

**Ghasiram Agarwalla Vs. the State**

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**Court :** Kolkata

**Decided On :** Jan-19-1967

**Reported in :** AIR1967Cal568,1967CriLJ1599

**Judge :** D.N. Sinha, C.J., ;B.N. Banerjee, ;P. Chatterjee, ;A.K. Mukherjea and ;A.C. Sen, JJ.

**Acts :** [Contract Act, 1872](#) - Section 148 and 182; ;[Sale of Goods Act, 1930](#) - Sections 4, 19, 19(2), and 30(2); ;[Trusts Act, 1882](#) - Sections 81 and 88; ;[Essential Commodities Act, 1955](#) - Section 3

**Appeal No. :** Full Bench Ref. No. 3 of 1961 in Criminal Appeal No. 340 of 1959

**Appellant :** Ghasiram Agarwalla

**Respondent :** The State

**Advocate for Def. :** S. Banerjee, Adv. General and ;Surathi Mohan Sanyal, Adv.

**Advocate for Pet/Ap. :** Chintaharan Ray and;Arun Kishore Das Gupta, Adv.

**Disposition :** Appeal allowed

**Judgement :**

Sinha, C.J.

1. The facts in this case are shortly as follows. The appellant, Ghasiram Agarwalla, was the appointed retailer of Fair Price Shop No. 1766, situated at 45/9, Beliaghata Main Road, Calcutta, in terms of agreement Ext. 4/8, copy whereof is set out at pages 4 to 6 of Part II of the paper book. The article of agreement is between the Governor of the State of West Bengal and the said Ghasiram Agarwalla, dated 8th October, 1956, and recites that the Government of West Bengal In the Department of Food. Relief and Supplies (Food Branch), had agreed to appoint the said Ghasiram Agarwalla and the said Ghasiram Agarwalla had agreed to carry on business, as a retail dealer of wheat under the Government's scheme to distribute wheat to consumers from fair price shops In the order of reference, the learned Judges have mistakenly stated that fair price shops retailed wheat of rice to the holders of ration cards at a fixed price Shops which retail rations are called ration shops. Fair price shops were introduced prior to the introduction of rationing or in areas where statutory rationing had not yet been introduced The rice or wheat, as the case may be which is to be distributed through fair price shops, originally belongs to Government. It is obvious, therefore, that the terms of distribution or the legal incidences of it have necessarily to be governed by the terms of the agreement between the parties, namely Ext. 4/8. The first thing to be noticed is that the agreement is entitled--'Agreement for distribution of wheat through Fair Price Shops', and the scheme mentioned in the agreement is for 'distribution of wheat to the consumers.' The main question to be decided in this case is as to whether under the terms of the agreement, the transaction that took place between the Government and the retailer was a transaction of sale and purchase or a mere agency for distribution From that point of view, the terms of the agreement are all important. In fact, the matter must be decided upon an interpretation of the articles of agreement and not upon any abstract provision of law. The main provisions of the agreement which are relevant for our purpose are set out below:--

'3 The retailer shall obtain his: supply of wheat on indents placed by him with the Officer-in-Charge of the Zonal Office or the Zonal Officer as the case may be, having jurisdiction in the respective zone. The Officer-in-Charge of the Zonal Office, or the Zonal Officer, shall sanction such quantity of wheat to each retailer on presentation of his indent, as is considered necessary.

4 The price of wheat to be deposited by the retailer will be Rs. 14 (fourteen) per maund inclusive of the price of containers and the price at which the retailer will sell to consumers will be Rs. 15 (fifteen) per maund, that is the retail price will be as 6 (six annas) per seer.

5. The retailer shall deposit the money for the indented quantity of wheat with the State Bank of India who will issue a demand draft or with the Reserve Bank of India and obtain appropriate challan, therefor. The heads of accounts for such deposit will be 'Regional Director of Food, Government of India Calcutta.

6. The retailer shall take delivery of wheat from the appropriate godown of the Government of India on production of the said indent together with the said demand draft or Reserve Bank Challan on a particular day fixed in this behalf.

7. The retailer immediately on receipt of the quantity of wheat lifted by him from the Government godown shall enter the same in appropriate stock registers to be maintained by him in this behalf.

8. The retailer shall sell wheat to consumers of the respective zone at the rate of as 6 (six annas) per seer.

9 On demand and offer of price by the customers, the retailer shall not refuse to supply wheat until the stock with him is completely exhausted.

10. The retailer shall issue cash memo for sale noting therein the name and address of the customer.

11. The retailer shall also maintain daily sales register which should be made up to date at the end of each day.

12. The retailer shall sell wheat during shops hours only.

13. The retailer shall offer all facilities to the inspecting staff of the Department of Food, Relief and Supplies (Food Branch) as well as to the staff of any other Government department authorised in this behalf for holding inspection of his stock and books of accounts

14. The retailer shall comply with such other directions as may be issued from time to time by the Director or any other officer authorised by the Director in this behalf.

15. If the retailer contravenes the provisions of any of the clauses herein, the Director may without assigning reason suspend supply of wheat to him forthwith and cancel his appointment, if he thinks fit and his decision in that behalf shall be final.

16. Notwithstanding anything hereinbefore contained, the Director shall at any time be at liberty in his uncontrolled discretion and without assigning reason to terminate this agreement on giving one month's notice in writing of his intention to so terminate the agreement and the retailer shall have no claim for losses or damages on that account against the Government and similarly, the retailer shall on like notice be at liberty to terminate the agreement after giving like notice aforesaid.

17 Any stock of wheat left with the retailer after cancellation of his appointment or termination of this agreement shall be dealt with or disposed of according to the direction issued in this behalf by the Director and not otherwise.'

Before we come to the construction of this agreement, it will be necessary to state here as to why it is necessary to construe it, and what the case is about. On or about 15th of May, 1957, the said Ghasiram Agarwalla obtained an indent of 10 bags of wheat weighing 26 maunds, from a Government godown. In the early part of the night of 15th May some people found him removing three bags containing grains from the fair price shop, in a pushcart. Suspecting something wrong they reported the matter to Krishna Prosad Bose, checker of ration shops in the Rationing Department of the Government of West Bengal, while he visited the fair price shop in question at 9-30 a.m. on the 16th of May. He thereupon made a check of the stock at the shop-room. He did not find any stock of wheat in the shop room, although according to the stock-book, there should have been a stock of 7 maunds 10 seers. He made a report to the officer-in-charge. North Zone, a copy of the report Ext. 5 is to be found at page 8 of Part II of the paper book in the report, it is said--'The proprietor was challenged to show any documents in support of the shortage as dictated by me.' This presumably means that upon being challenged,

the retailer could not explain the shortage. Bhubaneswar Chakravartti, Inspector of Rationing, Food Department, upon receiving the report went to the retail shop at about 3 p.m. He also did not find any wheat in the ration shop, although according to the books there should have been 7 maunds 10 seers of wheat. He, however, noticed that two bags of wheat were lying three or four cubits outside the shop room and another bag of wheat on the door-step of the shop-room and the retailer pointed out these three bags of wheat as the wheat belonging to the shop. From the evidence it has been established that after the checker of the Rationing Department held his inspection and went away after making an endorsement in the stock book that nothing had been found, the retailer brought three bags of wheat and attempted to take them into his shop, but was prevented by the members of the public from doing so, the result being that, these two bags were found deposited outside the shop where they were so found by the inspector, Rationing Department, as stated above A case was started against the retailer and he was arrested and the goods seized. The retailer was placed on trial before a Special Court, in respect of a charge under Section 409, I.P.C., for having committed criminal breach of trust in respect of 7 maunds 10 seers Government wheat supplied to him for distribution in terms of his agreement. The appellant pleaded not guilty. In the order of reference, it is stated that the accused took the defence that he had not actually removed the wheat from the shop and that the wheat was in the shop all along and there was an alternative defence that for safe custody he had removed the wheat to his own house and that he had not committed criminal breach of trust and had no dishonest intention. This is not strictly accurate. The accused did not call any evidence, although the prosecution examined 11 witnesses. The examination of the accused under Section 342. Cr. P.C., which is set out at page 35 of the Part I of the paper book, is absolutely colourless. It was suggested to him that he took 26 maunds of wheat from Government but out of that 7 maunds 10 seers could not be found with him and that he either sold away the same or removed the same and thereby committed breach of trust against Government. To this, all he said was that he was innocent. From the judgment of the learned Judge of the third Special Court who tried the accused, it appears that it was in course of the argument of the defence lawyer that a suggestion was made that the evidence adduced by the prosecution

showed that nobody slept in the shop at night and for the sake of safety the accused thought it prudent to remove the bags and bring them back when the customers came. There is however, no evidence on record to that effect. The defence taken was that the accused was the absolute owner of the commodities and the shop and therefore, the ingredient of an offence under Section 409 I.P.C. was wanting. It was argued that one cannot be convicted of criminal breach of trust in respect of the commodities of which he is the owner. The learned Judge of the third Special Court held that the accused was holding wheat in trust for Government and was not the owner but only a custodian. Also it was held that the offence was complete as soon as the wheat was removed from the shop. He said as follows:--

'The learned Lawyer has argued that at best the circumstances show that there was only preparation for commission of the offence of criminal breach of trust. It was not actually committed. I cannot agree with the learned lawyer. The offence was complete with the removal of the wheat. They were brought back when his offence was complete and detected by the checker of the Rationing Department. This circumstance cannot be put forth as an argument that the accused only made preparation and did not actually commit the offence.'

