set aside and the statement made by defendant No. 1 deserves to be given effect to, for the decision of the suit.

(27) For the reasons recorded above, the revision is allowed, the order of the trial Court dated 7th October, 1977, is set aside and the case is remanded to the trial Court to decide the suit in accordance with the statement made by defendant No. 1. Since there was conflict of authority in this Court, the parties are left to bear their own costs.

S. S. Sandhawalia, C.J.

(28) I have the privilege of perusing the lucid judgments recorded by my learned brothers B. S. Dhillon and G. C. Mital, JJ. I agree entirely with my learned brother G. C. Mital, J.

N.K.S.

FULL BENCH

Before P. C. Jain, Harbans Lal and M. M. Punchhi, JJ.

KRISHNA RICE MILLS,—*Petitioner.*

versus

STATE OF HARYANA and others,—*Respondents.*

Civil Writ Petition No. 1863 *of* 1979.

April 3, 1980.

Haryana Rice Procurement (Levy) Order, 1979—*Clause* 3—*Haryana General Sales Tax Act* (XX *of* 1973)—*Sections* 2(*l*) *and* 6—*Compulsory procurement of rice under the levy order—Whether a 'sale' under the Sales Tax Act—Such procurement—Whether taxable.*

Held, that compulsory sale of rice to the Government in pursuance of the Haryana Rice Procurement (Levy) Order, 1979 does not constitute a sale so as to be taxable under the provisions of the Haryana General Sales Tax Act, 1973.

(Para 10).

Note :—The Division Bench judgment reported in Food Corporation *of India and another* vs. *State of Punjab etc.* I. L. R. (1976)2 Punjab and Haryana 587 held to be good law even after the decision of the Supreme Court in *M/s Vishnu Agencies (P.) Ltd.* vs. *Commercial Tax Officer and others*, A. I. R. 1978, S. C. 449.

Case referred by a Division Bench consisting of Hon'ble Mr. Justice, D. S. Tewatia and Hon'ble Mr. Justice M. M. Punchhi on 18*th December*, 1979, *to a larger bench for decision of an important*

question of law involved in the case. The full Bench consisting of Hon'ble Mr. Justice Prem Chand Jain, The Hon'ble Mr. Justice Harbans Lal and The Hon'ble Mr. Justice M. M. Punchhi finally decided the case on 3rd April, 1980.

Petition under Article 226 *of the Constitution of India praying that :—*

(a) *A writ of mandamus may be issued thereby declaring that the instructions issued by the Haryana Government,*—vide *Annexure P.* 1 *are illegal* ultra vires, *null and void and unconstitutional and respondent may be restrained from assessing sales tax against the petitioners illegally treating the transaction of compulsory sale of rice along with Bardana to the State Government under levy order as a sale.*

(b) *And necessary direction may be issued to the respondent that supply of rice to the State Government under the compulsory levy scheme is not a transaction of sale and is, therefore, not taxable under the provisions of Haryana General Sales Tax Act.*

(c) *Or such other appropriate writ or direction may be issued as may be deemed fit under the circumstances of the case.*

(d) *The* ad interim *stay order may be issued thereby restraining the respondents from assessing the sales tax against the petitioner on the transactions of compulsory sale of rice to the State Government under Rice Procurement Scheme for the year* 1977-78, 1978-79.

(e) *Cost of the petition may be allowed against respondent.*

K. P. Bhandari, Advocate with Sarup Chand Goel, and Ravi Kapoor, Advocates and Pawan Kumar Bansal, Advocate, *for the Petitioner.*

Naubat Singh Sr. D. A. G. (H.), *for the Respondent.*

JUDGMENT

Prem Chand Jain, J.

(1) The petitioners are millers of rice and registered dealers under the Haryana General Sales Tax Act, 1973 (hereinafter referred to as the Sales Tax Act) and the Central Sales Tax Act, 1956 and are licensees under the Haryana Foodgrain Dealers Licensing and

Price Control Order, 1978. Under the Punjab Rice Procurement (Levy) Order, 1958, as then applicable to the State of Haryana, and now under the Haryana Rice Procurement (Levy) Order, 1979 (hereinafter referred to as the 1979, Levy Order) every licensed dealer or licensed miller is required to deliver to the Government a certain percentage of rice produced or manufactured by him at a fixed price. The petitioner had been supplying rice to the State Government through Director of Food and Supplies, Haryana, Clause 3 of the 1979 Levy Order reads as under:—

> "3. (1) Every licensed miller and licensed dealer shall sell to the Government at the procurement prices eighty per cent of each variety of Bold group rice and thirty per cent of each variety of Slender group rice produced or manufactured by him in his rice mill or got milled by him out of his stocks of paddy, every day beginning with the date of commencement of this order until such time as the Government otherwise directs.
>
> (2) The rice required to be sold to the Government under sub-clause (1) 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.
>
> (3) The Government may, by general order to be notified in the Official Gazette, vary the percentage of rice required to be sold to Government under this Order".

