Food Corporation of India Vs. Commissioner of Sales Tax and anr.

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Court : Allahabad

Decided On : May-21-1987

Reported in : [1988]69STC374(All)

Judge : S.S. Ahmad and ;Brijesh Kumar, JJ.

Appeal No. : Civil Misc. Writ Petition No. 2077 of 1986 with Writ Petition Nos. 2233 and 2879 of 1980, 1989, 113

Appellant : Food Corporation of India

Respondent : Commissioner of Sales Tax and anr.

Advocate for Def. : V. Upadhyay, Adv.

Advocate for Pet/Ap. : V.K.S. Chaudhari, Adv.

Disposition : Petition dismissed

Judgement :

Brijesh Kumar, J.

1. In this bunch of writ petitions, the petitioner, namely, the Food Corporation of India, who claims to perform governmental function for the purposes of constituting national pool of foodgrains, objects to the levy of purchase tax by the State of U.P. under the U.P. Sales Tax Act, 1948. The different writ petitions relate to different

assessment years. However, since according to learned counsel for the petitioner, points raised and argued are common, covering all the petitions, we propose to dispose of all the petitions by this judgment.

2. The Food Corporation of India is a 'dealer' as defined under Section 2(c) of the U.P. Sales Tax Act, 1948, which reads as follows :

(c) 'dealer' means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes-

(i) a local authority, body corporate, company, any co-operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(iii) ...

(iv) a Government which, whether in the course of business or otherwise buys, sells, supplies or distributes goods, directly or otherwise for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) ...

(vi) ...

3. The word 'business' has been defined in Clause (aa) of Section 2 as follows:

2. (aa) 'business', in relation to business of buying or selling goods, includes :-

(i) any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and

(ii) ...

but does not include any activity in the nature of mere service or profession which does not involve the purchase or sale of goods.

4. The charging provision is Section 3 of the U. P. Sales Tax Act, 1948 which provides as follows :

3. (1) Subject to the provisions of this Act, every dealer shall, for each assessment year, pay a tax at the rates provided by or under Section 3-A, or Section 3-D on his turnover of sales or purchases or both, as the case may be, which shall be determined in such manner as may be prescribed.

(2) ...

(3) ...

(4) ...

(5) ...

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

6. Although the purchase made by the Food Corporation of India from the State is a second sale or purchase but under explanation II to Section 3-D(1) of the U. P. Sales Tax Act, it is deemed to be the first purchase. The explanation II was added

with retrospective effect by U. P. Act No. 23 of 1976. It is specifically in respect of purchase of foodgrains in pursuance of orders made under Section 3 of the Essential Commodities Act. The explanation II reads as follows :

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

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

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

Provided that in the case of foodgrains, the rate of additional tax payable by any dealer, the aggregate of whose turnover or turnover of purchases or both, as the case may be, liable to tax, exceeds rupees ten crores in an assessment year shall be five per cent..

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

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

10. Shri V.K.S. Chaudhari, learned counsel for the petitioner, has submitted that the tax under the U. P. Sales Tax Act is not liable to be levied upon the petitioner as the Food Corporation of India, for the purposes of maintaining the national pool of foodgrains, discharges the governmental function. It has also been contended that the transactions as involved, do not amount to sale. Rather, transactions are in the nature of compulsory acquisition of property, hence not liable to be taxed under the U. P. Sales Tax Act. Another limb of the first contention is that the Food Corporation of India is only a service corporation. As such there cannot be any liability for payment of purchase tax for the services rendered by the Food Corporation of India.

11. In support of the first part of his argument that the Food Corporation of India discharges governmental function, the learned counsel for the petitioner has taken us through the different provisions of the Food Corporations Act, 1964. Section 5 provides that the original capital of corporation shall be such sum not exceeding one hundred crores of rupees as the Central Government may fix. Sub-section (3) of Section 5 provides that such capital may be provided by the Central Government from time to time after due appropriation made by Parliament by law for the purpose and subject to such terms and conditions as may be determined by that Government. Section 6 of the Food Corporations Act provides for management of the corporation by the board of directors. Constitution of the board of directors is provided under Section 7 which provides for representatives of different Ministries of the Central Government dealing with food, finance and co-operation. Sub-section (3) of Section 9 has also been placed before us to show that a director of the corporation can submit his resignation from the office of director by giving notice in writing to the Central Government. Section 12A provides that where the Central Government has ceased to perform any functions which under Section 13 are functions of the corporation, the Central Government may transfer to the corporation any of the officers or employees serving in the office of the Central Government dealing with food or engaged in the performance of those functions. The primary duty of the corporation as provided under Sub-section (1) of Section 13 is to undertake the purchase, storage, movement, transport, distribution and sale of foodgrains and other food-stuffs. It can also undertake activities for promoting production of foodgrains and setting up of rice

mills, etc., with the previous approval of the Central Government. Under Section 26 of the Food Corporations Act, the Food Corporation of India is required to submit programme of its activities each year and the financial estimates to the Central Government for approval. Our attention has also been drawn to Section 33 which provides that net annual profits earned by the Food Corporation of India shall be paid to the Central Government. Under Section 34, the Food Corporation of India is required to maintain its annual statement of accounts including the profit and loss account and the balance-sheet in the prescribed form and the accounts are to be audited by auditors appointed from the list of auditors approved by the Central Government on the advice of the Comptroller and Auditor-General of India. Under Section 35, an annual report is required to be submitted by the corporation to the Central Government about the working and its affairs, which is to be laid before both Houses of Parliament for necessary comments on the report. Section 40 protects the corporation and members of its board of directors and other officers from any legal proceedings for any act done in good faith in pursuance of the provisions of the Act. Our attention has also been drawn to Section 42 of the Act which specifically provides for payment of income-tax by the corporation as a company.

12. On the basis of the provisions indicated above, it has been submitted that the functions, which are now being carried on by the Food Corporation of India are such which had been carried on by the Central Government. It has been submitted that it is a primary duty of the State to provide food to the needy citizens of the country and to have proper distribution of the foodgrains for consumption of the citizens at a price which is within the reach of a common man. With a view to achieve this end, the Food Corporation of India maintains a national pool of foodgrains. The method to raise the national pool is that after a decision is taken in the meeting, in which the officers of the Food Corporation of India and different Ministries of the Government of India and others participate, the States are required to contribute to the national pool. The States in their turn issue Levy or Procurement Orders under the Essential Commodities Act for procurement of specified foodgrains which is made over by the States to the Food Corporation of India to raise and maintain the national pool. The Food Corporotion of India, on the directions issued by the Government of India from time to time, sends the required

quantity of foodgrains to the deficit States or at times to other countries, if so directed. It has further been submitted that the Food Corporation of India acts as a custodian of the national pool on behalf of the Government of India. The corporation in all details is controlled by the Central Government, may be in the matter of its management or otherwise. The profits earned by the corporation are to be credited to the Central Government. The activities of the corporation described above were being carried on by the Central Government prior to coming into existence of corporation and the staff of the Central Government connected with such activities was also transferred to the Food Corporation of India under the provisions of Section 12(3) of the Food Corporations Act.

13. In support of the fact that the procurement was being made for the national pool, reliance was placed on annexures 3 and 5 to the writ petition (No. 2077 of 1986). In annexure 3 which is a letter written by the Secretary to the State Government, Department of Institutional Finance to the Additional Secretary of the Government of India, Department of Food, it has been mentioned that the purchase of foodgrains by the Food Corporation of India was on behalf of the Central Government. Annexure 5 is again a letter by the Joint Secretary to the State Government mentioning therein that the State Government' and its agencies had been purchasing the foodgrains for the national pool. These documents have been referred to establish the fact that the foodgrains purchased by the Food Corporation of India from the State Governments are only contributions of the State Government towards the national pool. Para 5 of the counter-affidavit has also been referred to, where it has been stated by the opposite parties that it is admitted that the Food Corporation of India purchases foodgrains for the national pool. Since, earlier such activity of procurement of foodgrains had been carried on by the Food Department of the Government of India, it is a governmental activity now carried on by the petitioner, thus it was not liable to tax. It has, however, been submitted that in respect of transactions other than those related to levy foodgrains, it pays sales tax as those transactions do not take place in pursuance of any governmental function.

14. The learned counsel for the petitioner has referred to Article 285 of the Constitution which provides for exemption of property of the Union from State

taxation. A reference to Article 286 of the Constitution has also been made. The learned counsel for the petitioner has then referred to Article 289 of the Constitution which reads as follows :

289. Exemption of property and income of a State from Union taxation.- (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in Clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in Clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government.

15. Stress has been placed upon Clause (3) on the basis of which it has been submitted that it is clear that there is distinction between the functions of the Government and its activities of trade or business. If the trade or business is declared by the Parliament to be incidental to the ordinary functions of the State Government, that would exempt the property and income of the State from Union taxation. According to the learned counsel for the petitioner, the distinction between the trade or commercial activities of the State and the activities of trade and commerce incidental in discharge of the governmental function is quite clear from the provision quoted above. Therefore, if some transactions take place in discharge of governmental functions, that cannot be called trade or business activity of the State liable to be taxed.

16. Shri V. Upadhyay, learned counsel for the opposite parties, has submitted that the Food Corporation of India is neither a department of the Government nor does it perform any governmental function. Its activities are purely business and commercial activities. The question of earning profits is wholly immaterial. It has been submitted that the Food Corporation of India is only a company and it has to

be so assessed under the Income-tax Act as provided under Section 42 of the Act.

17. The learned counsel for the opposite parties has taken us through the Statement of Objects and Reasons for enacting the Food Corporations Act, 1964. The Statement of Objects and Reasons reads as follows :

Statement of Objects and Reasons

(1) It is considered desirable, in the interests of increased agricultural production as well as in the interests of the common consumer, to set up a State agency for the purpose of undertaking trading in food-grains in a commercial manner but within the framework of an overall Government policy. Only by such a measure it will be possible to effectively implement any policy of ensuring that the primary producer obtains the minimum price that may be announced from time to time and to protect the consumer from the vagaries of speculative trade.

(2) The setting up of the Food Corporation of India, as provided for in this Bill, will, therefore, be one of the essential and important steps in the implementation of Government's food policy. The corporation will be the first organised attempt to take up State trading in food-stuffs on an appreciable scale. The agency will also be used to build up gradually buffer stocks.

(3) The corporation will engage itself primarily in the purchase, storage, movement, distribution and sale of foodgrains. Provision has also been made in the Bill enabling the corporation to deal in other food-stuffs if considered necessary by the Government. The corporation may also discharge certain incidental functions as provided for in the Bill in consultation with the Central Government.

(4) The corporation will be encouraged to function generally as an autonomous organisation working on commercial lines. It is expected to secure for itself a strategic and commanding position in the foodgrains trade of the country. Bearing in mind the several large spheres in which the corporation will ultimately have to operate, this Bill is being introduced to enable it to function as a statutory corporation wholly owned by the Government.

(5) It is necessary that the corporation should work with the active and continued co-operation of State Governments and their machinery. The Bill, therefore, provides for the setting up of Boards of Management or State Food Corporations, as the case may be, to secure such co-operation and participation in a practical and effective way.