2. The accused was convicted under Section 409, I.P.C., and sentenced to rigorous Imprisonment for two months and a fine of Rs. 100 in default to undergo one month's rigorous imprisonment more. Against the conviction there was an appeal preferred to this Court which was heard by a Division Bench presided over by S.K. Sen, J. Sen, J. rightly points out that the offence of criminal breach of trust cannot be said to have been substantiated, as there was no actual disposal of the property. The learned Judge has rightly held that at best there could have been an attempt to commit criminal breach of trust which, of course, would entail the same consequences. In trying to decide whether the accused had committed the offence or attempted to commit the offence of a breach of trust Sen. J. remembered that he was a party to a decision in Criminal Appeal No. 303 of 1960. *Pashupati Ghosh v. The State*, D/- 7-6-1960 (Cal), where, a retailer of a fair price shop, bound by an agreement similar to Ext. 4/8, was held to be an agent of the Government for the specific purpose of distribution of the foodgrains at the retail price fixed by the

Government. Sen, J. however, thought that in view of certain decisions cited before him, there was reason to think that the decision in Cri. App. No. 308 of 1960. D/- 7-6-1960 (Cal), was wrongly decided In view of the importance of the matter and in view of the decision in the said case mentioned above, the learned Judges of the Court of Appeal decided to refer the case to a Full Bench with particular reference to the following points:---

'(1) Can the holder of a fair price shop bound by an agreement similar to the agreement, Ext. 4/8, be regarded as an agent of the Government in respect of the stock of wheat or rice received by him on deposit of the agreed wholesale price from the Government godown, or does the property in the wheat or rice pass to him?

(2) Was the case, Criminal Appeal No. 303 of 1960. D/- 7-6-1960 (Cal), rightly decided?'

The first thing upon which we are all agreed is that the points that have been set out are defective and cannot be answered as they stand. In question 1, mention has been made of an agreement 'similar to the agreement. Ext. 4/8 It is impossible to answer such a question, because our answer necessarily depends on the exact terms of the agreement. Even slight difference in the term might change the substance and meaning of the whole. Also, the 'deposit' of the agreed price is only one of the terms of agreement and therefore the mention of this single term is meaningless. In my opinion, the questions should be rearranged thus:--

'Question No. 1: Was the appellant by virtue of the agreement, dated the 8th October, 1966, Ext 4/8, to be regarded as an Agent of the Government in respect of the wheat received by him under the said agreement?

Question No. 2: Did the property in the stock of wheat received by the appellant under (he said agreement pass to him?

Question No. 3: Was the case Criminal Appeal No. 303 of 1960, D/- 7-6-1960 (Cal), rightly decided?'

3. These three questions are, however, not the only questions to be asked. It is fortunate that the entire case has been referred to us and therefore, in considering as to whether the property in the stock of wheat received by the appellant under the agreement pass to him and if so when, we would also have to decide as to whether, there was an entrustment with him within the meaning of Section 409, I.P.C., and whether he was guilty of a criminal breach of trust within the meaning of Section 409. I.P.C.

4. Before us, Mr. Roy, on behalf of the appellant, has argued the following points: the first point taken is that upon a construction of the articles of agreement. Ext. 4/8, it must be held that the appellant became the owner of the goods as a purchaser who had paid the price. In other words, upon paying the price and taking delivery, the property in the goods passed to him. Accordingly, he was the full owner of the goods and not an agent of Government. Consequently it could not be said that there was an entrustment within the meaning of Section 405, I.P.C., or a criminal breach of trust within the meaning of Section 409. I.P.C., Secondly, he argued that even if the articles of agreement resulted in a sale with restrictions, there could not be said to have been an entrustment within the meaning of Section 405, I.P.C., and the ingredients of an offence under Section 409, I.P.C., were wanting. At best, there might have been a breach of contract which would give rise to a cause of action in damages. The third point argued before us is that even if there was an agency, there were no terms and conditions in the contract that the goods should be kept at the retail shop at 45/19 Beliaghata Main Road, and therefore, the mere removal from the said shop of any part of the goods indented could not amount to an offence of criminal breach of trust He referred to the fact that in the case of Cri. App. No. 303 of 1960, D/- 7-6-1960 (Cal) (ibid), there was evidence of intention of disposing of part of the goods in what is commonly known as the black market. If there was no term in the contract that the goods should be kept in a particular place then the removal from such place would not constitute either a breach of trust or an attempt to commit breach of trust.

5. The first point raised, namely the construction of the contract is the most important point and I shall proceed now to deal with the same The main provisions of the Articles of agreement, Ext. 4/8 have been set out above It has already been

pointed out that the agreement has been entitled as an 'Agreement for distribution of wheat', and not as an agreement for sale. This of course is not conclusive and distribution may in a sense be taken to mean, sale and distribution, The introductory paragraph speaks of a 'Scheme' If this scheme was available, it would have thrown a world of light on the intention of the parties. Unfortunately however, in spite of the best efforts of the learned Advocate-General, the original 'scheme', if it ever existed, could not be found

6. It is clear that the point we have to determine is, as to whether this agreement is an agreement for sale and purchase, or an agency agreement Both sides have placed before us intrinsic evidence from the agreement, in support of their respective viewpoints one saying that it is a sale and the other saying that it creates an agency. I set out hereunder the respective arguments:

In favour of the view that it is an agreement for agency:

1. The agreement is entitled, 'Agreement for distribution of wheat through Fair Price Shops' and not an agreement for sale.
2. The retailer is 'appointed' a retail dealer. A purchaser cannot be 'appointed'. An 'appointment' which can be cancelled (Clause 15) is more consistent with agency than with a transaction of sale and purchase.
3. The price of wheat is to be 'deposited' by the retailer and not 'paid' (Clauses 4 and 5).
4. There are restrictions on sale, as follows: -
  - (a) The price at which it is to be sold is fixed.
  - (b) The wheat can only be sold to consumers within a specified zone and he cannot refuse to sell on demand by a customer within the said zone.
  - (c) The retailer must comply with directions issued by the Director of rationing or any other officer authorised by Director.
  - (d) The retailer can sell only during shop hours.

(e) Upon termination or cancellation of agreement, the remaining stock can only be disposed of according to direction of Director.

5. The retailer must maintain appropriate stock registers and sale register and issue cash memo to each customer, noting the name and address of the customer.

6. The retailer must offer inspection to authorised staff to inspect his stock and books of account.

7. If the retailer contravenes any provision of the agreement the Director may without assigning reason suspend supply of wheat to him and cancel his appointment.

8. The Director may at his uncontrolled discretion and without assigning any reason, terminate the agreement upon giving one month's notice, it may similarly be terminated by the retailer.

9. After cancellation or termination of the agreement, any stock of wheat left can only be dealt with or disposed of according to the direction issued in this behalf of the Director and not otherwise.

In favour of the view that it is an agreement for sale:

1. The wheat is obtained by depositing a price of Rs. 14 per maund and sold to consumers at Rs. 15 per maund (annas six per seer). Obviously the difference is the profit to be enjoyed by the retailer, but there is no provision in the agreement for his retention of this sum. It is therefore more consistent with sale than agency.

2. 'Price' has been defined in Section 2(10) of the Sale of Goods Act as meaning-- 'the money consideration for a sale of goods'. If it is agency, why should the 'price' have to be deposited and not merely the 'value' of the goods?

3. The retailer is obviously selling to his customer, because he charges him a price and issue a 'cash memo'. Under Clauses 8 and 12, he 'sells' the wheat. How can he 'sell' anything if he has not become the owner thereof? Before we discuss the respective merits of these two sides of the picture, it is necessary to notice a

number of decisions cited by the parties The first case cited is the Supreme Court decision, *Narayan Ittirvi Nambudiri v. State of Travancore Cochin.* : AIR 1953 SC478 . The facts in that case were as follows: Two receivers including, the appellant were appointed Receivers of a textile mill, by the High Court of Travancore Cochin. At the time that the appellant was appointed Receiver, the prices of textile goods were controlled. Thereafter, by the end of April, 1948, controls were lifted, although by a sort of a gentleman's agreement between the members of the South Indian Mill Owners' Association, the old practice of selling at prices stamped on each piece of cloth was continued. One Vaidyanath Aver was a dealer holding a quota from the mill. When he approached the Receivers for his quota, he was asked to pay a sum of Rs. 10,000 which was later on increased to Rs. 23,100 The Receivers were prosecuted. At the trial, the prosecution abandoned the case of illegal gratification but the charge pursued was a charge of criminal breach of trust under Section 389 of the Penal Code of Travancore Cochin, corresponding to Section 409 of the Indian Penal Code. The original court acquitted the accused but this was reversed by the High Court and the accused was convicted under Section 389 corresponding to Section 409 of the Indian Penal Code. The case went to the Supreme Court on appeal. Mukherjea, J. said as follows:--

'The other point that requires consideration is whether on the prosecution evidence, as it stands, the accused can be held guilty of criminal breach of trust? As laid down in Section 385, Cochin Penal Code (corresponding to Section 405, I.P.C.) to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by some one else which he willingly suffered to do.

