on the ground of his bona fide personal requirement—Provisions of section 11—Whether mandatory—Prohibition contained therein—Whether applicable to the landlord also.

Held, that a residential building let out for non-residential purpose by the landlord without obtaining the written permission of the Rent Controller in terms of section 11 of the East Punjab Urban Rent Restriction Act, 1949 would continue to be residential building and the landlord would be entitled to seek ejectment of the tenant on the ground of his *bona-fide* personal requirement.

(Para 29)