18. From the above, it has been submitted that the corporation is an autonomous body and has to undertake trading in foodgrains in commercial manner in the interest of producer as well as consumer. Then a reference has been made to Section 6 of the Food Corporations Act, 1964, which provides that the board of directors, in discharging its functions, shall act on business principles having regard to the interests of the producer and consumer. A reference has also been made to Section 13 which relates to the functions of the corporation. In view of the above, it has been submitted that it is incorrect to say that the corporation is a service corporation. It has also been submitted that according to Section 33 of the Act, the net profits earned by the corporation are to be credited to the Central Government. Therefore, it is incorrect to say that the activities are run on no profit no loss basis. In any case, it has been submitted that the profit making is not necessary for carrying on any trade or business so as to be liable to tax under the provisions of the U. P. Sales Tax Act, In this connection, a reference has also been made to Clause (aa) of Section 2 of the U. P. Sales Tax Act which defines 'business' as any trade, commerce or manufacture, whether or not with a motive to make profit and whether or not any profit accrues oh such trade, commerce or adventure. To repel the argument advanced on behalf of the petitioner that the Food Corporation of India is a department of the Government of India, the learned counsel for the opposite parties has placed reliance upon a case reported in AIR 1981 SC 1694 {State of Punjab v. Raja Ram), considering various provisions of the Food Corporations Act, the Honourable Supreme Court came to the conclusion that the Food Corporation is not a Government department. It has been held to have a status of a company and an autonomous body. However, looking to the fact that the original share of capital was provided by the Central Government and the control which is exercised by the Central Government, it could be said to be an agency or instrumentality of the Central Government.

19. Next case relied upon by the opposite parties is [1976] 38 STC 329 (SC) (Joint Director of Food, Visakhapatnam v. State of Andhra Pradesh). In this case, the Central Government in discharge of its high governmental functions, namely, distribution of foodgrains and fertilisers and commodities essential to the life of community at large, had been procuring such items and had been selling the same to the States or their nominees so as to ensure equitable supplies at fair price. For this purpose, the Central Government appointed a Joint Director of Food through whom foodgrains and fertilisers were sold to Andhra Pradesh State and to other States. According to the Sales Tax Department, the transactions were liable to sales tax under the State Act as well as under the Central Sales Tax Act. A similar argument was raised on behalf of the Central Government that it was only implementing its governmental obligations for distribution of essential commodities which cannot be said to be a trading activity or carrying on business. This argument was not accepted by the Honourable Supreme Court. The following passage from the judgment may be reproduced which meets the argument raised in this case :

A subsidiary contention calculated to insulate the Central Government from liability was set up by the learned Additional Solicitor-General to the effect that an undertaking to distribute essential commodities by the State in implementation of its governmental obligations cannot be described as 'trading' activity or carrying on of 'business' without doing violence to the concepts of governmental functions and business operations. Indubitably the State has the power to carry on trade or business as is manifest from Article 19(6)(ii) and other provisions. Indubitably, the State distributes essential commodities in a fair and equitable way for the survival of the community under its protection. It does not follow that we cannot harmonise the two functions. It is well on the agenda of State activity that it carries on trade or business in essential commodities because it has the power to do so and because it is obligated to ensure even distribution of vital goods for the needy sections of the people. We see no difficulty in inferring that the systematic activity of buying foodgrains and fertilisers and selling them by the State, although in fulfilment of a beneficent national policy is nevertheless trade or business. Necessarily, Government becomes a 'dealer' by definition and carries on 'business' within the meaning of the Central Act and the State Act (omitting for a moment the distinction

in the two definitions based upon the motive to make gain or profit). The conclusion, therefore, is inevitable that the appellant, representing the Central Government, is rightly held to be the assessee.

20. It may be mentioned here that under the U. P. Sales Tax Act also, the 'dealer' includes a Government as well which in the course of business or otherwise, buys, sells or distributes goods directly or otherwise for cash or for deferred payment or for commission, remuneration or for other valuable considerations. We, therefore, find that the case in hand is in no manner different from one considered in the case of Joint Director of Food [1976] 38 STC 329 (SC).

21. Another case relied upon on behalf of the opposite parties is [1976] 37 STC 423 (SC) (District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer). In this case, sales tax was sought to be imposed upon the Northern Railway on the sale of material and scraps. It was held that such transactions were exigible to tax. This case has been referred to show that even the railway which is a department of the Government, and which cannot be said to be not carrying on governmental function was found exigible to sales tax.

22. In respect of the case cited on behalf of the petitioner, namely, 1981 Supreme Court, page 670 wherein it has been held that the Food Corporation of India is an instrumentality of the State, learned counsel for the opposite parties has submitted that it will make no difference so far levy of tax is concerned. Firstly, it has been submitted that the Food Corporation of India may be considered as an authority under Article 12 of the Constitution of India for the purpose of Part III and, secondly, it has been submitted that when an activity carried on by the Government is liable to be taxed and the Government can be a dealer as denned under the Sales Tax Act, it would not be gainsaying that an instrumentality of the State cannot be taxed.

23. In view of the facts and cases mentioned above, we are of the view that there is no substance in the submission made on behalf of the petitioner. Since the petitioner entered into the transactions of sale and purchase, may be in pursuance of raising the national pool which is meant for equitable distribution of essential commodities to the needy section of the society and to meet the requirements of

needy people of this country, as were the facts in the case of Joint Director of Food v. State of Andhra Pradesh [1976] 38 STC 329 (SC), it cannot be said that the transactions entered into by the petitioner are not liable to sales tax. The activities so carried on by the Food Corporation of India are clearly covered under the term 'business' as defined under the U. P. Sales Tax Act and the petitioner would clearly be covered under the term 'dealer' as denned under the Sales Tax Act. It is wholly immaterial whether the ,activity is being carried on with a profit making motive or as to whether actually any profit do accrue or not. It cannot be said that the petitioner discharges governmental function.

24. We may now consider the' other limb of the argument that, in any case, the Food Corporation of India, in respect of national pool, can only be said to be a service corporation, which renders service to the people of the country on 'no profit no loss' basis. The loss suffered by the Food Corporation of India is subsidised by the Central Government. The capital is also provided by the Central Government.

25. The learned counsel for the petitioner has placed reliance upon a case reported in [1982] 51 STC 289 (Guj) (Mehsana District Shanker-4 Seeds Produce and Sale Co-operative Society Ltd. v. State of Gujarat). This is a Division Bench decision rendered by the Gujarat High Court. The Planning Commission of the Government of India recommended for forming agricultural co-operative societies of cotton growers for betterment of quality of cotton by distribution and multiplication of cotton seeds. In pursuance of the above scheme and object, the petitioner-society was registered. The society supplied seeds to its members and collected some charges in the nature of transport and other miscellaneous charges. The society also carried on other activities for the betterment of quality of cotton. The society was sought to be taxed under the Sales Tax Act but it was held that the object of the society was to give its extensive service to the members and it was merely rendering service by implementing the Government scheme. It was further observed that the essential purpose of the activity of such society was not commercial in nature but was to render exclusive service to its members. An activity in order to be a business must be a commercial activity of buying and selling with or without motive of profit. It has further been observed that if commercial element is lacking, it would be beyond the sweep of the term

'business' and will not be liable to sales tax.

26. The facts of the case reported in [1982] 51 STC 289 (Guj) (Mehsana District Shanker-4 Seeds Produce and Sale Co-operative Society Ltd. v. State of Gujarat) are different. The co-operative society supplied seed, etc., to its own members; so it could be said that the society was rendering service to its members. But in the case in hand, the position is different. Such activity carried on by the Central Government was held to be 'trade' or 'business' activity in the case of Joint Director of Food, Visakhapatnam [1976] 38 STC 329 (SC). Earning of profit or no profit is held to be immaterial. Under Section 2(aa)(ii) of the U. P. Sales Tax Act only such a service activity does not amount to business which does not involve purchase or sale of goods. Petitioner does enter into sale and purchase of foodgrains. It cannot claim to be an organisation rendering mere service.

27. We may now come to the next point urged on behalf of the petitioner that procurement of foodgrains under the Levy Orders amounts to compulsory acquisition of property. Therefore, it is not exigible to tax, not being a transaction of sale or purchase of goods. It has been submitted that the whole transaction beginning from the decision making to procurement of foodgrains as a contribution from different States in definite quantities till the supply of such foodgrains to the deficit States or to other countries, as the case may be, by the Food Corporation of India, is one transaction which passes through different stages. The foodgrain is acquired from the millers or the farmers as the case may be for the purposes of national pool with the object of feeding the millions. It is for that purpose that the State Governments issue Procurement, Levy or Requisition Orders under the provisions of the Essential Commodities Act. The State Government acquires the foodgrains through different agencies, e.g., the U. P. Co-operative Federation, Essential Commodities Corporation, U. P. State Agro Corporation as well as through the Food Corporation of India in certain areas. After so acquiring the foodgrains it is made over to the petitioner by the State Government 'for the purposes of national pool. The contention is that such a transaction made in respect of foodgrains acquired under the Levy or Procurement Orders with one specific purpose as mentioned above does not amount to sale or purchase.

28. In support of his contention that the transactions in question are in the nature of compulsory acquisition of property, the learned counsel for the petitioner has made a reference to entry 54 of List II of the Seventh Schedule to the Constitution which provides for taxes on the sale or purchase of goods other than newspapers subject to the provisions of entry 92A of List I. He has also referred to entry 42 of List III of the Seventh Schedule which provides for acquisition and requisition of property. It has thus been submitted that the sale and purchase of goods and acquisition of property denote two different concepts and acquisition of property cannot be taxed as tax on sale or purchase of property. It has been submitted that the main ingredients of acquisition of property are that acquisition is done by the State for a public purpose for some compensation, consequence of which is that the rights and title in the property vest in the State irrespective of the fact whether the holder of the property from whom it is acquired himself had that right or title or not. The act of acquisition extinguishes the right and title of third person as well who may not directly be involved in the transaction. In this connection, the learned counsel has referred to Section 6 of the U. P. Zamindari Abolition and Land Reforms Act, 1950 and similar provision under the U. P. Urban Area Zamindari Abolition Act, Section 16 of the Land Acquisition Act and Section 14 of the U.P. Imposition of Ceiling on Land Holdings Act to show that the property vests in the State free from all encumbrances; meaning thereby that the right or title even of third person extinguishes and vests in the State. It has been submitted that in so far as the Levy Orders are concerned, all the abovementioned ingredients are satisfied. The millers may be holding the foodgrain belonging to the farmers or others who may have given it for custom milling but still the millers will have to part with certain percentage of the stock irrespective of the fact that they do not have right or title over such foodgrains. He has also referred to different Levy Orders to indicate that nothing is left to be decided between the two parties and the levy foodgrain has to be given at a particular place, time and in definite quantities by the millers or farmers, as the case may be, as provided under the Levy Order. The price is also fixed under the Orders. Refusal to comply with the Order may make a person liable for prosecution, the authorities have even power to make search and seizure for the purposes of implementation of the Order. Therefore, no volition or area of consensual arrangement remains open between the parties. The whole

thing is predetermined under the Levy Orders issued by the State Government. Thus the transaction amounts to acquisition of property.

29. In support of this contention, reliance has been placed on a case reported in AIR 1970 SC 2000 (Chittar Mat Narain Das v. Commissioner of Sales Tax). The case related to procurement of wheat under the U. P. Wheat Procurement (Levy) Order, 1959. Under Clause 3 of the said Levy Order, it was provided that every licensed dealer had to sell to the State, at the control price, 50 per cent of wheat held by him in the stock at the time of commencement of the Order and 50 per cent of the wheat procured or purchased by him everyday. Clause 4 provided for power of the authorities to search or make seizure and to examine account books, etc. The relevant observations made by the Honourable Supreme Court are as follows :

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.