It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the

latter must hold it on account of some person or in some way for his benefit. In the case before us, it is not disputed that If the sum of Rs. 23,100 was paid by P.W. 1 to the appellant by way of illegal gratification to induce the latter to make an allotment of cloth in his favour, there can be no question of entrustment in such payment. The payee would then receive the money on his own behalf and not on behalf of or in trust for anybody else. The criminality of an act of this character would consist in illegal receipt of the money and the question of subsequent misappropriation or conversion of the same would not arise at all.'

It was held that the evidence showed that the money was received by way of illegal gratification and would, therefore, be not the subject-matter of a breach of trust, there being no entrustment of money within the meaning of Section 385 of the Cochin Penal Code.

7. The next case to be considered is another decision of the Supreme Court--New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, : AIR 1963 SC1207 . The facts in that case were briefly as follows: The assesseees were manufacturers of sugar in Bihar and despatched large quantities of sugar to different States in compliance with the directions issued by the controller exercising powers under the Sugar and Sugar Products Control Order, 1946. The course of dealing between the parties was that the various State Governments intimated to the Sugar Controller their requirement of sugar and similarly the factory owners sent to the Sugar Controller a statement of stocks of sugar held by them. After considering the requirements and the statements the Sugar Controller made the allotment in each case, the allotment order was addressed to the factory-owner directing him to supply the sugar to the State Government concerned, according to dispatch instructions received from the competent officer of the State Government. A copy of the allotment order was simultaneously sent to the State Government, on receipt of which the competent authority of the State Government sent to the factory concerned detailed instruction about the destination to which the sugar was to be dispatched, as also the quantities of sugar to be despatched to each place. The question was as to whether the assesseees were liable to be taxed under the Bihar Sales Tax Act 1947. It was held that the dispatches of sugar by the assesseees pursuant to the direction of the Sugar Controller was not the result of

any contract of sale and therefore there was no sale and the assesseees were not liable to pay sales tax on the amount received by them from the State of Madras for sugar supply. Shah, J, delivering the majority judgment pointed out that in popular parlance, 'sale' means transfer of property from one person to another in consideration of the price paid or promise or other valuable consideration. That is, however, not the meaning of sale in the Sale of Goods Act, 1930. It was pointed out that the State of Madras, the allottees of the sugar, did not make any offer to the assesseees, nor had the assessee any option to act or decline, since they were to act merely in compliance with the instructions of the Controller. The learned Judge said as follows:--

'A contract of sale postulates exercise of volition on the part of the contracting parties and there was, in complying with the orders passed by the Controller, no such exercise of volition by the assesseees. By the Indian Contract Act, IX of 1872, a proposal or an offer is defined as signification by one person to another of his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence. When the person to whom the proposal is made or signified assents thereto, the proposal is said to be accepted. The person making the proposal is called the promisor and the person accepting the proposal is called the promisee and every promise or every set of promises, forming the consideration for each other is an agreement. These provisions of the Contract Act are by Section 2(15) of the Sale of Goods Act, incorporated therein. There was on the part of the province of Madras no signification to the assesseees of their willingness to do or abstain from doing anything, with a view to obtaining the assent of the assesseees to such act or abstinence and the Controller did not invite any signification of assent of the assesseees to the intimation received by them. He did not negotiate a sale of sugar: he in exercise of his statutory authority ordered the assesseees to supply sugar to the Government of Madras. We are unable to hold that from the intimation of the Controller and compliance therewith by the assesseees any sale of goods resulted in favour, of the State of Madras.'

It must, however, be noted that the Supreme Court held that it was not a sale of goods under the Sale of Goods Act and therefore no sales tax was payable because under the Bihar Sale of Goods Act only such sales were taxable as were

sales within the meaning of Sale of Goods Act This was however done on the particular facts of the case.

8. In *S.N. Barik v. State of West Bengal*, : AIR1963 Cal79 , A.K. Mukherjea, J. was dealing with the Cement Control Order. The facts in that case were as follows: The plaintiff made an application to the Civil Supply Department of the Government of West Bengal for the issue of a permit for supply of 15 tons of cement. At that time the Cement Control Order was in force, and it was not possible to procure cement in the open market. Messrs Bharatiya Byapar Mondal was a dealer of cement under the Cement Control Act and the Government issued a permit in favour of the plaintiff upon the said dealer for 15 tons of cement. The plaintiff paid the sum of Rs. 2,264/14 to the dealer but after a week he got delivery of only 5 tons which was found to be of inferior quality, the bags having been opened and tampered with. The plaintiff did not receive any further quantity of cement. The plaintiff brought a suit against the State of West Bengal as defendant No. 1 and the dealer as defendant No. 2, it was stated that he was the agent of defendant No. 1. The defendant No. 2 did not enter appearance and in fact could no longer be traced. The State of West Bengal took the defence that the dealer was an authorised dealer and stockist of cement under the Cement Control Order and was never an agent of the State and as such the plaintiff had no cause of action against the State. It was held that the dealer was not an agent of the State and the suit against the State was dismissed. It was inter alia held that the mere fact that the price would have to be deposited with the seller, that is the stockist, can hardly be construed as an act creating the relationship of agency between one of the parties to the sale transaction and Government Reference was made in this behalf to an earlier decision of this Court--*Pasupati Gorai v. Brindaban Khan*, ILR (1951) 1 Cal 82. That was a case under the Cotton, Cloth and Yarn Order, 1945. The plaintiff paid for certain textile goods from the defendant, who after having obtained the full value of the goods gave short delivery as well as failed to give delivery of certain goods for which he had received the price. The plaintiff claimed refund of the price for the goods which he had not received. The defendant took the defence that he was a mere handling agent of Government, and sold goods to the plaintiff as an agent of Government, and that the plaintiff had no cause of action against him but should pursue his remedies against the Government. Das. J. held that the

defendant was not an agent on behalf of the Government and he was therefore, personally liable for the claim of the plaintiff. In the opinion of Das. J. the Cotton, Cloth and Yarn Order, 1945, does not affect the mutual relation of manufacturer wholesale dealer and retailer, but merely imposes a restriction as regards the price of the textiles and the persons who are entitled to deal with them in the market and in view of the scheme of things envisaged in that Order it was a misnomer to describe the defendant as an agent of the Government.

9. The next case which has been cited on behalf of the appellant is a Division Bench decision of this Court--Satyendra Nath Mukherji v. Emperor, ILR (1947) 1 Cal 97. The facts in that case were as follows: The appellant Satyasundar Mitra was convicted under Section 406, I.P.C., and sentenced to rigorous imprisonment for four months. The appellant Satyendra Nath Mitra was convicted for abetting the offence. The prosecution case was that the appellant Satyasundar Mitra was a contractor and was granted a permit by the Executive Engineer (Shelter) Construction Division to purchase 7 tons of cement from Messrs, Balmer Lawrie and Co, on condition that the cement would be used to the construction of air raid shelters only. Cement was controlled under the Defence of India Rules under which the order had been issued by the Government of India preventing the selling agents from delivering any cement except under the instruction from Government or from the Cement Adviser. The contractor, with the help of the other appellant, diverted six tons of cement sold under the permit and disposed of it to other parties. Thereupon, they were prosecuted. The learned Judge said as follows :

'In our opinion, there was no entrustment of the cement in question within the meaning of the terms as used in Section 405, I.P.C., and accused accordingly cannot be convicted of the offence of breach of trust. The permit was granted in accordance with the system of control established under the Defence of India Rules, under which an order has been issued by the Government of India preventing selling agents such as Balmer Lawrie and Co. from delivering any cement except under instructions from the Government or from the Cement Adviser. The transaction, so far as the contractor is concerned, was one of purchase and the property in the cement clearly passed to him... Unless there is entrustment the transaction in question cannot be affected by the terms of Section

405 of the Indian Penal Code.'

The appeal was allowed and the conviction of the appellant was set aside.

10. The next case cited on behalf of the appellant in *Sheo Narayan v. State of Bihar*, : AIR1953 Pat225 . The facts in that, case were as follows: The distribution, supply and price of molasses produced by the factories in the province of Bihar were controlled, first by means of an Ordinance known as the Bihar Molasses (Control) Ordinance, 1946, and then under the Bihar Molasses (Control) Act, 1947. Under the said provisions the Excise Commissioner was constituted a controller. Without the permission of the Controller no molasses could be moved by rail or river from any place in the province to any other place therein. The Controller had the power to issue directions to owners or occupiers of factories to supply molasses to the provincial Government or to distilleries or to other persons or organisations. The Provincial Government (now the State Government) had the power to fix the price of molasses. The proprietors of certain distilleries obtained permits from the Excise Commissioner for lifting molasses from certain factories in North Bihar. According to the permit, the molasses was to be taken to distilleries but a part of the molasses thus obtained on permit was not taken to the distilleries but was sold in the black market, and for that purpose it was alleged that there was a conspiracy entered into by the distilleries with Excise Officers and railway employees, through one Ramjilal Murwari. A criminal case was started against him inter alia for Criminal breach of trust, Das, J. said as follows:

'The offence of criminal breach of trust is defined in Section 406, Penal Code. One of the essential conditions is that the property which is the subject-matter of the offence must have been entrusted to a person; a trust of some kind is necessary, and the property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or the beneficial interest in or ownership of it must be in some other person and the offender must hold such property on trust for such other person or in some way for his benefit. In all the cases given in the illustrations to Section 405 in which a person is said to have committed the offence, the property in respect of which it is said to have been committed to the property of another person or property of

which the offender was not the beneficial owner, I fail to see how it can be alleged in this case that the molasses which the distilleries had purchased were the property of any person other than the distilleries themselves. Therefore, I do not think that it can be said that any obligation was attached to the ownership of molasses, such as would constitute a 'trust' within the meaning of Section 405, Penal Code, either by reason of the terms of the licenses or permits.