(2) The question as to whether compulsory sale of foodgrains to the Government in pursuance of levy procurement scheme constitutes transaction of sale so as to be/taxable under the provisions of the Sales Tax Act came up for consideration in a case arising out of U.P. Wheat Procurement (Levy) Order, 1959 in *M/s. Chhitter Mal Narain Das* v. *Commissioner of Sales Tax* (1), wherein it was observed thus:—

> "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,

(1) A.I.R. 1970 S.C. 2000.

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."

(3) Thereafter, a matter arising out of the Punjab Rice Procurement (Levy) Order came up for consideration before a Bench of this Court in *The Food Corporation of India and another* v. *State of Punjab, etc.* (2). On consideration of the entire case law and on the basis of the judgment in *Chhitter Mal's case*, the Bench observed thus:—

"The facts of the case in hand are exactly similar to those of *Chhitter Mal's case* and the ratio of that decision squarely applies to the facts of the present case. Applying the law laid down in *Chhitter 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."

(4) Thereafter, another judgment of the Supreme Court in *M/s. Vishnu Agencies (Pvt.) Ltd.*, v. *Commercial Tax Officer and*

(2) I.L.R. 1976 (2) Pb. & Haryana 587.

others (3) has come wherein the provisions of the Cement Control Order, 1948 issued under the W. B. Cement Control Act, 1948, and the Andhra Pradesh Paddy Procurement (Levy) Orders, came up for interpretation. On consideration of the provisions of those particular Orders, their Lordships of the Supreme Court observed thus:—

> "Applying the ratio of *Gannon Dunkerlay* (A.I.R. 1958 S.C. 560) the true question for decision, therefore, is whether in the context of the Control Orders issued by the Government of West Bengal for regulating the supply and distribution of cement, the transactions under which the appellant supplied cement to persons who were issued permits by the authorities to obtain the commodity from the appellant, involved an element of volition or consensuality. If they did, the transactions would amount to sales but not otherwise. It is undeniable that under para 2 of the West Bengal Order of 1948, which we have for convenience designated as the Cement Control Order, no person can dispose of or agree to dispose of any cement except in accordance with the conditions contained in a written order of the Director of Consumer Goods or the authorities specified in that paragraph. That is a limitation on the dealer's right to supply cement. Correspondingly by paragraph 3, no person can acquire or agree to acquire cement from any person except in acordance with the conditions contained in a written order of the Director of Consumer Goods or the authorities specified in that paragraph. That is a limitation on the consumer's right to obtain cement. Paragraph 4 puts a restriction on the price which a dealer may charge for the commodity by providing that no person shall sell cement at a price higher than the notified price. Paragraph 8 imposes on the dealer the obligation to supply cement by providing that no person or stockist who has any stock of cement in his possession and to whom a written order has been issued under para 2 shall refuse to sell the same at a price not exceeding the notified price. A person who contravenes the provisions of the Cement Control Order is punishable under section 6

(3) A.I.R. 1978 S.C. 440.

of the West Bengal Cement Control Act, 1948 with imprisonment for a term which may extend to three years or with fine or with both.

These limitations on the normal right of dealers and consumers to supply and obtain the goods, the obligations imposed on the parties and the penalties prescribed by the Control Order, do not in our opinion, militate against the position that eventually, the parties must be deemed to have completed the transactions under an agreement by which one party bounds itself to supply the stated quantity of goods to the other at a price not higher than the notified price and the other party consented to accept the goods on the terms and conditions mentioned in the permit or the order of allotment issued in its favour by the concerned authority. Offer and acceptance need not always be in an elementary form, nor indeed does the law of contract or of Sale of Goods require that consent to a contract must be express. It is commonplace that offer and acceptance can be spelt out from the conduct of the parties which covers not only their acts but omissions as well. Indeed, on occassions, silence can be more eloquent than eloquence itself. Just as correspondence between the parties can constitute or disclose an offer and acceptance, so can their conduct. This is because, law does not require offer and acceptance to conform to any set pattern or formula.