30. The Honourable Supreme Court in the above-noted case also did not approve the view taken by the Full Bench of this Court reported in AIR 1970 All 518 (Ram Bilas Ram Gopal's case). The Full Bench was considering the Levy Order under which the dealer was obliged to sell to the State certain specified quantity of wheat on a fixed price, from the date of the commencement of the Order until such time

as the State Government otherwise directed. The delivery of the goods was to be made by the dealer to the Regional Food Controller or any person authorised by him. There was no option but to sell the wheat so far dealer was concerned and the State was to purchase the same. The Full Bench took the view that all other details of the transactions were left open to negotiation; for example, negotiations in respect of the time and the mode of payment of the price, the time and mode of delivery of wheat and other conditions of the contract. It was also observed that it was open to the State Government to say that from a particular date, it would not purchase the wheat. Thus the Full Bench took the view that the element of volition was there and the parties concerned had to come to an agreement in particular area which was left open. Thus whatever compulsive or coercive force is used to bring about a transaction, ,it must be traced to legislation. This transaction was held to be sale exigible to sales tax.

31. The Supreme Court in Chittar Mai's case AIR 1970 SC 2000 placed reliance upon AIR 1963 SC 1207 (New India Sugar Mills' case), where supplies were made by the factory owners under the allotments made by the Sugar Controller of India to different States; it was observed that the despatches of sugar pursuant to the directions of the Controller were not made in pursuance of the contract for sale. There was no offer by the suppliers, nor any acceptance by the State of Madras. The suppliers had no volition in the matter. The transaction was held not to be sale so as to be exigible to tax under the Sales Tax Act. This was the view taken by the majority with Mr. Justice Hidayatullah, as he then was, delivering a dissenting judgment. The Honourable Supreme Court thus found in the case of Chittar Mai AIR 1970 SC 2000 that the Order ignored the volition of the dealer and there was no contract between the dealer and the State; hence the transaction did not amount to sale and, therefore, not exigible to sales tax.

32. The learned counsel for the petitioner referred to the definition of 'sale' given under the Sale of Goods Act. It has been submitted that there has to be an agreement to sell before a sale takes place. There should be an offer and acceptance and unless the parties agree exercising their volition in the matter, there cannot be any sale. He has referred to AIR 1958 SC 660 (State of Madras v. Gannon Dunkerley and Company). In that case, the question related to the goods

used by a contractor during the course of execution of a contract for construction of a building. The material used by the contractor, would amount to sale or could be included in the turnover of the company, was the question under consideration of the Honourable Supreme Court. It was held not to be a sale and it was observed that sale of goods has essential ingredient of existence of an agreement to sell for a price and property passing therein pursuant to the agreement. The definition of 'sale' given under the Sale of Goods Act and Benjamin on 'Sale', 8th Edition, page 3 show that for constituting a sale, four elements must be there, viz., parties must be competent to contract; there must be mutual assent; property is transferred from seller to buyer and price in money is paid or promised. The learned counsel for the petitioner has also referred to [1955] AC 696 (Kirkness's case). On the basis of the above decisions too, the learned counsel for the petitioner submitted that there being no agreement to sell preceding the transaction itself, the transaction was nothing but compulsory acquisition and not a sale. He has also placed reliance on a case decided by the Punjab High Court ILR 1976 (2) Punj 687 (Food Corporation of India v. State of Punjab). A Division Bench of the Punjab High Court took the view that procurement of foodgrains by the States and their officers and despatch of the same to the deficit States did not amount to 'sale'. This case followed the decision of Chittar Mai Narain Das AIR 1970 SC 2000. The learned counsel then referred to AIR 1978 SC 449 (Vishnu Agencies' case) and submitted that it does not overrule the view taken in Chittar Mai's case AIR 1970 SC 2000. In this connection, he has also referred to another Division Bench case of the Punjab and Haryana High Court in Civil Writ Petition No. 1573 of 1983 (Food Corporation of India v. State of Haryana [1987] 66 STC 7) decided on November 26, 1986. In this case, the question for consideration before the court was as to whether after the decision of Vishnu Agencies' case AIR 1978 SC 449 by the Supreme Court, the earlier decision of the Punjab High Court reported in [1976] 38 STC 144 (Food Corporation of India v. State of Punjab) and the decision in Chittar Mai's case AIR 1970 SC 2000 anymore hold good. The Division Bench came to the conclusion that the Chittar Mai's case AIR 1970 SC 2000 is not overruled to the extent it held that the levy transaction amounted to compulsory acquisition of property and not a sale.

33. Shri V. Upadhyay, learned counsel appearing on behalf of the opposite parties, while refuting the submission made on behalf of the petitioner, submitted that the transactions under the Levy Orders amounted to 'sale' and there was no compulsory acquisition of property. It has also been submitted that an area of consensual arrangement still remains there between the parties and the element of volition is not completely excluded under the Levy Orders. Thus the transaction amounted to sale. It has also been submitted that the decision in Chittar Mai's case AIR 1970 SC 2000 stands practically overruled and is no more a good law in view of the latter decision, namely, Vishnu Agencies' case AIR 1978 SC 449. Another submission made is that after the Forty-sixth Amendment of the Constitution by adding Clause (29A) to Article 366 and similar amendment in the U. P. Sales Tax Act by Act No. 25 of 1985, the transactions in question are exigible to sales tax.

34. To fortify their submission, reliance has been placed by the opposite parties upon AIR 1978 SC 449 (Vishnu Agencies' case). We propose to come to this case later and before that we may refer to other two cases which are : AIR 1972 SC 87 (Solar Jung Sugar Mills Ltd. v. State of Mysore). In this case, the Sugarcane Control Order was under consideration under which certain fixed quantity of sugarcane was required to be supplied by the sugarcane growers to the sugar mills on controlled price. Further, the direction was that no sugarcane should be exported from the reserved area except in accordance with the terms issued by the Central Government. One of the contentions raised was that everything was fixed and decided under the Order and there was no volition left to the parties. Therefore, the transactions taking place under the Sugarcane Control Order were out of the pale of the definition of the word 'sale' which necessarily implies consensus between the vendor and the purchaser before the transaction takes place. The argument was repelled and after considering certain decisions, their Lordships of the Honourable Supreme Court observed that the statutory orders regulating supply and distribution of goods by and between the parties under the Control Orders do not absolutely impinge on the freedom to enter into contract. It was further observed that legislative measures or statutory provisions fixing the price, delivery, supply, restricting areas for transactions are all within the realm of planning economic need ensuring production and distribution of essential

commodities and basic necessities of the community. The Honourable Supreme Court further observed in para 38 of the judgment as under :

The complexity of modern activities and the consequent difficulty of providing for every eventuality have shaken fervour for freedom of contract as there was during the nineteenth century. The economic environment has changed. The individual freedom is to be reconciled with adequate performance by the Government of its functions in a highly organised society. Delimiting areas for transactions or parties or denoting price for transactions are all within the area of individual freedom of contract with limited choice.

35. Their Lordships after considering the Control Order held that despite the fact that the parties were certain under the Control Order as to who had to sell and purchase the sugarcane, the price was fixed, the area was fixed, still it was found that there were areas in which the parties had freedom to agree on certain things. Thus the transactions taking place under the Control Orders were held to be 'sale'.

36. The next case relied upon is AIR 1976 SC 2478 (Oil and Natural Gas Commission v. State of Bihar). The case of Solar Jung Sugar Mills Ltd. AIR 1972 SC 87 was followed in this case and it was held that supplies made to the Indian Oil Corporation by the Oil and Natural Gas Commission under the directions of the Central Government on a fixed price was 'sale'. Their Lordships of the Supreme Court observed that any sale under the Control Orders is not as a result of the coercion. The statute supplies the consensus and the modality of consensus is furnished by the statute. There is privity of contract between the parties. The transaction is neither a gift nor an exchange nor a hypothecation nor a loan. It is a transfer of property from one person to another for consideration. The law presumes the assent when there is transfer of goods from one person to the other. The Honourable Supreme Court further went on to observe, 'a sale may not require the consensual element and that there may, in truth, be a compulsory sale of property with which the owner is compelled to part for a price against his will and the effect of the statute in such a case is to say that the absence of the transferor's consent does not matter and the sale is to proceed without it. In truth, transfer is brought into being which ex facie in all its essential characteristics is a

transfer of sale'.

37. On behalf of the petitioner, it was submitted, in respect of the above-noted two cases, namely, Solar Jung Sugar Mills Ltd. AIR 1972 SC 87 and Oil and Natural Gas Commission case AIR 1976 SC 2478, that they stand on different footing inasmuch as there are two parties who enter into transactions and who are brought together under the Control Orders. The Orders involved in the two cases are not the Levy Orders. According to the learned counsel for the petitioner there is no element of acquisition of property but those Orders only regulated the sale. In respect of Oil and Natural Gas Commission case AIR 1976 SC 2478, it has been submitted that it is distinguishable also because of Section 29 of the Oil and Natural Gas Commission Act. We think, no distinction can be made on the ground of Section 29 of the Oil and Natural Gas Commission Act. It only provides that the commission shall be deemed to be a company and shall be liable to pay such taxes which are levied on the States by the Central Government. It does not provide that the transaction of supply of crude oil by the commission to the corporation under the directions issued by the Central Government would be construed as a sale.

38. We may now come to the next case, namely, AIR 1978 SC 449 (Vishnu Agencies case) which has been pressed into service on behalf of the opposite parties, which, according to them, practically overrules the decision rendered in the case of Chittar Mai Narain Das AIR 1970 SC 2000. The Chittar Mai's case AIR 1970 SC 2000 had been decided following the case of New India Sugar Mills' case AIR 1963 SC 1207, which in turn had followed the decision in Gannon Dunkerley's case AIR 1958 SC 560. According to the learned counsel for the opposite parties, Gannon Dunkerley's case AIR 1958 SC 560 was decided in a different context having no application to the case in hand and it had interpreted the definition of the word 'sale' as provided under the Sale of Goods Act and Benjamin on Sale. The Supreme Court in Vishnu Agencies case AIR 1978 SC 449 has specifically overruled the view taken in New India Sugar Mills' case AIR 1963 SC 1207 and has approved the minority view as expressed by Justice Hidayatullah, as he then was. We may, therefore, have to examine as to how far the decision in Chittar Mai's case AIR 1970 SC 2000 holds good and to what extent it has been overruled

in Vishnu Agencies' case AIR 1978 SC 449. In Vishnu Agencies' case AIR 1978 SC 449, two appeals were connected which had been disposed of together. One was by M/s. Vishnu Agencies (Pvt.) Ltd. and the other by Dhanyalakshmi Rice Mills. Vishnu Agencies case AIR 1978 SC 449 relates to the West Bengal Cement Control Act (26 of 1948) which regulated production, supply and distribution of cement at a fair price. A Cement Control Order was passed under the provisions of the Cement Control Act which .provided that no sale or purchase of cement could be made except in accordance with the conditions contained in the order issued by the Director of Consumer Goods, West Bengal or by officers authorised by him. The cement could be purchased only by a permit-holder from the dealer specified therein at a fixed price. The manner of payment and time of delivery of goods was also specified under the licence. Vishnu Agencies who held the licence of a dealer under the Licensing Order, made supplies from time to time under the specific orders issued by the authorities concerned which was sought to be taxed and the tax was paid but subsequently the same was challenged in view of the decision of the Honourable Supreme Court in New India Sugar Mills case AIR 1963 SC 1207 and on the basis of the same it was contended that in view of the provisions of the Cement Control Act and the Cement Control Order, no volition or area of bargaining was left to the parties nor there was any element of mutual consent or agreement.

39. The other appeal, namely, Dhanyalakshmi Rice Mills related to the Andhra Pradesh Paddy Procurement (Levy) Order under which paddy growers in the State were to sell the paddy to the licensed agent appointed by the Government at a fixed price. It was held that the transaction amounted to sale and was taxable. The appeal was preferred against the said order of the Honourable High Court. In the judgment of the Honourable Supreme Court, there is an observation in para 16 mentioning that counsel appearing in the Andhra Pradesh appeals agreed that the decision in the Calcutta case would govern those appeals also. While holding that the transactions under the Control Orders amount to sale, the Honourable Supreme Court observed in para 33 of the judgment as under :

33. 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 the 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 transactions between the appellant and the allottees are not consensual. They, with their free consent, agreed to enter into the transactions.