11. The next case, relied on by the learned Advocate-General is a Division Bench judgement of the Andhra High Court--State of Madras v. Jayalakshmi Rice Mill Contractors Co., : AIR 1959 AP352 . The facts in that case were as follows: Certain millers were appointed licensees under the Madras Food Procurement Order to purchase paddy from the producers and sell the same to persons directed by the Collector and at such rates as may be prescribed by him from time to time. The licensee was to deposit certain amount with the District Supply Officer for the due performance of his obligation. Briefly speaking, the arrangement was that he was to purchase the paddy from persons at particular rate in an area and was bound to sell them at particular rate to particular persons as directed. He was allowed a commission for his labour. It was held that the relationship of principal and agent could not be said to have been established between the Government and the procurement agent, their relationship was more analogous to that of a master and servant than of a principal and agent. The same view was expressed by a Single Judge of the Andhra High Court in G. Alluraiah v. State of Andhra Pradesh, : AIR 1963 AP394 . The State of Madras passed an order, the Madras Foodgrains (Procurement) Order, 1947. The plaintiff was appointed as a wholesale dealer for sale of rice under the said order. He executed an agreement pursuant to that order. According to that agreement he was to purchase foodgrains from the Government and to sell them to the persons nominated. Rates at which it was to be sold were specified and he could sell only at a specified price. He was responsible for the safe custody of the goods and accountable for the difference in price realised by him. In September, 1952, the District Collector, Nellore, allotted to the plaintiff and some others certain quantity of Vishakhapatnam rice to be delivered at Singariakonda railway station after collection of the price etc. The appellants paid for and lifted the rice and discovered that it was boiled rice for which there was no demand in the locality. The plaintiff made representations to

the Collector. Nellore, who directed him to return the stocks which was accordingly done. The plaintiffs sued Government stating that they acted throughout as the agent of the Government and they were entitled to claim the expenses which they incurred by receiving the foodgrains and in returning the same, including interest. The suit was resisted by Government, contending that the transactions were outright sales and there was no relationship of principal and agent, that the ownership of the goods passed to the plaintiff upon delivery. In other words the facts were just the opposite to the present case. It was held that the plaintiffs were agents and not purchasers and the suit was, therefore, decreed. This was so decided, although the word 'purchase' was used in the agreement. The learned Judge followed the earlier decision of the Andhra High Court which held that the relationship under the circumstances although not that of a principal and agent was akin to that between a master and servant and that there was some kind of entrustment, creating a fiduciary relationship.

12. So far as the last two decisions of the Andhra High Court are concerned, with respect. I am unable to agree that the legal position of a licensee under a Food Procurement Order is that of a servant under Government who is the master. Simply because the law enables certain restrictions to be put on transactions it does not mean that the relationship of master and servant is created between the Government and the licensee. As to whether some kind of fiduciary relationship is created will depend on the terms of the statutory provision under which the license has been issued or upon the terms of agreement between the parties. The next class of cases to be considered is typified by the Supreme Court decision cited above, : AIR 1963 SC1207 . It will be observed, however, that these cases deal with the question as to whether, in the facts and circumstances of the case, the 'sale' is under the Sale of Goods Act, inasmuch as it has now been authoritatively decided that sales tax would not be payable unless a sale was in accordance with the definition of sale in the Sale of Goods Act. The New India Sugar Mill's case. : AIR 1963 SC1207 (supra), has special facts. There the Sugar Controller directed (he dealer to supply sugar to certain parties, without any reference to the dealer, who had no option in the matter of choosing the persons to be supplied. It was held that this was not a sale as contemplated by the Sale of Goods Act and therefore, no sales tax was payable. In the present case, however, the facts are not exactly

similar. The disposal of the goods is restricted to a zone, but not to any particular person in a zone. In the present day world of controls, a certain degree of control is unavoidable. Simply because the price is controlled and the area within which sale should take place is controlled, it does not follow that there cannot be a sale of goods. Coming now to the terms of the agreement, I confess that it is not at all easy to construe, particularly as we have not the advantage of seeing the scheme which was mooted by Government for opening Fair Price Shops. It is true that the agreement is entitled--'agreement for distribution of wheat .' but that would not be inconsistent with a sale to the retailer. After all, it is amply clear that there was an overall shortage of supply and the available foodstuff was being taken over by Government and then distributed amongst the people through the instrumentality of Fair Price Shops. In these days of scarcity and controls, the mere fact that restrictions are put on sales and purchases is not decisive on the question as to whether the transaction is one of sale of goods or not. Similarly, the word 'deposit' of the price is not decisive because, where Government is concerned., we find that deposits, even of the price of goods sold may be required to be made into local treasuries or Government offices and the use of the word 'deposit' is frequently made in connection with such payment. In my opinion, the transaction might be split into two parts. The first part of the transaction relates to Government and the retailer. The retailer deposits the price and gets the goods. The second part of the transaction is a transaction between the retailer and the ultimate purchaser, the consumer. The latter transaction is hedged with conditions, The retailer can only sell to persons within a specified zone, he must sell at a specified price and he must observe certain other conditions, otherwise his license may be revoked. But until the license is revoked, the licensee has a right of disposal and he sells the goods to the consumer and receives the price which he keeps for himself and does not pass on to Government, or account for it to Government.

13. Taking all the facts and circumstances of the case into consideration, and considering all the authorities cited, I am of the opinion that the transaction between Government and the retailer is one of sale and purchase and not of agency. In other words, the property in the goods passes to the retailer and he does not hold the property as an agent or in trust for Government. That being so, there was no criminal breach of trust as defined in Section 405 of the Indian Penal

Code and no offence was committed, for which the accused could be convicted under Section 409 of the Indian Penal Code.

14. There is another aspect of the matter which renders the conviction bad. Assuming that there was the relationship of principal and agent, between Government and the retailer, the accused-appellant in this case. It is plain that there can be a breach of trust only, if the accused had violated the terms of the agreement. As I have stated above, the terms of agreement are to be found in a written agreement, dated 8th October, 1956, Ext. 4/8. From the evidence it appears that upon inspection there was no stock found at the Fair Price Shop, but immediately thereafter the accused brought over the missing quantity and attempted to bring it inside the shop but he was prevented from doing so. Normally of course, the goods should have been in the shop and it might be that the case that was put forward from the Bar that it was taken to the house of the accused for safe custody was not true and was a mere ruse on behalf of the accused for eventually diverting the goods to the black market. This however is mere speculation. The agreement contained no terms that the goods taken delivery of from Government should be kept at any particular place. If that is so, the accused was not bound to keep the goods at the shop at 45/9, Beliaghata Main Road, Calcutta. He may have kept it at his godown or at his residence or somewhere else. It will be remembered that so far as the hooks are concerned, they showed a stock and there is no evidence that the accused ever said that he has no stock anywhere except his shop room or refused to supply any goods to a consumer. The mere fact that part of the goods was removed from the Fair Price Shop and later on brought back, does not appear to be a violation of any of the terms of agreement binding the accused as retailer of the Fair Price Shop. If that is so, I cannot see how it can be established that the accused had committed the offence of breach of trust, simply by not keeping the stock at the Fair Price Shop. In fact, this position seems to have been established in evidence. Bhubaneswar Chakravarty, witness No. 1 for the prosecution, was the Inspector of Rationing, Food Department, It was he who inspected the shop and the stock register. He found no stock in the shop but he found three bags of wheat outside the shop which was pointed out to him by the accused as belonging to the shop. In cross-examination he said as follows:

'The dealer or proprietor has to purchase with his own money. There is no agreement as to the place where the commodities are to be kept. There are no rules to my knowledge. I asked him to weigh but he did not. There was one bag of wheat near one door of the shop and the two other bags were at a distance of 3/4 cubits. The police seized these bags .... The accused said that the three bags of wheat were his. I did not question the accused why the bags were outside the shop.'

15. It is, therefore, admitted that there was no term of the contract between the Government and the retailer that the goods should always remain in the Fair Price Shop at all at 45/9, Beliaghata Main Road.

16. I now come to the case of Cr. Appeal No. 303 of 1960, D/- 7-6-1960 (Cal), which induced Sen, J. to make the reference. The facts in that case were briefly as follows: The accused (appellant) there was a retailer who, by an agreement with Government had got a Fair Price Shop. The conditions of the agreement were almost identical with the present case. On 1st November, 1957, he attempted to sell a bag of atta from the Fair Price Shop to a marwari gentleman who actually came out of the shop with the goods. Upon inspection of stock, it was found that there was a large short-fall, which the accused was unable to explain convincingly. It was held that the transaction was not a sale, that the property in the goods had not passed and that there was entrustment inasmuch as the retailer was the agent of Government. The defence that the transaction was of sale and purchase and property having passed there could not be a criminal breach of trust within the meaning of Section 405 of the Indian Penal Code was rejected and the accused was convicted under Section 409 of the Indian Penal Code. On facts there is a slight difference between the two cases. In the present case, there was a shortage in stock so far as the shop was concerned, but the goods were found in front of the shop and there was no evidence of actual disposal of goods by the retailer to parties in contravention of his agreement or any attempt to do so. Otherwise however, the cases are the same, because the crucial point, namely whether the retailer was an agent of Government or not and whether under the agreement, the property in the goods passed to him are identical in both cases.