In order, therefore, to determine whether there was any agreement or consensuality between the parties, we must have regard to their conduct at or about the time when the goods changed hands. In the first place, it is not obligatory on a trader to deal in cement nor on any one to acquire it. The primary fact, therefore, is that the decision of the trader to deal in an essential commodity is volitional. Such volition carries with it the willingness to trade in the commodity strictly on the terms of Control Orders. The consumer too, who is under no legal compulsion to acquire or possess cement, decides as a matter of his volition to obtain it on the terms of the permit or the order of allotment issued in his favour. That brings the two parties together one of whom is willing to supply

the essential commodity and the other to receive it. When the allottee presents his permit to the dealer, he signifies his willingness to obtain the commodity from the dealer on the terms stated in the permit. His conduct reflects his consent. And when, upon the presentation of the permit, the dealer acts upon it, he impliedly agrees to supply the commodity to the allottee on the terms by which he has voluntarily bound himself to trade in the commodity. His conduct too reflects his consent. Thus, though both parties are bound to comply with the legal requirements governing the transaction, they agree as between themselves to enter into the transaction on statutory terms, one agreeing to supply the commodity to the other on those terms and the other agreeing to accept it from him on the very terms. It is, therefore, not correct to say that the transaction between the appellant and the allottees are not consensual. They, with their free consent, agreed to enter into the transaction.

We are also of the opinion that though the terms of the transaction are mostly predetermined by law, it cannot be said that there is no area at all in which there is no scope for the parties to bargain. The West Bengal Cement Control Act, 1948 empowers the Government by Section 3 to regulate or control the prices at which cement may be purchased or sold. The Cement Control Order, 1948 provides by paragraph 4 that no person shall sell cement at a higher than notified 'price', leaving it open to the parties to charge and pay a price which is less than the notified price, the notified price being the maximum price which may lawfully be charged. Paragraph 8 of the Order points in the same direction by providing that no dealer who has a stock of cement in his possession shall refuse to sell the same 'at a price not exceeding the notified price', leaving it open to him to charge a lesser price which the allottee would be only too agreeable to pay. Paragraph 8 further provides that the dealer shall deliver the cement 'within a reasonable time' after the payment of price. Evidently within the bounds of reasonableness, it would be open to the parties to fix the time of delivery. Paragraph 8-A, which confers on the allottee the right to ask for

weighment of goods also shows that he may reject the goods on the ground that they are short in weight just as indeed, he would have the undoubted right to reject them on the ground that they are not of the requisite quality. The circumstance that in these areas though minimal, the parties to the transactions have the freedom to bargain militates against the view that the transactions are not consensual."

(5) It appears that on the basis of the aforesaid judgment of the Supreme Court, the Government of Haryana issued instructions,—*vide* letter No. 3922/Reg. 6/Sii, dated 8th September, 1978, copy Annexure P. 1 to all the Assessing Authorities for information and necessary action saying that the compulsory sale of rice to the State Government in pursuance of levy procurement scheme under the provisions of Punjab Rice Procurement (Levy) Order, 1958, amounts to a transaction of sale and is liable to be subjected to the levy of sales tax under the provisions of the Sales Tax Act, with the result that the Assessing Authorities started treating the transactions in pursuance of rice procurement (levy) scheme as sales. As in pursuance of these instructions, there is a threat to levy sales tax on the petitioner the present petition calling in question the constitutional validity of these instructions, has been filed.

(6) The petition came up for hearing before a Bench of this Court. As the correctness of the decision of the Division Bench of this Court in *Food Corporation of India's case* (supra) had been challenged on the basis of the judgment of the Supreme Court in *M/s. Vishnu Agencies' case,* the Bench thought it proper that the matter deserved to be decided by a larger Bench and that is how we are seized of the matter.

(7) At the outset, it may be observed that before the Division Bench as well as before us the learned counsel appearing for the State very fairly conceded that it was not proper for the Government to have issued such instructions to the Assessing authorities and on that score the State counsel conveyed his assurance that the State Government would withdraw the impugned instructions. If we had accepted this assurance then the writ petition would have become infructuous; but considering the importance of the matter referred to us, we decided to go into the merits of the controversy also.

(8) The short question that arises for our consideration is whether the judgment of this Court in *Food Corporation of India's case* stands overruled by the judgment of the Supreme Court in *M/s. Vishnu Agencies' case* ? In order to find out the correct position, the entire judgment of the Supreme Court in *M/s. Vishnu Agencies' case* was read to us. Reference was also made to the judgment of the Supreme Court in *Chhitter Mal's case,* on the basis of which *Food Corporation of India's case* was decided.