40. It has further been observed in para 34 that though the terms of the transaction were mostly predetermined by law, but still there was some area in which there was possibility of bargaining and consensual arrangement. In that connection it was observed that it was open to the dealer to charge lesser price or the parties could fix the time of delivery of goods. There was also a provision conferring a right on the allottee to ask for weighment of goods which, according to the Honourable Supreme Court, shows that the allottee could reject the goods if they were short in weight just as indeed, he would have the undoubted right to reject them on the ground that they were not of the requisite quality. The observation of the Honourable Supreme Court further is that though the areas of the agreement were minimal, still the parties to the transactions had the freedom to bargain and this circumstance was against the view that the transactions were not consensual. After considering several decisions, their Lordships of the Honourable Supreme

Court observed in para 39 of the judgment about the decision in New India Sugar Mills case AIR 1963 SC 1207 as follows :

We are of the opinion that the true position in law is as is set out in the dissenting judgment of Hidayatullah, J., and that the view expressed by Kapur and Shah, JJ., in the majority judgment, with deference, cannot be considered as good law. Bachawat, J., in Andhra Sugars [1968] 1 SCR 705 was, with respect, right in cautioning that the majority judgment of Kapur and Shah, JJ., in New India Sugar Mills AIR 1963 SC 1207 'should not be treated as an authority for the proposition that there can be no contract of sale under compulsion of a statute' (pages 715-716 of SCR) (at page 606 of AIR). Rather than saying that, in view of the growing uncertainty of the true legal position on the question, we are constrained to say, namely, that the majority judgment in New India Sugar Mills AIR 1963 SC 1207 is not good law. Bachawat, J., preferred to adopt the not unfamiliar manner of confining the majority decision to 'the special facts of that case'.

41. About the decision in Gannon Dunkerley's case AIR 1958 SC 560, which was followed in New India Sugar Mills case AIR 1963 SC 1207, their Lordships observed in para 40 of the judgment that the decision in Gannon Dunkerley's case AIR 1958 SC 560 was in a different context and the enquiry was only to a limited extent as to whether the material used by a building contractor ' during the course of execution of the contract amounted to sale. It was held that it did not amount to sale in the context of the definition of the word 'sale' under the Sale of Goods Act and since the ingredients of the 'sale' were not present as laid down in Benjamin on Sale, therefore, no tax could be levied on such material. The reasons given in Gannon Dunkerley's case AIR 1958 SC 560 for holding that the using of material did not amount to 'sale' has been summarised by the Honourable Supreme Court in para 40 of the judgment where it has also been indicated that Gannon Dunkerley's case AIR 1958 SC 560 was not rightly followed in New India Sugar Mills case AIR 1963 SC 1207. The observations are as follows :

Thus, the two reasons given by the court in support of its conclusion were, firstly, that in a building contract there was no agreement, express or implied, to sell 'goods' and secondly, that property in the building materials does not pass in the

materials regarded as 'goods' but it passes as part of immovable property. In New India Sugar Mills [1963] 14 STC 316 (SC), the commodity with which the court was concerned was sugar and was delivered as sugar just as in the instant case, the commodity with which we are concerned is cement which was delivered as cement. That meets the first reason in Gannon Dunkerley [1958] 9 STC 353 (SC). As regards the second, it is quite clear that the tax was demanded after the commodity had changed hands or, putting it in the words of the Sale of Goods law, after property in it had passed. With great respect, therefore, the majority in New India Sugar Mills [1963] 14 STC 316 (SC) was in error in saying that 'the ratio decidendi of that decision [Gannon Dunkerley [1958] 9 STC 353 (SC)] must govern this case'. The question before us which was the very question involved in New India Sugar Mills [1963] 14 STC 316 (SC), viz., whether a transaction effected in accordance with the obligatory terms of a statute can amount to a 'sale' did not arise in Gannon Dunkerley [1958] 9 STC 353 (SC).

42. Their Lordships of the Honourable Supreme Court have also in para 41 of the judgment referred to the case [1955] AC 696 (Kirkness v. John Hudson and Company Ltd.) which was followed in Gannon Dunkerley's case AIR 1958 SC 560. The court observed thus :

In fact, if we may say so with great respect, the observation in Gannon Dunkerley [1958] 9 STC 353 (SC) that the decision in Kirkness [1955] AC 696 concluded the question before the court seems to us somewhat wide of the mark. Since Kirkness [1955] AC 696 involved an altogether different point, we would have avoided referring to it but the reliance upon it in Gannon Dunkerley [1958] 9 STC 353 (SC) may lead to a misunderstanding regarding its true ratio which needs to be clarified.

43. Their Lordships of the Honourable Supreme Court have thereafter observed that a more relevant decision on the point would be [1962] Ch 376 (Ridge Nominees Ltd. v. Inland Revenue Commissioners). In that case, under certain circumstances, the transfer of shares had to be executed under the statutory provisions even against the consent of one of the parties. The question was whether a transfer of shares under such circumstances was required to be stamped as a transfer on sale. The question, therefore, was whether the

transaction amounted to sale even though element of mutual consent was totally absent. It was observed by Lord Evershed, M.R., that what the Companies Act had done, by the machinery it had created, was that in truth it brought into being a transaction which had apparently all characteristics of transfer on sale. While concurring with the decision Donovan, L.J., observed that the dissent of the shareholder was overridden by an assent which the statute imposed upon him though it may be fictional. Danckwerts, L.J., also concurring with the judgment observed that a sale may not always require the consensual element and that there may be a compulsory sale of property in which the owner is compelled to part with his property against his will.

44. While dealing with the earlier decision in Chittar Mai's case AIR 1970 SC 2000, the Honourable Supreme Court has observed in para 44 of the judgment as follows :

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.

45. Further their Lordships of the Supreme Court in para 45 of the judgment clarified the position as follows :

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 Chittar Mai AIR 1970 SC 2000 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 (page 677 of SCR) (at page 2004 of AIR). 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 Chittar Mai [1970] 26 STC 344 (SC) can be justified only on the view that Clause 3 of. the Wheat Procurement Order envisages compulsory acquisition of wheat by the State

Government from the licensed dealer. Viewed from this angle, we cannot endorse the court's criticism of the Full Bench decision of the Allahabad High Court in Commissioner, Sales Tax, U.P. v. Ram Bilas Ram Gopal AIR 1970 All. 518 which held while construing Clause 3 that so long as there was freedom to bargain in some areas the transaction could amount to a sale though effected under compulsion of a statute. Looking at the scheme of the U.P. Wheat Procurement Order, particularly Clause 3 thereof, this court in Chittar Mai [1970] 26 STC 344 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 Clause 3 in no uncertain terms by saying that 'it did not envisage any consensual arrangement'.

46. From the above observations, what emerges out is that, no doubt, cases of compulsory acquisition of property stand on different footings but in those transactions where there is some area of consensual arrangement and some field for volition is left untouched by the legislation, the transactions will take the colour of sale. The criticism of the Full Bench decision of this Court (AIR 1970 All. 518: Commissioner of Sales Tax, U.P. v. Ram Bilas Ram Gopal) in the case of Chittar Mal AIR 1970 SC 2000 has not been approved by the Honourable Supreme Court in Vishnu Agencies' case AIR 1978 SC 449. In other words, the view taken in the Full Bench decision of this Court was approved where it was held that the sale made by a dealer to the Regional Food Controller under the U. P. Wheat Procurement (Levy) Order, 1959 amounted to sale and exigible to sales tax. It was held that a sale under the compulsion of a statute is still a sale. Whatever coercive force is used to bring about the transaction must be traced to legislation. It cannot be attributed to the State Government as a party to the transaction. The terms of the contract, it has been observed, are supplied by the statute.

47. In our opinion, it is clear that the decision in Chittar Mai's case AIR 1970 SC 2000 does not hold good in view of Vishnu Agencies' case AIR 1978 SC 449, in respect of transactions where there still remains some area of consensual arrangement. In this regard with due respect we are unable to agree with the decision of the Punjab High Court in Writ Petition No. 1573 of 1983 (Food Corporation of India v. State of Haryana [1987] 66 STC 7). From the different

decisions and observations made therein it clearly comes out that there may be compulsory sales even against the wishes and consent of one of the parties, still the transaction may amount to sale. In such cases the dissent is overridden by an assent supplied by the statute. The statute brings the two parties together, restricting their area of consensual agreement howsoever minimal it may be, none the less property passes on to the purchaser for a price which is the essential feature of 'sale'; therefore, such transaction amounts to 'sale'. So we may have to find out if there is any volition left with the parties or not in the case in hand.

48. To show that area of volition between the parties still existed despite restrictions placed under the Levy Orders, learned counsel for the opposite parties has first submitted that there is no provision regarding mode of payment of price of the foodgrains which were purchased under the Levy Orders. Therefore, it was open to the parties to settle their own terms and conditions regarding manner and mode of payment. Next it has been pointed out that it was open to the Food Corporation of India to reject the foodgrains offered by the State Government if it thought that the foodgrains did not conform to the standard of quality as required by it. In this connection, an averment has been made in para 13 of the counter-affidavit filed on behalf of the opposite parties by Sri R. B. Agarwal stating therein that the petitioner had rejected 142 metric tonnes of wheat which was offered by the State Government. This, according to the opposite parties shows that the petitioner reserved the right to accept or reject the offer of the State Government in the circumstances mentioned above. A reply to the said averment has been made in para 12(e) of the rejoinder affidavit on behalf of the petitioner through Sri S. R. Singh wherein it has been stated that the Food Corporation of India rejects and does not accept the foodgrains which are not in accordance with the specifications fixed by the Government of India. So far rejection of 142 metric tonnes of wheat is concerned, it has been said that the quantity was just a drop in the ocean. However, it appears that on the second thought the petitioner tried to explain this matter in its supplementary affidavit dated 20th May, 1986 sworn by Sri S. R. Singh. In this supplementary affidavit it has been stated that the opposite parties did not aver in the counter-affidavit that 142 metric tonnes of wheat pertained to levy transaction, and in respect of non-lifting of 47 metric tonnes of rice it has been stated that it was advance levy which was taken by the State Government;

therefore, it was not lifted. However, it has been accepted in para 4 that the Food Corporation of India is bound to accept the levy foodgrains provided they are of the prescribed specifications. So a total sum of situation which emerges out is that some area of consensual arrangement still remains; that is to say, if the Food Corporation of India is not satisfied about the quality of the foodgrain, it has a right to reject the same. In the case of Vishnu Agencies [1978] 42 STC 31; AIR 1978 SC 449, their Lordships of the Supreme Court had discussed various conditions as contained in the Control Order, while considering the question of area of consensual arrangement and volition between the parties to the transactions. One of the clauses taken into account was related to weighment of goods. The observations in that connection are as follows :

Paragraph 8A 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.

49. In para 46 of the judgment in Vishnu Agencies' case AIR 1978 SC 449, their Lordships of the Supreme Court while considering the case of Solar Jung Sugar Mills Ltd. AIR 1972 SC 87, took note of the fact that the Control Orders had left to the parties the option in regard to taking higher quantity than stipulated in the Orders, a higher price than the minimum fixed as also the form and manner of payment. It was further observed that a factory could reject goods after inspection which indicated not only freedom in the formation but also in the performance of the contract.