17. Therefore, it must be held that the case was not correctly decided.

18. In my opinion the questions posed should be answered as follows:

Question No. 1: No.

Question No. 2: Yes.

Question No. 3: No

19. It must further be held that it has not been established that the accused appellant committed any breach of trust as defined by Section 405 of the Indian Penal Code and is not guilty of any offence under Section 409 of the said Code.

20. The appeal should therefore succeed and the conviction and sentence of the accused-appellant is set aside and he is acquitted and the bail bond is discharged.

**Banerjee, J.**

21. I agree with my Lord the Chief Justice. I, however, want to add a few words of my own, not because I aspire to express myself in more felicitous language than his but because I want to emphasise upon the particular reasons why I agree with his Lordship.

22. The agreement (Ext. 4/8), dated October 8, 1956, does not establish the relationship of agent and principal between the appellant and the respondent. Under conditions contained in the agreement, the appellant appears to have purchased the wheat in question, on payment of price, from the appropriate department of the respondent State. The property in the bags of wheat passed to the appellant. Then again, there was no condition in the agreement that the bags of wheat must be stocked or stored at the Fair Price Shop and nowhere else. This is also the evidence of prosecution witness No. 1 Bhubaneswar Chakravarty. Since the bags of wheat were the property of the appellant and since under the agreement he was not bound to keep the wheat stocked in his Fair Price Shop only, he does not appear to have committed an offence of criminal breach of trust, under Section 409 of the Indian Penal Code, only because, at one stage, he removed the bags of wheat from his shop and thereafter, possibly apprehensive of adverse consequences, brought them back to his shop. The essential condition of

an offence of criminal breach of trust is that the property, which is the subject-matter of the offence, must belong to some person other than the accused. In the case of : AIR 1953 SC478 , the Supreme Court observed that the ownership or beneficial interest in the property in respect of criminal breach of trust alleged must be of some person other than the accused and the latter must hold it on account of such person or in some way for his benefit, In the instant case, the property in the bags of wheat no longer belonged to the respondent State after the same had been sold to the accused-appellant. The accused-appellant could not commit breach of trust in respect of his own property Thus the charge levelled against the accused-appellant appears to be misconceived.

23. In the result, I agree with the answers I proposed by my Lord Chief Justice to the questions before the Full Bench.

**Chatterjee, J.**

24. I agree with the order proposed by my Lord the Chief Justice; however, I think title did not pass to the retailer on the relevant date I now proceed to consider the reasons for so holding.

25. There was an agreement between the Government of West Bengal and the accused. The agreement was styled as 'Agreement for distribution of wheat through Fair Price Shop'and that has been marked as Ext. 4/8 in the case. It has been urged before us that on consideration of the articles of the agreement then I was a sale out-right to the accused and hence there was no entrustment. Whereas the prosecution case is that he was entrusted with the goods either in his capacity as a retail dealer or in his capacity as an agent Therefore, the question is substantially in question of interpretation of the agreement. Before I go further into the matter. I would say that it is not necessary for us to determine whether the accused retailer became, at any point of time, the owner of the goods or the owner of the price at which he would sell to the consumers: but all that is necessary for us to decide is whether at the date, when the alleged breach of trust was committed, title passed to the retailer, even if the retailer is not ultimately an agent and even if the retailer may become the ultimate purchaser from the Government,

the question is whether at the date of the alleged breach of trust, title passed to the retailer or the retailer was entrusted with the goods for the purpose of sale to the consumers and had dominion over the same and having such dominion committed breach of trust.

26. Mr. Advocate-General argued that I was a case of mere appointment of an agent by the Government find the accused is guilty because he was an agent; but the charge in eludes also the case as to whether he was entrusted with the goods as a retailer and had dominion over the same and committed a breach of trust. Though the Advocate-General mainly stressed the point that the agreement was really an agreement for appointment of an agent, he did not give up the case that the accused if not an agent being a retailer was entrusted with the goods, had dominion over the same and committed breach of trust before title passed in him as the purchaser if at all.

27. In order to appreciate the legal position we have been referred to certain decisions of this Court and that of the Supreme Court. The first of such decisions is reported in : AIR1963 Cal79 . This relates to control of cement While issuing permit, the Government told the buyer that the price would have to be deposited with the seller, i.e., the stockist and it was urged that there would be an agency as between one of the parties and the Government. It was held that this could not be construed as an act of creating relationship of agency as between one of the parties to the sale transaction and the Government In the aforesaid matter the Government was never the owner of the stock of cement at any point of time and when the buyer deposited the money with the seller he did it merely in accordance with the terms of the Cement Control Order and there was no question of agency. By such direction the Government never acted as the agent of the stockist nor as the agent of the consumer. In the circumstance of this case, the Government is the owner of the goods and the question is when the retailer takes delivery of the goods from the owner, does the retailer take the goods as an agent or a bailee of the Government or as the purchaser of the goods of the Government? This question was not considered in the aforesaid case.

28. We have been next referred to two decisions reported in 68 Cal WN. One of them is reported at page 401 (Indian Steel & Wire Products Ltd. v. State of West Bengal. (1964) 68 Cal WN 401. Where it was held that the sale being compulsory, the provisions of the Sales Tax Act could not be applied on the basis of the decision of the Supreme Court in the case of : AIR 1963 SC1207 . Another decision of this Court reported in (1964) 68 Cal WN 998, was referred to. That is a decision of My Lord the Chief Justice. There again the decision of the Supreme Court in New Indian Sugar Mills Ltd., : AIR 1963 SC1207 , was followed. Then we have been referred to the decision of the Supreme Court in the aforesaid case reported : AIR 1963 SC1207 In that case the Supreme Court held 'Transactions of despatch of sugar by the assessee pursuant to the directions of the Controller were not the result of any contract of sale. In calling upon the manufacturing units to supply sugar, the Controller did not act as an agent of the province to purchase goods. He acted in exercise of his statutory authority.' It was further held 'a contract of sale postulates exercise of volition on the part of the contracting parties and there was in complying with the orders passed by the Controller no such exercise of volition by the assessee' The Government of Madras never intended to purchase sugar but it merely ordered sugar for the purpose of distribution to the consumers and the factory never intended to sell such stocks to the Madras Government on payment of price. They were merely asked in supply to the Madras Government.

29. We are also referred to a decision of this Court which is not yet reported and which is in appeal from the decision reported in (1964) 63 Cal WN 401. The Indian Iron & Steel Co. in terms of Iron & Steel Control Order was to supply iron and steel to the consumers; but the supply was restricted by various conditions or in other words, the supply was not a free supply but supply by the producer to the consumers was controlled and restricted But the factory had the intention to sell and the consumer had the intention to purchase Mitter. J., then in this Court, having considered the circumstance came to the following conclusion:

'In our view, the Iron and Steel Control Order and the documents disclosed in this case leave us in no doubt that subject to certain limitations imposed the Petition was at liberty to enter into transactions of sale.'

In fact, when the goods are sold to the consumer and the consumer purchases under restricted conditions, it cannot be said that title did not pass to the consumer. In the circumstance of this case, the consumer had no choice with regard to the price of the goods sold nor had he any choice with regard to the quantity that might be sold to him, he could not purchase at any time he liked but only during particular hours; with regard to the quality he had no option. Therefore, his purchase was controlled by various circumstances. But all the same there was an intention that he would pay the price and acquire title to the goods sold provided the conditions for sale are satisfied. Hence, the substantial matter for consideration in each case is whether there was an intention to transfer title. This refers us at once to Section 19 of the Sale of Goods Act.

30. Section 19 of the said Act for our purpose reads as follows:

'(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

2. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.'

Therefore, we have to ascertain from the circumstances of the case, from the conduct of the parties and from the terms of the contract as to whether the Government intended to sell to the retailer and if they intended to sell at what point of time title passed to the retailer. We have also been referred to a decision of the Supreme Court in Civil Appeal No. 164 of 1964, *Gordon Woodroffe and Co. (Madras) Ltd v. M.A. Majid and Co.*, 0065/1966 : AIR 1967 SC181. The question there was whether on the terms of the agreement, there was an outright sale or there was an agency created. The Supreme Court referred to Blackwood Wright 'Principal and Agent' Second Edn.. page 5.

'In commercial matters, where the real relationship is that of vendor and purchaser, persons are sometimes called agents when, as a matter of fact, their relations are not those of principal and agent at all, but those of vendor and

purchaser. If the person called an 'agent' is entitled to alter the goods, manipulate them, to sell them at any price that he thinks fit after they have been so manipulated, and is still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he sold them, it is impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of principal and agent exists'

In the circumstances of this case, the re-taller was not entitled to manipulate the goods nor the retailer was entitled to sell at any price he liked; but he was liable to pay at a particular price and sell at another particular price; he had no option to manipulate the goods in any manner. On the other hand he agreed that the goods were liable to inspection at different stages which is inconsistent with the position of a purchaser who had acquired title to the property. It is also stated, following the decisions in *Ex parte White*, (1871-6 Ch A 397), and other cases, as follows:

'A purchaser has not to account to his vendor; his only duty is to pay him; and all the other rights and duties which exist between principal and agent do not exist between vendor and purchaser.'