(9) After giving our thoughtful consideration to the entire matter, we find that the Control Orders which were the subject-matter of decision in *Vishnu Aqencies' case* were different from the Levy Orders under which the State Government sets up a machinery for compulsory acquisition of the essential commodities. Further, the judgment of the Supreme Court in *Chhitter Mal's case* which was relied upon for deciding the case by the Division Bench of this Court in *Food Corporation of India's case* holds the field and does not stand impliedly overruled as would be evident from the observations of their Lordships of the Supreme Court in *Vishnu Agencies' case,* which read as under:—

> In *Chhitter Mal Narain Das* v. *Commissioner of Sales Tax* 1971 (1 SCR 671), (AIR 1970 SC 2,000) the appellants who were dealers in Foodgrains 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 High Court held in a reference made to it under the Sales Tax Act that the transaction amounted to sale and was exigible to sales-tax. In appeal to this Court it was held by a Bench consisting of Shah and Hedge, JJ., that cl. 3 of the U.P. Procurement (Levy) Order, 1959 sets up a machinery for compulsory acquisition by the State Government of stocks of wheat belonging to the licensed dealers, that the order contains a bald in junction to supply wheat of the specified quantity day after day, that it did not envisage any consensual arrangement and that the order did not even require the State Government to enter into an informal contract with the supplier. Delivering the judgment of the Bench, Shah, J. observed that the 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 in the prescribed manner. It was observed that the decision in *Indian Steel and Wire Products* (A.I.R. 1968 S.C. 478), does not justify the view that even if the liberty of contract in relation to the fundamentals of the transaction is completely excluded, a transaction of supply of goods pursuant to directions issued under a Control Order may be regarded as a sale. This decision is clearly distinguishable since the provisions of the Wheat Procurement Order were construed by the Court as being in the nature of compulsory acquisition of property obliging the dealer to supply wheat from day to day. Cases of compulsory acquisition of property by the State stand on a different footing since there is no question in such cases of offer and acceptance nor of consent, either express or implied.

We would, however, like to clarify that though compulsory acquisition of property would exclude the element of mutual assent which is vital to a sale, the learned Judges were, with respect, not right in holding in *Chhitter Mal* (A.I.R. 1970 S.C. 2,000) that even if in respect of the place of delivery and the place of payment of price, there could be a consensual arrangement, the transaction will not amount to a sale (p. 677) (of SCR): (at page 2004 of A.I.R.). The true position in law is as stated above, namely, that so long as mutual assent, express or implied is not totally excluded, the transaction will amount to a sale. The ultimate decision in Chhitter Mal can be justified only on the view that cl. 3 of the Wheat Procurement Order envisages compulsory acquisition of wheat by the State Government from the licensed dealer. Viewed from this angle, we cannot endorse the Court's criticism of the Full Bench decision of the Allahabad High Court in *Commissioner Sales Tax, U.P.* v. *Ram Bilas Ram Gopal,* (4), which held while construing cl. 3 that so long as there was freedom to bargain in some areas the transaction could amount to a sale though effected under compulsion of a statute. Looking at the scheme of the U.P. Wheat Procurement

(4) A.I.R. 1970 All. 518.

Order, particularly cl. 3 therefore, this Court in Chhitter Mal seems to have concluded that the transaction was, in truth and substance in the nature of compulsory acquisition, with no real freedom to bargain in any area. Shah, J., expressed the Court's interpretation of cl. 3 in no uncertain terms by saying that 'it did not envisage any consensual arrangement."

(10) From the aforesaid observations, it is clear that the Control Orders under which compulsory acquisition of foodgrain can be made stand on a different footing and in those cases the transactions would not amount to sale. It is correct that their Lordships did not agree with the observations of the learned Judges in Chitter Mal's case to the effect that even if in respect of the place of delivery and the place of payment of price there could be a consensual arrangement, the transaction will not amount to a sale. But in spite of those observations, so far as the cases of compulsory acquisition under the relevant procurement orders are concerned, the view in Chhitter Mal's case was upheld. That being so, there is no merit in the contention of the learned State counsel that the judgment of this Court in *Food Corporation of India's case* stands overruled and does not lay down a correct law.

(11) In this view of the matter the instructions issued by the State, copy Annexure P. 1 to the petition, cannot legally be sustained and have to be quashed.

(12) Consequently, we allow this petition with costs and quash the instructions of the State of Haryana issued,—*vide* letter No. 3922/Reg. 6/SII, dated 8th September, 1978 (Copy Annexure P. 1) Counsel's fee Rs. 250.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia, C.J., D. S. Tewatia and Harbans Lal, JJ.

MAJOR SINGH,—*Petitioner.*

versus

UNION OF INDIA and another,—*Respondents.*

Civil Writ Petition No. 2089 *of* 1979.

April 10, 1980.

Code of Criminal Procedure (2 of 1974) *as amended by Act* (45 of 1978)—*Sections* 416, 432, 433, 433-*A and* 434—*Constitution of India*