50. The above observation of the Honourable Supreme Court leaves no room for doubt that area of consensual arrangement did exist between the parties. In the Full Bench case, Commissioner of Sales Tax v. Ram Bilas Ram Gopal AIR 1970 All. 518 which has implied approval of the Supreme Court in Vishnu Agencies' case AIR 1978 SC 449, one of the circumstances taken into account was that one of the parties to the transaction, namely, the State Government, had option to say

or decide when it will stop purchasing wheat from the dealer. So it was a matter left open to one of the parties. Same is the position in the present case. The question of mode of payment of price was also taken into account in the abovementioned Full Bench decision in Ram Bilas Ram Gopal AIR 1970 All. 518. Therefore, it cannot be said that the area of consensual arrangement is absolutely excluded in the levy transactions.

51. It has next been vehemently urged that the millers are required to part with a certain percentage of their stocks irrespective of the fact that whether the foodgrains belong to the millers or not. The stock of miller may include such stock of foodgrains which may have been handed over by the farmers or other persons for hulling. This, according to the learned counsel for the petitioner, is one of the strong ingredients to establish that the transaction amounts to acquisition of property, otherwise ordinarily a person can sell only the property in which he has his right and title. The argument at the first sight appears to be fascinating but we find that it is devoid of any merit. As a matter of fact, the Levy Orders prescribe a mode of taking delivery of foodgrains through the millers even though goods may not belong to them. It is only title of the owner of the food-grains which passes on to the State Government and the price in turn is actually paid to the owner of the property through the millers. The millers are only the medium in the transaction through whom the required quantity of foodgrains passes on to the State Government. The provisions of the Zamindari Abolition and Land Reforms Act and the Imposition of Ceiling on Land Holdings Act, etc., which have been referred to provide for automatic vesting of rights in the State Government from a particular date. Nothing further is required to be done for passing on the title and the effect of the statutory provision automatically takes effect divesting a person of his right and title and vesting of the same in the State. But that is not so under the Levy Orders of the foodgrains. As observed earlier, we find that the millers are only a medium for passing on the foodgrains of the farmers or other persons to the Slate. May be that it has been provided for the sake of convenience in taking delivery of foodgrains. We are, therefore, of the view that only this feature of the Levy Orders, viz., taking of stock of foodgrains from millers, does not convert the sale transaction into acquisition of property.

52. On behalf of the opposite parties Sri V. Upadhyay has next submitted that in the case of Gannon Dunkerley AIR 1958 SC 560 and other subsequent cases which have followed the said case, the interpretation of the word 'sale' was done on the basis of the definition of the word 'sale' under the Sales Tax Act and the Sale of Goods Act but there has been constitutional amendment as well as amendments in the U. P. Sales Tax Act as a result of which transactions under the Levy Orders are covered under the term 'sale' without there being any room for doubt. It has further been submitted that the amendment was necessitated because of interpretation of 'sale' as given in different cases by the Honourable Supreme Court.

53. By means of the Constitution '(Forty-sixth Amendment) Act, 1982, Clause (29A) has been inserted after Clause (29) of Article 366 of the Constitution. The newly added Clause (29A) is as follows :

(29A) 'tax on the sale or purchase of goods' includes-

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or

any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

54. Learned counsel for the opposite parties has placed before us the Statement of Objects and Reasons for passing the Forty-sixth Amendment Act, which reads as follows :

'Statement of Objects and Reasons

Sales tax laws enacted in pursuance of the Government of India Act, 1935, as also the laws relating to sales tax passed after the coming into force of the Constitution proceeded on the footing that the expression 'sale of goods', having regard to the rule as to broad interpretation of entries in the legislative lists, would be given a wider connotation. However, in Gannon Dunkerley's case AIR 1958 SC 560, the Supreme Court held that the expression 'sale of goods' as used in the entries in the Seventh Schedule to the Constitution has the same meaning as in the Sale of Goods Act, 1930. This decision related to works contracts.

2. By a series of subsequent decisions, the Supreme Court has, on the basis of the decision in Gannon Dunkerley's case [1958] 9 STC 353 (SC), held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax. As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

3. This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter-State consignment transfers, i.e., transfer of goods from head office or a principal in one State to a branch or agent in another State or vice versa or transfer of goods on consignment account, to avoid the

payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of a works contract, if the contract treats the sale of materials separately from the cost of the labour, the sale of materials would be taxable, but in the case of an indivisible works contract, it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as movables. Though practically the purchaser in a hire-purchase agreement gets the goods on the date of the hire-purchase, it has been held that there is sale only when the purchaser exercises the option to purchase at a much later date and therefore only the depreciated value of the goods involved in such transaction at the time the option to purchase is exercised becomes assessable to sales tax. Similarly, while sale by a registered club or other association of persons (the club or association of persons having corporate status) to its members is taxable, sales by an unincorporated club or association of persons to its members is not taxable as such club or association, in law, has no separate existence from that of the members. In the Associated Hotels of India case AIR 1972 SC 1131, the Supreme Court held that there is no sale involved in the supply of food or drink by a hotelier to a person lodged in the hotel.

4. In the New India Sugar Mills case AIR 1963 SC 1207, the Supreme Court took the view that in the transfer of controlled commodities in pursuance of a direction under a Control Order, the element of volition by the seller, or mutual assent, is absent and, therefore, there is no sale as defined in the Sale of Goods Act, 1930. However, in Oil and Natural Gas Commission v. State of Bihar AIR 1976 SC 2478, the Supreme Court had occasion to consider its earlier decisions with regard to the liability of transfers of controlled commodities to be charged to sales tax. The Supreme Court held that where there are any statutory compulsions, the statute itself should be treated as supplying the consensus and furnishing the modality of the consensus. In Vishnu Agencies v. Commercial Tai Officer AIR 1978 SC 449, six of the seven Judges concurred in overruling the decision in New India Sugar Mills case [1963] 14 STC 316 (SC) while the seventh Judge held the case to be distinguishable. It is, therefore, considered desirable to put the matter beyond any doubt.

5. The various problems connected with the power of the States to levy a tax on the sale of goods and with the Central Sales Tax Act, 1956, were referred to the Law Commission of India. The Commission considered these matters in their Sixty-first Report and, recommended inter alia certain amendments in the Constitution if as a matter of administrative policy it is decided to levy tax on transactions of the nature mentioned in the preceding paragraphs.

6. Device by way of lease of films has also been resulting in avoidance of sales tax. The main right in regard to a film relates to its exploitation and after exploitation for a certain period of time, in most cases, the film ceases to have any value. It is, therefore, seen that instead of resorting to the outright sale of a film, only a lease or transfer of the right to exploitation is made.

7. There were reports from State Governments to whom revenues from sales tax have been assigned, as to the large scale avoidance of Central sales tax leviable on inter-State sales of goods through the device of consignment of goods from one State to another and as to the leakage of local sales tax in works contracts, hire-purchase transactions, lease of films, etc. Though Parliament could levy a tax on these transactions, as tax on sales has all along been treated as an item of revenue to be assigned to the States, in regard to these transactions which resemble sales also, it is considered that the same policy should be adopted.

8. Besides the abovementioned matters, a new problem has arisen as a result of the decision of the Supreme Court in Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi AIR 1978 SC 1591. States have been proceeding on the basis that the Associated Hotels of India case [1972] 29 STC 474 (SC) was applicable only to supply of food or drink by a hotelier to a person lodged in the hotel and that tax was leviable on the sale of food-stuffs by a restaurant. But overruling the decision of the Delhi High Court, the Supreme Court has held in the above case that service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax but must be regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. It would not make any difference whether the visitor to the restaurant is charged for the meal as a whole or according to each dish

separately.

9. It is, therefore, proposed to suitably amend the Constitution to include in Article 366 a definition of 'tax on the sale or purchase of goods' by inserting a new Clause (29A). The definition would specifically include within the scope of that expression tax on-

(i) transfer for consideration of controlled commodities;

(ii) the transfer of property in goods involved in the execution of a works contract;

(iii) delivery of goods on hire-purchase or any system of payment by instalments;

(iv) transfer of the right to use any goods for any purpose for cash, deferred payment or other valuable consideration;

(v) the supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) the supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration. (see Clause 4).

10. A new entry is sought to be inserted in the Union List in the Seventh Schedule as entry 92B, to enable the levy of tax on the consignment of goods where such consignment takes place in the course of inter-State trade or commerce, (see Clause 5).

11. Clause (1) of Article 269 is proposed to be amended so that the tax levied on the consignment of goods in the course of inter-State trade or commerce shall be assigned to the States. Clause (3) of that article is proposed to be amended to enable Parliament to formulate by law principles for determining when a consignment of goods takes place in the course of inter-State trade or commerce, (see Clause 2).

12. Clause (3) of Article 286 is proposed to be amended to enable Parliament to specify, by law, restrictions and conditions in regard to the system of levy, rates and other incidents of the tax on the transfer of goods involved in the execution of

a works contract, on the delivery of goods on hire-purchase or any system of payment by instalments and on the right to use any goods, (see Clause 3).

13. The proposed amendments would held in the augmentation of the State revenues to a considerable extent. Clause 6 of the Bill seeks to validate laws levying tax on the supply of food or drink for consideration and also the collection or recoveries made by way of tax under any such law. However, no sales tax will be payable on food or drink supplied by a hotelier to a person lodged in the hotel during the period from the date of the judgment in the Associated. Hotels of India case [1972] 29 STC 474 (SC) and the commencement of the present Amendment Act if the conditions mentioned in Sub-clause (2) of Clause 6 of the Bill are satisfied. In the case of food or drink supplied by restaurants this relief will be available only in respect of the period after the date of judgment in the Northern India Caterers (India) Limited case [1978] 42 STC 386 (SC) and the commencement of the present Amendment Act.

14. The Bill seeks to achieve the above objects.

55. Clause 6 of the Amendment Act has also been referred to, which is a validation and exemption clause. Clause 6 reads as follows :

6. Validation and exemption.-(1) For the purposes of every provision of the Constitution in which the expression 'tax on the sale or purchase of goods' occurs, and for the purposes of any law passed or made, or purporting to have been passed or made, before the commencement of this Act, in pursuance of any such provision,-

(a) the said expression shall be deemed to include, and shall be deemed always to have included, a tax (hereafter in this section referred to as the aforesaid tax) on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) for cash, deferred payment or other valuable consideration; and

(b) every transaction by way of supply of the nature referred to in Clause (a) made before such commencement shall be deemed to be, and shall be deemed always to have been, a transaction by way of sale, with respect to which the person making such supply is the seller and the person to whom such supply is made, is the purchaser, and notwithstanding any judgment, decree or order of any court, tribunal or authority, no law which was passed or made before such commencement and. which imposed or authorised the imposition of, or purported to impose or authorise the imposition of, the aforesaid tax shall be deemed to be invalid or ever to have been invalid on the ground merely that the legislature or other authority passing or making such law did not have competence to pass or make such law, and accordingly :-

(i) all the aforesaid taxes levied or collected or purporting to have been levied or collected under any such law before the commencement of this Act shall be deemed always to have been validly levied or collected in accordance with law;

(ii) no suit or other proceeding' shall be maintained or continued in any court or before any tribunal or authority for the refund of, and no enforcement shall be made by any court, tribunal or authority of any decree or order directing the refund of, any such aforesaid tax which has been collected;

(iii) recoveries shall be made in accordance with the provisions of such law of all amounts which would have been collected thereunder as such aforesaid tax if this section had been in force at all material times.

(2) Notwithstanding anything contained in Sub-section (1), any supply of the nature referred to therein shall be exempt from the aforesaid tax-

(a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of September, 1978, and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or

(b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or after the 4th day of January, 1972, and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time :

Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in Clause (a) or, as the case may be, Clause (b), shall be on the person claiming the exemption under this sub-section.