In this case, under the terms of the agreement, the retailer was liable to place his accounts before the Government to show to whom he sold and at what rate he sold, to show what was his stock and what was the quantity that he sold and these are not consistent with the relationship of an owner and a purchaser; it may be consistent with agency. Hence, having considered all the aforesaid cases, the net result that we get is that in every case the question has to be decided as to whether the parties intended to transfer goods or not and for the purpose of ascertaining that intention we have to refer to three matters under Section 19, Sub-section 2 of the Sale of Goods Act. Those three matters are (1) the terms of the contract, (2) the conduct of the parties and (3) the circumstances of the case.

31. I shall first refer to the circumstances of the case The circumstances are that the agreement was titled 'An Agreement for distribution of wheat through fair price shop'. Secondly, the first part of the articles of the agreement show that the Government of West Bengal agreed to appoint the appellant and the appellant agreed to carry on business as retail dealers in wheat under the Government

scheme for distribution of wheat to the consumers through fair price shop and the parties agreed to 18 terms of the agreement which I shall presently refer. True, we have not before us a full and complete government scheme but this is clear that the transaction was not just a commercial transaction; it has a strong administrative bias. The purpose of that appointment was that he would distribute wheat to consumers at a fair price through a fair price shop. Hence the circumstances show that Ghosiram Agarwala was not intended to become the purchaser from the Government on delivery of the goods but Ghosiram will take delivery of the goods from the Government for the purpose of distributing them to the consumers. The phrase 'distribute to consumers' means in the circumstances of the case to sell to consumers particular quantity at a particular price. Therefore, the circumstances indicate that Ghosiram was not intended to become the full owner of the stock of wheat on delivery but he held the said stock for the purpose of selling to the consumers. These circumstances are in the first part of the agreement.

32. If we refer to the conduct of the parties we would find that after the goods were delivered to him he stored them at the fair price shop and then he removed the goods from the shop at night between 9-30 and 10 p.m. There was no purpose for such removal unless he thought that the removal would be beyond the terms of the contract. The conduct of Ghosiram shows that he knew that he was not to be considered to be the owner of the goods from the date of the delivery but that he would hold the goods on deposit of money and then would sell them to consumers at another fixed price. There is nothing from which I can hold that the Government ever did anything which would induce Ghosiram to think that he would become the owner of the goods on the deposit of the price and on delivery of the goods. Ghosiram would not have acted stealthily if he knew that he was the full owner on delivery. This is about conduct.

33. Next I shall refer to the terms of the agreement. The terms appear at page 4, Part II of the Paper Book and My Lord the Chief Justice has referred to all the terms. Therefore, I need not reiterate them once again. The terms are not here referred to for the purpose of considering their legal effect. They are referred to to determine at what time, if at all, parties intended that title will be transferred. Term

No. (1) merely defines the word 'Director'. Term No. (2) defines Zonal Offices and Zonal Officers. Term No. (3) provides method by which the retailer shall obtain the supply of wheat. This shows that the retailer would obtain his supply of wheat on indent placed by him and thereafter the Zonal Officer shall sanction such quantity of wheat to each retailer on presentation of his indent, as is considered necessary. This term shows something about the scheme for distribution. In commercial transaction the purchaser demands his requirement and the seller, if he has no stock sells. But here the demand of the purchaser, namely, the retailer will not determine the amount of supply but the amount of supply will be determined by the Zonal Officer on presentation of his indent and he would sanction such quantity as he considers necessary. Therefore, the Zonal Officer will sanction such quantity as he thinks necessary for distribution through a particular shop at a particular time, or in other words, the supply is restricted and it will not conform to the requirement of the retailer but conform to the requirement of the consumers as also to the ability of the Government to distribute, Term No. 3(A) determines the date on which the agreement would come into force. Term No. (4) is very important. Term No. (4) shows that the price of wheat to be deposited by the retailer will be Rs. 14 per maund and the price at which the retailer will sell to the consumers will be Rs. 15 per maund. This term therefore supposes that the retailer will become the owner of the stock at some particular point of time. Unless the retailer becomes the owner of the goods at some particular point of time he would not have to pay the price for it. The price, as is well known, is payable when title passes. By Term No. (4) price is not directed to be paid but is directed to be deposited, hence the price directed to be deposited by the retailer will become payable to the Government as soon as the retailer becomes the owner of the goods. Hence we have to determine when does the retailer become the owner of the goods.

34. For that purpose, Term No. (4) does not help us; because Term No. (4) refers merely to the deposit of the price and not payment of the price. Term No. (5) refers to deposit of money for the indented quantity of wheat This again does not give us any idea as to when the price is payable by the retailer and the price realisable by the Government. It merely refers to deposit of the money which has already been referred to in Term No. (4) as the price. Term No. (6) refers to delivery and the learned advocate for the appellant says that title passes to the retailer on

delivery after the deposit of the price. I shall examine this proposition with reference to other terms. Term No. (7) says the retailer immediately on receipt of the quantity of wheat lifted by him from the Government godown shall enter the same in appropriate stock registers to be maintained by him in this behalf. If on delivery the retailer becomes the owner, the Government have no business in asking him to enter the same in the appropriate stock registers. Term No. (8) determines the price, to the consumers. Term No. (9) provides that the retailer shall not refuse to supply wheat until the stock with him is completely exhausted. If the retailer becomes the owner of the price on delivery he could have sold his goods at any price he liked. But Term No. (8) shows that he agreed not to sell it to the consumer at a price higher than 6 as, per sheer. They indicate that parties did not intend that title would pass on delivery. Term No. (8) does not support the case that title passed on delivery. Term No. (9) compels the retailer to supply till his stock is exhausted at the price referred to in Term No. (8). Had title to the goods been intended to have been passed to the retailer on delivery, he would not have agreed to sell at a particular price until the stock is exhausted. He could have sold or he might not have sold as he chose: but he agreed to sell the goods at a fixed price until the entire stock was exhausted. This is inconsistent with an argument that title passes on delivery. Term No. (10) refers to cash memo to the customers noting their names and addresses. Had title passed to the retailer, the vendor, the Government could not have compelled him to make such notes in the cash memo and this is inconsistent with the case that parties intended that title passed on delivery of goods because on passing of title to the retailer, the vendor, the Government would have nothing more to do. Hence Term No. (10) is also inconsistent with the case that title would pass on delivery. Term No. (11) relates to the maintenance of daily sales register which should be made up to date at the end of each day. As I have already said had it been intended, that the goods should be sold and title would pass on delivery the vendor could not compel nor the purchaser would agree to Term No. (11). Term No. (12) also directed the retailer to sell during particular shop hours only. The vendor who has sold his goods to purchaser does not determine at what time the purchaser would sell. Hence this term is also inconsistent with the case that title passed on delivery of the goods after the deposit of the price, term No. (13) is much worse. Term No.

(13) shows that the retailer shall offer all facilities to the inspecting staff as well as the staff of any other department of the Government for holding inspection of his stock and books of account. No vendor after title passed to the purchaser can insist on such a term. This is completely inconsistent with the case of the accused that title would pass on delivery after deposit of the price. Term No. (14) is equally strong. The retailer shall comply with such other directions as may be issued from time to time by the Director or any other Officer authorised in this behalf. Term No. (14) shows that the Director will have control over the goods even after delivery to the retailer. This should be distinguished from the conditions on which intoxicants, arms and ammunitions are sold. In those cases the Government controls, on authority desired from statutes and the producer does nothing. Term No. (15) provides that in case of any contravention the appointment of the retailer could be cancelled. Term No. (16) refers to cancellation of the agreement on breach of any condition whatsoever including the violation of the Term Nos. (7) to (14). Term No. (17), in my opinion, is decisive to show that title would not pass on delivery. Term No. (17) shows any stock of wheat left with the retailer after cancellation of his appointment or termination of this agreement shall be dealt with or disposed of according to the direction issued in this behalf by the Director and not otherwise. That shows if, after delivery of the goods and after the deposit of the price, the appointment is cancelled or the agreement is terminated the retailer would not be able to sell the goods but he would return the same to such person as the Director directs. Therefore, this shows that title was not intended to pass on ^deposit of the price or on delivery of the goods; because if that case be accepted, the result would be that the Government would still continue to be the owner of the goods because the retailer would deal with the goods in the manner directed by the Director. This is completely inconsistent with the case of the accused. The Government could not be the owner of the price at the same time and Term No. (17) positively shows that the Government would continue to be the owner even after delivery and to this term the accused agreed. Therefore, Term No. (4) read with other terms shows that the price deposited was not intended to be paid on delivery in accordance with the Term No. (6) but that price deposited would still remain deposited, until the goods are sold 'to the consumers in accordance with the Term Nos. 8, 9, 10, 11 and 12. Therefore the price is not realisable by

the Government until the retailer sells his goods to the consumers and until then the price remains merely deposited and the Government would not be in a position to appropriate that money. Hence, in my opinion, title was never intended between the parties to pass either on the deposit of the price or on delivery of the goods. It may be that the retailer would never be the owner of the goods but would be the owner of the selling price or he would be an agent for sale until the retailer sells the goods in accordance with the Terms Nos. 8 to 12 to the consumers; or he may on such sale get title to the goods and pass that title to the consumer. Hence, in my opinion, at the date when the accused removed the goods he had not till then title to the goods. He might have acquired title to the goods subsequently on its transfer to the consumer or he might never have got title to the goods but have title to the price at which he sells. We are not to consider that aspect of the matter. But what we need consider is whether that at the date when the goods were removed, did the accused become the owner of the goods? In my opinion, for the reason stated above, he did not become the owner of the goods on the relevant date though he might have or might not have become an owner subsequently.