(3) For the removal of doubts, it is hereby declared that,-

(a) nothing in Sub-section (1) shall be construed as preventing any person-

(i) from questioning in accordance with the provisions of any law referred to in that sub-section, the assessment, reassessment, levy or collection of the aforesaid tax, or

(ii) from claiming refund of the aforesaid tax paid by him in excess of the amount due from him under any such law; and

(b) no act or omission on the part of any person, before the commencement of this Act, shall be punishable as an offence which would not have been so punishable if this Act had not come into force.

56. The U.P. Sales Tax Act was also similarly amended by Act No. 25 of 1985. By means of this amendment,, Clause (h) of Section 2 of the U. P. Sales Tax Act has been substituted as follows :

(h) 'sale', with its grammatical variations and cognate expressions, means any transfer of property, in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration, and includes-

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire-purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;.

57. The amendment was effected with effect from 13th September, 1985. There is also a validation clause which is Clause 17. It reads as follows:

17. Validation.-(1) Notwithstanding any judgment, decree or order of any court or other authority, anything done or any action taken before the commencement of this section, which conforms to the provisions of the principal Act, as amended by this Act, shall be deemed to be and always to have been valid and lawful as if the provisions of this Act were in force at all material times.

(2) Where, before the commencement of this section, any court or authority has, in any proceeding, made any assessment, levy or collection of any tax, or passed any order imposing any penalty or making any other demand under the principal Act, or passed any order modifying, setting aside or quashing (wholly or in part) such assessment, levy, collection, penalty or demand and such assessment or other order becomes, in consequence of the provisions of this Act, inconsistent with the provisions of the principal Act as amended by this Act, then, subject to the provisions of Sub-section (3), any party to the proceeding or the Commissioner of Sales Tax may, within six months from the date of such commencement, make an application to such court or authority for a review of the assessment or order, and

thereupon such court or authority may review the proceeding and make such order, varying or revising the order previously made, as may be necessary to give effect to the provisions of this Act.

(3) The assessing, appellate or revising authority, as the case may be, may, within a period of one year from the commencement of this section or within the period specified in Section 22 of the principal Act, whichever expires later, make any rectification in any order passed by it where such rectification becomes necessary in consequence of the amendment of the principal Act by this Act :

Provided that no rectification, which has the effect of enhancing the assessment, penalty or other dues, shall be made unless the authority concerned has given notice to the dealer or the person concerned of his intention to do so and has allowed him a reasonable opportunity of being heard.

58. On the basis of amendments in the Constitution and the U. P. Sales Tax Act referred to above, it has been submitted on behalf of the opposite parties that the transactions which take place under the Levy Orders are fully covered as sales under Sub-clause (a) of Clause (29A) of Article 366 of the Constitution and under Clause (h) of Section 2 of the U. P. Sales Tax Act. Transfer of property in goods otherwise than in pursuance of a contract is included in the definition of the word 'sale'. Therefore, by the above inclusion the definition of 'sale' as given under the Sale of Goods Act, to the extent it does not include such transactions, does not hold good for the purposes of the U. P. Sales Tax Act. It has further been submitted that the earlier cases relate to the definition of the word 'sale' as it then stood. It may not be necessary to refer to those cases for the purposes of the meaning of the word 'sale' after amendment. If a transaction or transfer of property in goods is covered under Clause (h) of Section 2 of the U. P. Sales Tax Act, then such transaction would be exigible to tax. We find that in the earlier decisions the main emphasis for not holding a transaction a 'sale' was on the ground that there was no contract preceding the sale, which is a necessary ingredient of 'sale' according to the definition of 'sale' under the Sale of Goods Act and 'Benjamin on Sale' as relied upon by the Honourable Supreme Court in the case of Gannon Dunkerley AIR 1958 SC 560. However, we have already noted that in some of the

decisions, referred to earlier, it has been held that the consent to a transaction can be provided under the statute or dissent of a party to transaction of sale may be overridden by the statutory provisions. The contention of the opposite parties is that such a doubt which was lingering in respect of certain transactions has been removed by a clear provision about the meaning of the word 'sale' by means of a constitutional provision as well as by subsequently amended provision under the U. P. Sales Tax Act.

59. It has been submitted on .behalf of the opposite parties that the vires of the amended constitutional provision and the amended provision of the U. P. Sales Tax Act has not been challenged. That is to say, the competence of the legislature to define the word 'sale' as it has been done is not in dispute nor the substantive amended provision is under challenge; therefore, a transfer of property in goods otherwise than in pursuance of a contract would mean 'sale' as included in the definition. This position would lead to the conclusion that the petitioner does not and cannot object to the transactions under the Levy Orders amounting to sale for the reason of lack of agreement between the parties. It has been submitted that the transfer of property in goods does take place in the transactions under the Levy Orders for price. Whatever controversy existed earlier about such transactions, it has come to an end.

60. Learned counsel for the petitioner has submitted, no doubt that the validity of the amended provision has not been challenged but still the transactions under the Levy Orders would not be covered under the amended definition of the word 'sale'. He has again emphasised that the transaction under the Levy Order amounts to acquisition of property and not sale. It has been submitted that the compulsory acquisition and the sale are undisputedly two different concepts and connote different kinds of transactions. It has also been pointed out that these two different terms have been differently used in the Constitution under entry 54 of List II of the Seventh Schedule and entry 42 of List III of the Seventh Schedule. We have already made a reference to those entries in the earlier part of this judgment. Then reliance has been placed upon the observation made by the Honourable Supreme Court in Vishnu Agencies' case AIR 1978 SC 449 wherein it has been observed that the cases of compulsory acquisition stand on different footing. On this basis, it

has been submitted that if transactions under the Levy Orders amount to acquisition of property, then such transactions would not be governed by the amended definition of the word 'sale'. In this connection, he has referred to the use of the word 'transfer' occurring in Sub-clause (a) of Clause (29A) of Article 366 of the Constitution. It has been submitted that acquisition of property does not involve transfer. We are afraid, the argument is fallacious. The title in the property does pass on to the State in the cases of compulsory acquisition and such passing on of the title is nothing but transfer of rights and title of the holder of property. We have already held earlier that transactions under the Levy Orders do not amount to compulsory acquisition.

61. It has then been submitted that latter part of Clause (29A) of Article 366 refers to transfer, delivery or supply of goods, meaning thereby that there has to be a transferor. Under the said provision a person making the transfer is deemed to have made the 'sale' and purchase of those goods is made by one to whom the transfer, delivery or supply is made. It has been submitted that in levy transactions the millers have to transfer the foodgrains to the procuring agency though such foodgrains may not belong to them. Ordinarily a transferor cannot convey a title better than what he possesses. This is only in the cases of compulsory acquisition that the property vests in the State irrespective of right, title or encumbrances of the transferor or other parties. We have already dealt with this submission of the petitioner and we cannot lose sight of the fact that the amended provisions relate to inclusive definition and deemed 'sale' of goods. In such matters, some element of fiction is necessarily there. That is to say, a certain thing or position is presumed for some specific purpose though actually it may not be there. Therefore, to test whether a transaction falls within the inclusive definition is not to be judged on the basis of general principle or ingredients of the term involved but on the basis of definition as provided in the statute.

62. It was then submitted that the word 'transfer' used under the new definition of the word 'sale' should partake its colour and character of the nature of sale. It has been submitted that a general term takes colour from specific term used. In this connection, he has cited a case reported in AIR 1973 SC 1293 (S.P. Watel v. State of U.P.) and has also referred to the Legislation and Interpretation by

Jagdish Swaroop, page 117, 1974 Edition. Reliance has also been placed on AIR 1957 SC 18 (Ram Narain v. State of Uttar Pradesh). There is no dispute with the proposition that a word has to be given meaning keeping in view the context in which it is used and the company of other words which it keeps. But in our view, the question of searching such meaning arises when there is vagueness in the meaning of the word to be interpreted or there is some doubt about the same and it may not be possible to have the plain meaning on the bare reading of the provision. We find no such ambiguity in this case. The inclusive definition has been provided for the word 'sale' and there seems to be no difficulty in holding that where property in goods is transferred even though without in pursuance of a contract, for a price or consideration that would be 'sale'.

63. It has then been submitted that while making the amendment, the legislature did not have in its mind the levy transactions. In different paragraphs of the Statement of Objects and Reasons for inserting Clause (29A) to Article 366 of the Constitution, different cases decided by the Supreme Court and different situations sought to be met were mentioned, e.g., about supply of food-stuffs, transactions of hire-purchase and material used in building contract, etc., but there was no mention of Chittar Mai's case AIR 1970 SC 2000 or about levy transactions. Thus there was no intention to cover levy transactions by means of the said amendment. We are afraid, it may not be necessary for us to go into the question of intention of the legislature as it would be necessary only in those cases where there is any doubt or ambiguity about the meaning of Sub-clause (a) of Clause (29A) of Article 366 or Clause (h) to Section 2 of the U. P. Sales Tax Act. In any case, we note that mention of Vishnu Agencies' case AIR 1978 SC 449 and New India Sugar Mills' case AIR 1963 SC 1207 is certainly there. In Vishnu Agencies' case AIR 1978 SC 449, all the cases, namely, the cases of Chittar Mal AIR 1970 SC 2000, Gannon Dunkerley AIR 1958 SC 560 and New India Sugar Mills AIR 1963 SC 1207, etc., had been considered. Therefore, the omission to specifically mention the case of Chittar Mal AIR 1970 SC 2000 is immaterial. We are, therefore, not of the view that the definition as it stands, does not cover the levy transactions. So long as the amended provisions remain unchallenged and stand as they are, it would be difficult to hold that the transactions under the Levy Orders would not be covered under the said amended definition of 'sale' which includes a

transaction of transfer of property in goods otherwise than in pursuance of a contract for cash payment or consideration, etc. We find that this amendment was not taken into consideration by the Division Bench of the Punjab High Court in Writ Petition No. 1573 of 1983 (Food Corporation of India, Karnal v. State of Haryana [1987] 66 STC 7).

64. Learned counsel for the opposite parties, Sri V.B. Upadhyay, has referred to a decision of this Court 1985 ATJ 585 (Pandit Restaurant v. State of U.P.). In this case, it appears that M/s. Pandit Restaurant had challenged the assessment on the ground that there was no sale when food or drink is supplied to a guest staying in a hotel as held in AIR 1978 SC 1591 [Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi]. However, such a supply made to the guest was included as 'sale' by an amendment in Article 366 of the Constitution and U. P. Act No. 25 of 1985. In this case it was also considered whether such amendment could retrospectively be made or not. The Division Bench of this Court upheld the validity of amending Act No. 25 of 1985 as well as upheld the retrospectivity of the amended provision. A reference was also made to an unreported decision of this Court by Honourable Mr. Justice N. D. Ojha, as he then was, in Sales Tax Revision No. 171 of 1983 and Sales Tax Revision No. 184 of 1983 (Commissioner, Sales Tax, U.P. v. Rajpur Brothers), decided on 25th April, 1984. It appears that certain restaurant owners had challenged the levy of sales tax on items supplied to the customers, e.g., sweets, tea, poori, etc., on the strength of decision in Northern India Caterers' case AIR 1978 SC 1591. It appears that when these revisions were decided, the Forty-sixth Amendment of the Constitution had taken place as a result of which Clause (29A) to Article 366 of the Constitution was added but a similar amendment under the U. P. Sales Tax Act had not yet taken place. This Court had taken the view that although the definition of 'sale' as then stood under the Sales Tax Act was not the same, yet it was covered by the definition of the word 'sale' as amended under Clause (29A) of Article 366 of the Constitution of India and the items were found to be exigible to sales tax.

65. On the question of amendment we may refer to para 49 onwards in the judgment of the Vishnu Agencies' case AIR 1978 SC 449 where necessity to amend and change the laws, in keeping with times, has been commented upon. In

this connection, para 51 may be usefully reproduced as under:

Anson is perhaps over-optimistic in saying that there has been a fundamental change in social outlook and in the legislative policy towards contract. Anyway, with the high ideals of the preamble and the directive principles of our Constitution there has to be such a fundamental change in judicial outlook. Instances given in Cheshire and Anson have their parallels in India too, wherein freedom of contract has largely become an illusion. The policy of our Parliament in regard to contracts, including those involved in sale of goods, has still to reflect recognition of the necessity for a change, which could be done by a suitable modification of the definition of 'sale' of goods.

66. It is evident that it was expressed quite early by the Honourable Supreme Court that there was necessity to amend the definition of the word 'sale' which has ultimately been done by the forty-sixth amendment. Developing concepts shall definitely take their place which is irresistible due to changing circumstances, needs and requirements of the society. Something which may have withstood test of time two centuries ago, may not necessarily hold good today due to vast socio-economic changes as well as change in outlook and obligations of the State. With the change of definition of the word 'sale' in the Constitution and by the U. P. Amendment Act, the whole position stands changed and transactions covered under the Levy Orders squarely fall within the inclusive definition of the word 'sale'.

67. On behalf of the petitioners, explanation II to Sub-section (1) of Section 3-D of the U. P. Sales Tax Act has also been challenged. Before reproducing explanation II to Section 3-D(1), it would be appropriate to refer to Section 3 which is the taxing provision and Section 3-D(1). Section 3 reads as follows :

Section 3. Liability to tax under the Act.-(1) Subject to the provisions of this Act, every dealer shall, for each assessment year, pay a tax at the rates provided by or under Section 3-A, or Section 3-D on his turnover of sales or purchases or both, as the case may be, which shall be determined in such manner as may be prescribed.

(2) No dealer shall, except as otherwise provided in Section 18, be liable to tax under Sub-section (1) if, during the assessment year, the aggregate of his turnover of-

(a) purchases of goods notified under Section 3-D;

(b) purchases liable to tax under any other provision of this Act;

(c) sale of goods notified under Section 3-D where such goods have not been purchased within the State;

(d) sales of all goods (except those notified under Section 3-D), whether such sale is made by the dealer directly or through his branch, depot or agent inside the State, in the course of inter-State trade or commerce or outside the State,

is less than fifty thousand rupees in the case of manufacturers and one lakh rupees, in the case of other dealers, or such larger amount as the State Government may, by notification, in the Gazette, specify in that behalf either in respect of all dealers in any goods or in respect of a particular class of such dealers.

(3) ...

(4) ...

68. Section 3-D of the U. P. Sales Tax Act provides as follows :

Section 3-D. Levy of purchase or sales tax on certain goods.-(I) Except as provided in Sub-section (2), there shall be levied and paid, for each assessment year or part thereof, a tax on the turnover, to be determined in the prescribed manner,-

(a) of first purchases of opium, at such rate not exceeding twenty-six per cent,

(b) of first purchases of such other goods at such rate not exceeding-

(i) the maximum rate for the time being specified in Section 15 of the Central Sales Tax Act, 1956 (Act 74 of 1956), in respect of goods declared by Section 14 of that

Act to be of special importance in inter-State trade or commerce, and

(ii) fifteen per cent in respect of other goods,

and with effect from such date, as the State Government may, by notification in the Gazette, specify in relation to purchases made within Uttar Pradesh by a dealer (whether on his own account or on account of any one else), or through a dealer acting as a purchasing agent :

Provided that such tax on the turnover of first purchase of mentha herb, shall be levied and paid at the rate of seven per cent, or at such rate not exceeding fifteen per cent as the State Government may, by notification, declare.'

'Explanation II.-(1) For the purposes of this sub-section, in relation to purchases of foodgrains in pursuance of any order made under Section 3 of the Essential Commodities Act, 1955, including any purchase in excess of the levy share, the purchase first made by a dealer from the State Government or its purchasing agent shall be the first purchase of such food-grains and the tax shall accordingly be levied at that point on such dealer.

(2) Where in respect of any goods notified under Sub-section (1), the purchaser whether on his own account or on account of any one else, is a person other than a registered dealer, there shall be levied and paid, for each assessment year or part thereof, a tax on the turnover, to be determined in the prescribed manner, of sale of such goods by the dealer who sells the goods or through whom the goods are sold to such purchaser; and the rate of tax shall be the same as notified under Sub-section (1).

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

69. It may be mentioned here that explanation II was added by U.P. Act No. 23 of 1976 with retrospective effect. Under Clause (b) of Sub-section (1) of Section 3-D of the Sales Tax Act, the liability of tax is fastened upon the first purchaser. However, in the case of purchase of foodgrains in pursuance of any order under Section 3 of the Essential Commodities Act, 1955, a purchase made by a dealer from the State Government is to be considered as first purchase of such foodgrains including the quantity which may be purchased in excess of levy share.

70. The result of the above explanation II is that although the foodgrains are actually first purchased by the procuring agencies or the State under the Levy Orders issued under Section 3 of the Essential Commodities Act from the growers, farmers, millers or stockists and so on but for the purposes of Section 3-D when such .foodgrain is purchased by a dealer from the State Government, that purchase is taken to be the first purchase. There is no dispute about the fact that after the levy foodgrains are procured by the State through its agencies, the same are then purchased by the Food Corporation of India which is also registered as a dealer under the U. P. Sales Tax Act. The liability is thus fastened upon the petitioner by virtue of explanation II to Section 3-D(1) of the U. P. Sales Tax Act quoted above.

71. The validity of explanation II has been challenged on the ground that it is discriminatory and unreasonable. It has been submitted that why a commodity, namely, the foodgrains, procured under the Levy Orders in particular has been selected for explanation II. It has then been submitted that the foodgrains procured beyond the levy share, in any case, have been unreasonably included in the provision as that is like any other sale by the Government to another person. It has been submitted that the explanation II has been added only with a purpose to tax the Food Corporation of India, inasmuch as there is no other agency which might be purchasing from the State the foodgrains procured in pursuance of Section 3 of the Essential Commodities Act. It has also been submitted that the foodgrains procured by other agencies when sold to the Food Corporation of India, the Food Corporation of India cannot be taxed as first purchaser. Liability of tax of other

agencies cannot be passed on to the Food Corporation of India.

72. So far procuring agencies are concerned, there is no doubt about the fact that the State procures foodgrains under the Levy Orders through different agencies, namely, Provincial Co-operative Federation, Essential Commodities Corporation, Agro Industrial Corporation and in certain areas through the Food Corporation of India. These are the agencies employed for the purposes of procuring the levy foodgrains. Such foodgrains which are procured under the Orders issued under the Essential Commodities Act, cannot be said to be belonging to the procuring agencies. Such foodgrains necessarily belong to the State. The petitioner could not show or establish that there is any other dealer who might be making purchases of such levy foodgrains from the State Government but has been exempted from the purchase tax. Therefore, we do not find any force in the submission made on behalf of the petitioner that there is any discrimination.

73. We also cannot hold that explanation II was added only with a view to single out the petitioner for taxation. In para 13 of the counter-affidavit, filed on behalf of the opposite parties, it has been averred that in the year 1981-82, the Food Commissioner of U. P. had sold levy rice to the Essential Commodities Corporation, U. P. and for that the said corporation was assessed to purchase tax under Section 3-D(1), explanation II of the Sales Tax Act. This is an example which clearly shows that the Food Corporation of India is not the only dealer who alone could purchase from the State Government, other dealers may also purchase from the State Government. The assertion of singling out of the petitioner is thus not made out. Therefore, the question of discrimination does not arise.

74. The other ground of attack is, as to why a particular commodity, viz., the foodgrain, procured under the Levy Orders under the Essential Commodities Act, has been chosen for the purposes of first purchase under explanation II and why not other commodities have been chosen, e.g., non-levy foodgrains and foodgrains procured under the price support scheme, etc. The argument is that the levy foodgrain is meant for those people who are economically not very well-off and it is distributed through the Food Corporation of India who is being burdened

with tax as first purchaser. The burden of tax should not fall upon such persons. On the other hand, the non-levy foodgrains as well as the foodgrains purchased under the price support scheme have not been included in explanation II. According to the petitioner, the only idea in adding explanation II was to tax the petitioner who would alone be covered under the provision. It may not be possible for us to hold so. There is nothing to indicate that the addition of explanation II was aimed against the petitioner. We have already seen as an example that the U. P. Essential Commodities Corporation was also assessed to purchase tax when the State Government had sold such foodgrains to it. A reference has also been made to annexure-6 accompanying the rejoinder affidavit dated 12th May, 1986 sworn by Sri S. R. Singh which shows that the State Government sells or may in certain circumstances sell levy foodgrains to dealers other than the Food Corporation of India. From the said annexure-6 it transpires that the Food Corporation of India had not been able to lift the levy rice due to difficulties in storing it. Therefore, the State Government had decided to sell it to the other agencies and preference was given to the U. P. Co-operative Federation, U. P. State Food and Essential Commodities Corporation and Consumer Co-operative Federation. The price of different qualities of rice was also indicated. It was also indicated that the prices fixed included the amount of sales tax. Annexure-6 belies the contention of the petitioner that there is no other agency except the Food Corporation of India which purchases or may alone purchase levy foodgrains from the State. We find that according to annexure-6 the amount of tax was also sought to be realised from the purchasers by including the same in the prices fixed.

75. So far the other argument is concerned, viz., by taxing first purchaser under explanation II the consumers of levy foodgrains will be affected, we think the argument is fallacious. Explanation II only provides for point of taxation. It does not create fresh liability. It only indicates who and at what point is to be taxed. If the purchase of levy foodgrains is taxed at any earlier point, then too, the burden will ultimately pass on to the consumers alone. We, therefore, find no force in this contention too. Non-levy foodgrain or other commodities do not get any exemption from taxation because of explanation II.

76. Learned counsel for the opposite parties has also placed reliance upon the case reported in [1963] 1 SCR 404 (East India Tobacco Company v. State of Andhra Pradesh). It has been observed by the Honourable Supreme Court that the State has wide discretion in selecting a person or objects it would tax and the taxing statute will not be open to attack on the mere ground that it taxes some person or objects and not others, but when within the range of its selection, the law operates unequally then certainly Article 14 of the Constitution may be said to be violated. Nothing has been shown to indicate that any discrimination has been made between one purchaser and the other in regard to purchases of levy foodgrains made from the State Government. Reliance has also been placed upon a case reported in (1973) 1 SCC 216 (Hira Lal Rattan Lal v. Sales Tax Officer). In that case the then newly added explanation II to Section 3-D(1) of the U. P. Sales Tax Act by the amendment and validation clause were under challenge. By adding explanation II, processed or split pulses were again made liable for tax as different item from unsplit and unprocessed foodgrains. They were made liable to tax in respect of first purchase of split or processed foodgrains even though tax may have been imposed in respect of their first purchases in their unsplit or unprocessed form. The amendment was retrospective. The validation clause validated earlier notifications and transactions, etc., notwithstanding any judgment, decree or order of any court and so the challenge was made on different grounds. The Honourable Supreme Court while turning down the plea of the assessees to hold the provision invalid, observed thus in para 19 :

19. It must be noticed that generally speaking the primary purpose of the levy of all taxes is to raise funds for public good. Which person should be taxed, what transactions should be taxed or what goods should be taxed, depends upon social, economic and the administrative considerations. In a democratic set up it is for the legislature to decide what economic or social policy it should pursue or what administrative considerations it should bear in mind. The classification between the processed or split pulses and unprocessed or unsplit pulses is a reasonable classification. It is based on the use to which those goods can be put. Hence, in our opinion, the impugned classification is not violative of Article 14.