35. The next question is whether there was any entrustment of the goods to the retailer at the relevant time or whether the retailer acted as the agent of the Government at the relevant time. I have analysed the agree-merit and found that the substance of the agreement is as follows:--

The retailer will place indent for supply of wheat, the Zonal Officer will check up and then sanction a quantity; the retailer thereafter will deposit a sum of money for the indented quantity of wheat at the rate of Rs. 14 per maund. The retailer will then take delivery. The retailer will then sell the wheat to the consumers of the respective zone at a particular price until the whole stock is exhausted. The retailer should issue cash memo in a particular manner and maintain registers and sell during particular hours; all these would be under the superintendence of the Government. The agreement may be terminated and, on such termination the retailer would deliver the quantity held by him to such person as the Director might direct.

36. It may be expressed in the following manner The goods were delivered by the Government to the retailer on his deposit of money for the purpose of selling to the consumers upon a contract that when the goods will be sold to the consumers the retailer will get the price at which they were sold and the Government will get the price deposited. This satisfies Section 148 of the Indian Contract Act where the bailment is defined as follows:

'A bailment is the (a) delivery of goods, (b) by one person to another, (c) for some purpose, (d) upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.'

Referring now to the circumstances we find that the elements of bailment are satisfied in the following way (a) there was delivery of goods, (b) goods were delivered by the Government to the retailer, (c) the purpose for such bailment was to enable the retailer to sell to the consumers, and (d) the contract was that when so sold to the consumers the retailer would get the price at which he sold and the Government would get the money deposited by the retailer Hence, it satisfies the requirement of bailment. It is sufficiently clear from the aforesaid definition that goods were entrusted to the bailee. According to Halsbury's Laws of England Vol. (2) 3rd Edn., page 94. 'a bailment, properly so called, is a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed shall have elapsed or been performed' I do not think I need go further into the question that bailment implies entrustment But there was no trust of storing the goods at any particular place.

37. The next question is whether it may be said that at the date when the goods were removed, the retailer acted as the agent of the Government. I may refer to Section 30, Sub-section (2) of the Sale of Goods Act which, supports the argument of the Advocate-General. That section for our relevant purpose reads as follows:

'Where a person having agreed to buy goods, obtains, with the consent of the seller, possession of the goods, the delivery or transfer by that person of the

goods under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods or have the effect as if such a lien or right did not exist.'

38. This proposition in Section 30(2), Sale of Goods Act has been considered in Halsbury's Laws of England, Vol. 84, 3rd Edn., page 86, Art. 190 where it has been put in the following manner:

'Where a person having agreed to buy goods, obtains, with the consent of the seller, possession of the goods ... the delivery or transfer by that person ... under any sale, pledge or other disposition thereof ... to any person receiving the same in good faith and without any notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner.'

There is no substantial difference between Section 30(2) of the Sale of Goods Act and the proposition in Art. 130 of Halsbury's Laws of England, Vol. 34, 3rd Edn. page 86, dealing with sale of goods. Hence, it may be urged that if the retailer had sold the goods to a person who would purchase in good faith, the retailer, in such circumstances, would be considered to be an agent of the seller the Government. In the circumstances of this case, if the retailer had sold to a person who purchased in good faith, on the agreement for sale the retailer could not have passed his title to the property because he had not then acquired title to the goods, he would pass title of the Government to the consumer, if he would be an agent at the time of such subsequent sale he would still remain an agent till the property is sold. Hence, there is substance in saying that the retailer would remain the agent of the Government till the goods are sold to the consumer.

39. But in any case, whether the retailer acted as the agent of the Government or was a bailee and had not acquired title to the property at the relevant date, there may be a bailment or an agency for sale; but still he had no duty as an agent or as a bailee to store at any particular place. Hence there was no breach of trust in removing the goods.

40. With regard to the other question whether this removal was bona fide or not, the Trial Court on a consideration of an evidence came to the conclusion that the circumstances, 'indicated dishonest intention'. There is no evidence that the accused intended to sell contrary to the terms of agreement. He had no duty either as an agent or otherwise to keep the goods at any particular place. Hence, by removal itself no offence was committed.

41. I hold that the accused has committed no offence within the meaning of Section 400 of the Indian Penal Code because he was not entrusted to store the goods at a particular place either as an agent or as a bailee.

**A.K. Mukherjea, J.**

42. I concur in the findings of My Lord the Chief Justice in this matter. Considering, however, the importance of this case and also considering the fact that I have come to identical findings sometimes through a slightly different path. I would like to record my reasons briefly for coming to these findings.

43. The facts of this case have already been set out in sufficient details in the judgment of My Lord the Chief Justice. I do not propose to repeat them except in so far as it may be necessary to refer to some of them for making my points.

44. This reference has been made in connection with the trial of an owner of a fair price shop under Section 409 of the Indian Penal Code. The charge was that he had removed certain quantities of wheat from his shop with an intent to commit criminal breach of trust in respect thereof. It is admitted that the wheat in question was brought back to the shop subsequently. It is not, therefore, the case of the prosecution that the offence of criminal breach of trust had been completed. The charge now is merely of an attempt to commit criminal breach of trust. It is not doubted that if the ingredients of an offence of criminal breach of trust can be established, there would be no legal difficulty in finding the accused guilty of the lesser offence of attempting to commit criminal breach of trust. The question that arose was: could there be criminal breach of trust in respect of a stock of wheat for which the appellant had paid the wholesale price fixed by Government in his capacity as retailer of the fair price shop?

45. The appellant had entered into an agreement which has been marked as Exht. 4/8. He was under an obligation to sell the wheat which he had taken delivery of from the appropriate godown of the Government to consumers of the respective zone. The appellant was, under the agreement, subject to various other restrictions about the retail sale of the wheat: restrictions regarding parties, regarding hours, regarding the manner of keeping accounts of the sales. The retailer also undertook to comply with any other directions what would be issued in the future by the Director or by any other authorised officer. The agreement provided a penal clause which says that if the retailer contravened the provisions his appointment would be cancelled. The Director had the right to terminate the agreement on giving one month's notice. So could the retailer. After cancellation of appointment or termination of agreement the retailer could not deal with or dispose of the wheat except in conformity with directions issued by the Director. The agreement itself is described as 'agreement for distribution of wheat through fair price shops.' In the preamble there is a recital that the appellant has agreed to carry on business as a 'retail dealer in wheat under the Government scheme for distribution of wheat to consumers through fair price shops.'

46. It was argued on behalf of Government that the retailer was an agent of Government for the purpose of distribution of food grains at the retail price fixed by Government. The contention is that when the appellant tried to dispose in the black market of a certain quantity of stock received by him, it was an attempt to commit criminal breach of trust. On the other hand, it was contended on behalf of the appellant that he is a retail dealer under the agreement and he had bought the wheat from Government upon payment of price. As soon as he paid the price and the wheat was delivered to him he became the owner of the wheat. Therefore, he could not possibly commit breach of trust in respect of his own property.

47. The first Court presided over by S.K. Sen, J., were of the opinion that once the retailer or the owner of a fair price shop has paid for the goods at the agreed whole-sale price it is difficult to say that he does not become the full owner of the stock of foodstuff. They were, however, confronted with a Division Bench decision of this Court to which Sen, J. himself had been a party, viz., Cri. App. No. 808 of 1960, D/ 7-6-1960 (Cal), where the owner of a fair price shop bound by a similar

agreement had been held to be an agent of Government. They, therefore, made this reference to Full Bench for decision of the case with particular reference to the following points:--

(1) Can the holder of a fair price shop bound by an agreement similar to the agreement Exht. 4/8 be regarded as an agent of the Government in respect of the stock of wheat or rice received by him on deposit of the agreed wholesale price from the Government godown, or does the property in the wheat or rice pass to him?

(2) Was the case Cri. Appeal No. 303 of 1960 (Cal) rightly decided?

48. For various reasons we were not quite happy about the framing of the questions in this Reference Firstly, we were firmly of the opinion that the answer to the first question must depend on the terms of the agreement and similarity was not a sufficient guarantee that the answer must be the same in two cases. Besides, the second part of the first question, viz., the question as to passing of property was considered by us to be an independent question. However, since we have to decide the whole case, we agreed to re-formulate the questions in the following form: -

(1) Was the appellant by virtue of the agreement, dated the 8th October, 1956, Exht. 4/8, to be regarded as an Agent of the Government in respect of the wheat received by him under the said agreement?

(2) Did the property in the stock of wheat or rice received by the appellant under the said agreement pass to him?

(3) Was the case of Cri. Appeal No. 808 of 1960 (Cal), rightly decided?