77. It is a matter of policy for the State to take a decision as to which commodity is to be taxed, at what point it is to be taxed and who is to be taxed. We, therefore, find no force in the submission made on behalf of the petitioner to hold that addition of explanation II to Section 3-D(1) is discriminatory or unconstitutional.

78. The validity of Section 3-F has also been challenged. It may be pointed out that Section 3-F was also added by means of the same amending Act, namely, Act No. 23 of 1976, by which explanation II to Section 3-D(1) was added. Section 3-F was given retrospective effect with effect from 1st April, 1975. Section 3-F provides for additional tax and reads as follows :

Provided that in the case of foodgrains, the rate of additional tax payable by any dealer, the aggregate of whose turnover or turnover of purchases or both, as the case may be, liable to tax, exceeds rupees ten crores in an assessment year, shall be five per cent.

79. The validity of this provision has been challenged on the ground that the amendment was aimed against the Food Corporation of India alone. According to the learned counsel for the petitioner, there were no other dealers dealing in foodgrains except the Food Corporation of India, whose turnover exceeds rupees ten crores. It has further been submitted that the State Government considers the Food Corporation of India as milching cow and it was for that purpose that two provisions were added by Act No. 23 of 1976, namely, explanation II to Section 3-D(1) and Section 3-F of the Sales Tax Act. It has been submitted that a reading of these provisions together would leave no room for doubt that the amendments have been made only with a view to single out the petitioner. While dealing with this point in the context with explanation II to Section 3-D(1) we have already found that the above contention raised on behalf of the petitioner is not sustainable, rather the indications are otherwise, namely, it could not be said that the petitioner was singled out for the purposes of tax as first purchaser of levy foodgrains.

80. It has been submitted that certain goods can be declared as goods of special importance under Section 14 of the Central Sales Tax Act. The result of declaration of goods of special importance under Section 14 of the Central Sales

Tax Act is that the tax on such declared goods could not exceed four per cent of the turnover and it could only be a single point taxation. According to the learned counsel for the petitioner, it had come to the knowledge of the State of U. P. in January, 1976 itself that the cereals were going to be declared as goods of special importance. Therefore, hastily the State of U. P. amended the U. P. Sales Tax Act by means of U. P. Act No. 23 of 1976 with effect from 20th May, 1976 by adding explanation II to Section 3-D(1) and Section 3-F. So far Section 3-F is concerned, it was given retrospective effect with effect from 1st April, 1975. Cereals were declared as goods of special importance with effect from 7th September, 1976, that is to say a few months after U. P. Act No. 23 of 1976 came into force. According to the learned counsel for the petitioner, all this was done knowingly as the State of U. P. very well knew that it would not be possible to levy high rate of additional tax after the goods in question were declared to be goods of special importance. It may be pointed out that Section 3-F was deleted subsequently in 1981. So the relevant period so far additional tax under Section 3-F is concerned is from 1st April, 1975 to 7th September, 1976, i.e., until the items in question were declared as goods of special importance. It has been submitted that the talks had taken place between the State of U. P. and the Food Corporation of India and an understanding was arrived at that the provisions under challenge would be deleted with retrospective effect but that has not been done. Whatever may be the position, that would not take us any further in deciding the question whether the amendments by adding the said provisions were valid or not. The contention raised on behalf of the petitioner is that the addition to Section 3-F of the Sales Tax Act was not fair and no such legislation should have been passed when it was within the knowledge of U. P. Government that the goods in question were going to be declared as goods of special importance. According to the learned counsel, the intention of the State was to tax the maximum amount from the Food Corporation of India. In reply to the said submission, the learned counsel for the opposite parties has submitted that no such plea of mala fide is permissible so far it relates to the field of legislation. He has on this point placed reliance upon a case reported in AIR 1985 SC 551 (K. Nagaraj v. State of Andhra Pradesh). We are, therefore, of the view that no motive could be imputed in adding Section 3-F by amending Act No. 23 of 1976.

81. So far the question of retrospective amendment is concerned, learned counsel for the opposite parties has placed reliance upon the following cases:

AIR 1954 SC 158 (Union of India v. Madan Gopal Kabra), AIR 1961 SC 1534 (J.K. Jute Mills Co. ltd. v. State of Uttar Pradesh), AIR 1964 SC 1581 (Epari C. Krishna Moorthy v. State of Orissa), AIR 1973 SC 1034 (Hira Lal Rattan Lal v. Sales Tax Officer, Kanpur).

82. On the basis of the above decisions it has been submitted that the legislature is quite competent to impose tax with retrospective effect. Nothing has been shown to us on the basis of which it could be said that the newly added provisions, namely, explanation II to Section 3-D(1) and Section 3-F, could not be given retrospective effect. Reliance has also been placed upon AIR 1976 SC 489 (District Controller of Stores v. Assistant Commercial Taxation Officer). In that case, the definition of the word 'business' was changed with retrospective effect. The change was upheld by the Honourable Supreme Court. In view of the decisions of the Supreme Court cited above, we find no merit in the submission of the petitioner.

83. The next contention raised on behalf of the petitioner is that imposition of additional tax at the rate of 5 per cent under Section 3-F is bad as it is confiscatory in nature and arbitrary as there is no slab system but it is a flat rate tax which cannot be upheld. In connection with the submission that the additional tax imposed under Section 3-F of the Sales Tax Act is confiscatory, reliance has been placed on behalf of the petitioner upon a case reported in AIR 1983 SC 1019 (Hoechst Pharmaceuticals Ltd. v. State of Bihar). In that case it was provided under the impugned provision that those who had gross turnover of Rs. 5 lacs or more in a year, shall be liable to pay a surcharge at the rate of 10 per cent of the tax payable by them. The provision in question was challenged on several grounds. However, the grounds raised were negatived by the Honourable Supreme Court and the imposition of surcharge was upheld. It was held that it was within the legislative competence of the State to classify the dealers and to impose surcharge upon those who were placed in one category taking into consideration their economic superiority. On the other pleas raised, it was held that the

imposition of surcharge would not be bad on the ground that it could not be collected from the consumers, nor it was held to be a tax on income. It was held to be a matter of policy of the State. It was held that such a classification on the basis of gross turnover was reasonable. However, on behalf of the petitioner reliance has been placed on the observations made by the Honourable Supreme Court in para 93 of the judgment where it has been observed that surcharge was imposed upon those dealers who were economically superior to others. That is to say it was imposed on those who had a capacity to bear the burden of additional tax. On the basis of the above observation, it was submitted that one of the relevant considerations would be the capacity of the dealer to bear the burden of additional tax. However, in the case of the petitioner it has been submitted that the Food Corporation of India has already incurred loss in relation to levy transactions which have been subsidised by the Central Government from time to time. It has been submitted that higher turnover in the case of the petitioner does not indicate the economic superiority of the petitioner nor its capacity to bear the burden of additional tax. The result of the imposition of additional tax would be that even the capital of the petitioner would be eaten up in payment of additional tax. That is to say, the imposition of additional tax is confiscatory in nature. In this connection, reliance has also been placed upon a case reported in AIR 1985 SC 12 (K.M. Mohamed Abdul Khader Firm v. State of Tamil Nadu). We are afraid it will not be possible for us to accept the contention raised on behalf of the petitioner, firstly because no foundation on facts has been laid in the petitions or in the affidavits filed subsequently. There is an averment in the rejoinder affidavit dated 12th May, 1986 filed by Sri S. R. Singh on behalf of the petitioner, in para 3(b), wherein it has been stated that in any such welfare activity there is bound to be marginal profit in some transactions and loss in others. The Union Government, therefore, gives a subsidy to the Food Corporation of India every year, which was Rs. 1,352.68 crores in 1984-85. In our view, a mere averment on facts as given above is not sufficient to come to the conclusion that imposition of additional tax would result in confiscation of the property of the petitioner. Again we feel that if there is some loss in running a business, it would not mean that taxes are not to be imposed on such concerns. While considering the question whether a tax is confiscatory in nature, all the activities of a business organisation as a whole have to be taken

into account. The confiscatory nature of tax cannot be judged transactionwise. Admittedly the petitioner also deals in foodgrains other than covered under the Levy Orders, e.g., pulses, etc. The additional tax was leviable upon foodgrain dealers in general. There may be some loss in one kind of transaction but profit in other kind of transactions which may make up the loss and still leave some profit in the hands of the dealer or in a particular year, there may be a set-back but the position may not be the same in subsequent years. Thus on the basis of mere assertion made in para 3(b) of the rejoinder affidavit as quoted above, it cannot be inferred that the imposition of additional tax was confiscatory in nature.

84. The next ground of attack is that providing a flat rate of additional tax without there being any slab is unreasonable. The effect of imposition of additional tax, as it is, would be that whole amount of turnover shall be liable to additional tax. According to the learned counsel for the petitioner if slab is not placed at different levels of turnover, it would be hit by Article 14 of the Constitution being unreasonable and a taxation discriminatory in nature. For the proposition that the taxing statute in certain cases can be attacked on the ground of violation of Article 14 of the Constitution, reliance has been placed upon a case reported in AIR 1961 SC 552 (Kunnathat Thathunni Moofiil Nair v. State of Kerala). In that case, it was held that the taxation was confiscatory in nature. It was also held that inequality had resulted because of lack of classification for the purposes of taxation. But we find that in the present case for the purposes of levy of surcharge, a classification has been made and only those whose turnover is more than rupees ten crores in one assessment year, are made liable for surcharge at the rate of 5 per cent. It cannot be said that there is absolute lack of classification, nor it can be suggested that some more slabs should have been provided for the purposes of taxation. It is entirely within the competence and jurisdiction of the State to have its policy in regard to imposition of tax. Unless it is shown that the provision is such that it would result in inequality, it cannot be struck down merely on the ground that tax can be imposed in a better manner or in some more equitable manner. In this connection, it would be useful to refer to the observations made by the Honourable Supreme Court in the above-noted case of Kunnathat Thathunni Moopil Nair AIR 1961 SC 552 :

A taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that' the court might think more just and equitable. If the legislature has classified persons or properties into different categories which are subjected different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not be in the way of such classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property.

85. In the present case, it may be noted that all those who have a a turnover of more than rupees ten crores in an assessment year are to be taxed alike. No discrimination within the class is to be found. We are, therefore, unable to accept the submission made on behalf of the petitioner that the provisions of Section 3-F of the U. P. Sales Tax Act as existed during the relevant period are hit by Article 14 of the Constitution. At the same time we also do not accept the submission made on behalf of the opposite parties that the slab system is something foreign to sales tax as would be evident from the judgment of the Honourable Supreme Court in the case of Mohamed Abdul Khader Firm AIR 1985 SC 12. The concept of slab system, therefore, is not foreign to sales tax. However, we have found that no discriminatory treatment is being meted out to the dealers belonging to one particular category.

86. In a general way it has been submitted on behalf of the petitioner that it was against the public interest to tax the petitioner, firstly by adding explanation II to Section 3-D(1) of the Sales Tax Act, the petitioner has been made liable to pay tax as first purchaser although first purchasers from the millers and farmers are the different agencies purchasing the foodgrains under the Levy Orders which 'should have been taxed but even the liability of such procuring agencies or the State

while making the first purchase has been passed on to the petitioner as the provision is in respect of sale and purchase of foodgrains procured under the Levy Orders. Such foodgrains are meant for distribution through fair price shops that helps in feeding millions of poor people. Such a commodity should not have been chosen for tax. We are afraid, it would not be possible for this Court to hold imposition of tax upon such a commodity, namely, the foodgrains, invalid on the ground urged on behalf of the petitioner as it is a matter of policy which is decided by the State. The State is free to choose a commodity for tax as well as the manner and rates of tax over such commodity.

87. In view of the discussion held above, we find no merit in the petitions and the same are dismissed with costs. The order of interim relief is discharged.