49. I should, however, like to point out that, speaking for myself I am not quite satisfied even with the shape that we have now given to the questions. I shall try to explain why I say so in a few words.

50. Section 409 of the Indian Penal Code runs as follows:--

'Whoever being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.'

51. The most important ingredient involved in this offence is, of course, the commission of criminal breach of trust. Criminal breach of trust has been defined in Section 408 of the Indian Penal Code and is in the following terms:--

'Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust.'

52. Criminal breach of trust may be committed by various persons and the Indian Penal Code provides for different degrees of punishment for criminal breach of trust depending on the status of the person who commits it. If it is committed by a carrier, wharfinger or warehouse-keeper, it is an offence dealt with under Section 407 of the Indian Penal Code and is punishable with a particular kind of sentence. If it is criminal breach of trust by a clerk or servant, it is a slightly different offence dealt with separately under Section 408 of the Indian Penal Code. Criminal breach of trust by a public servant or by a bank or by a merchant or by an agent is dealt with in Section 409 and provides for a severe punishment. In the instant case, we are concerned, according to the prosecution, with a case of an attempted criminal breach of trust by an agent. Before we can convict the accused on this charge, we shall, therefore, have to satisfy ourselves that on the facts of the case three elements are satisfied:--firstly, that there was an attempt to commit criminal breach of trust within the meaning of Section 406 of the Indian Penal Code and, secondly, that this attempt was made by a person who was an agent and thirdly, that the

offence was attempted to be committed in respect of a property with which the agent was entrusted. The important thing to remember is that in a case under Section 409 of the Indian Penal Code it is not enough to establish the second element that the offence was committed by an agent. The more important element is the first element, namely, was there a criminal breach of trust?

53. I have a feeling that the questions that have been framed do not bring to a clear enough focus the most important points for decision in this case. There seems to be an assumption underlying the whole reference, namely, once we know the answers to the questions that have been referred to us by the Division Bench or the questions that we have re-formulated, we know how to decide the case. This, I am afraid, is an entirely wrong assumption. As I shall show presently, even if the property in the stock of wheat had not passed to the appellant and, what is more, even if the appellant were an agent of Government, the facts of this case as well as the evidence on record would not warrant a conviction of the appellant under Section 409 of the Indian Penal Code.

54. Apart from this, the reformulated questions Nos. 1 and 2 seem to make the following assumptions: -

(1) that if the property in the stock of wheat passed to the appellant when he received them from the Government godown he could no longer be regarded as an agent.

(2) that Exht. 4/8 is either an agreement of agency or an agreement of sale.

I do not think that either of the above assumptions is correct.

55. The whole charge has been based on one fact: the retailer had removed the wheat from the godown to his home. I am afraid I do not see how that can amount to an offence. I have carefully analysed the articles of agreement. I find nothing there which imposes a fetter on the retailer's discretion to keep the goods in any place where he likes to keep them. Undoubtedly, Clause 14 is a wide enough clause authorising the Director to ask the retailer to keep the goods in the fair price shop. But I find no evidence of such direction having been issued to the retailer.

56. Secondly, it is a surprising thing that there is nothing in the agreement which compels the retailer to sell the goods only to holders of ration cards. It merely says that the retailer shall sell the wheat to consumers of the respective zone. I am quite alive to the fact that the appellant's conduct in removing three bags of wheat from his shop to his house is not free from suspicion. It may as well be that the appellant did have designs of dishonestly disposing of the wheat. Let us take the case at its worst and assume that the retailer not only removed the goods to his house but sold the goods to consumers who were within the respective zone but did not hold any ration cards. Will that amount to an offence? I have not been given any materials which will warrant a conclusion that even a completed act of that nature would amount to an offence. We cannot say, firstly, that that act is a contravention of any Article of the agreement proved (Exht. 4/8) Not one clause of that agreement is contravened by such an act. Whether any contravention of a clause of the agreement would have amounted to an offence is a matter which I shall consider separately. But the fact remains that such an act would not have amounted to a contravention of any article of that agreement. I can imagine that apart from the agreement that act could have been a contravention of some other Statute and could have made the retailer liable to penalty, but our attention has not been drawn to the provision of any such statute. The prosecution was relying on the agreement alone to support the case against the accused I have not been able to discover even one cogent reason to hold that even a completed act of sale of the wheat to any person within the zone whether he held a ration card or not, would have been either a contravention of the agreement or the commission of an offence under any special statute. It is nobody's case that the mere removal of the bags to the retailer's house was anything more than an attempt to dispose of the goods But if the disposal of the goods itself does not amount to an offence how can the removal be tantamount to the commission of an offence? I must make it clear that when I say all this I am quite alive to the fact that the dealer was under an obligation to sell the wheat to a consumer within his own zone. That is the only condition of the agreement which is relevant in this connection. So long as the dealer does not violate that condition no charge can be brought against him of doing anything in breach of the agreement. In any case, it was obviously not possible to level against the appellant a charge of violation of any special penal

statute. I presume that is why a charge has been brought against the accused under the general law, that is, under the Indian Penal Code.

57. In considering whether the appellant has committed an offence under the Indian Penal Code we must confine ourselves strictly to the provisions of the Indian Penal Code and must not allow ourselves to be prejudiced by any notion of what a dealer should or should not do in the general perspective of a national policy regarding control of price and distribution of foodstuff. If the appellant has committed an offence under the Indian Penal Code, on the facts of this case, he will certainly be liable to be convicted under the appropriate section. But the question whether his guilt has been established or not will have to be strictly measured in terms of the express provisions of the Indian Penal Code and none other.

58. Now, what are the ingredients of an offence under Section 405 of the Indian Penal Code? The ingredients, as far as I can see, are as follows:--

(1) The accused must have been entrusted with the property or with any dominion over property.

(2) He must have dishonestly, misappropriated or covered to his own use that property. Or he must have disposed of that property in violation of any direction of law prescribing the mode in which the trust was to be discharged or in violation of a legal contract which he has made touching the discharge of such trust.

(3) The entrustment of property or of dominion over property must have been made to the accused.

59. Section 409 would mean the addition of one extra element, viz., that the entrustment with property or with dominion over property referred to above would be to the accused in his capacity as an agent. But if the ingredients of an offence under Section 405 are not satisfied, it is impossible to convict a person under Section 409 of the Indian Penal Code. The more vital point therefore, is whether we can say that under the terms of the agreement there was any entrustment of property and whether the appellant tried to dispose of that property in violation of

these terms That is why, to my mind, the questions that have been framed in this reference are not sufficient or adequate in disposing of this case.

60. It has been argued that Exht. 4/8 is not an agreement of sale and it has also been argued that even when the retailer after payment of price receives the quantity of wheat from Government godown, property in the wheat does not pass to him. It is contended that the retailer only takes over the wheat as an agent of Government.

61. I find it impossible to accept the above arguments. It is true that Exht. 4/8 is not an agreement of sale, but I say this in the sense that it is not merely an agreement of sale. It contains an agreement between the Government and the retailer on various other points Government wants wheat to be distributed through fair price shops. For this purpose it enters into an agreement with various persons. These persons are to act as retailers. The jural relationship between the retailer and Government established by the agreement is not merely the relationship of a vendor and purchaser. Only some of the terms of the agreement relate to sale of wheat by Government to the retailer. So far as those terms go, it is futile to say that there is no transaction of sale Clause 4 of the agreement mentions the price of wheat to be 'deposited' by the retailer as Rs. 14 per maund inclusive of the price of containers. It also mentions the price at which the retailer was to sell to consumers, i.e., at Rs. 15 per maund. The clause obviously indicates the margin of profit which a retailer could retain for himself. I do not understand how it can possibly be contended that Government did not intend to sell the wheat to the retailer. Why should the retailer pay the price? The word 'price' when it first occurs in Clause 4 refers to the 'wholesale price' and the same word when it occurs for the second time in that clause refers to the 'retail price'. If the retailer himself was depositing the price of Rs. 14 with Government, why should not there be a relationship of vendor and purchaser between Government and the retailer in respect of that transaction? Much has been made of the word 'deposit' as if that word can change the character of the transaction that takes place. In this case the retailer pays the price in advance. It is only after he deposits the money with the State Bank of India that he gets a demand draft and an appropriate challan against which the retailer can take delivery of wheat. In this case payment of price and

delivery of goods are not concurrent as is normally the case when there is a sale of goods. The price has to be paid in advance and the mechanics of that payment have been detailed in paragraph 5 of the agreement. The mechanics of delivery of the goods by Government to the retailer have been set out in paragraph 6, Paragraph 5 of the agreement does not say that the retailer shall pay the price because neither the State Bank of India nor the Reserve Bank of India were to deliver the goods. As such it does not use the words 'pay the price' but, instead uses the words 'deposit the money' because that paragraph is really speaking of depositing the amount of the money with the State Bank of India or the Reserve Bank of India Deposit is indeed, a more appropriate word in that context, I do not see how the use of the word 'deposit' in paragraph 4 can nullify or destroy the effect of the use of the word 'price' with reference to the consideration that will proceed from the retailer to the Government in respect of the wheat that he was going to take later.

62. Considerable arguments were made about the precise point of time when the property passed. Under the general law, as soon as the specific ascertained goods, viz., the bags of wheat were handed over to the retailer who had already paid the price in advance, property would, in my opinion, pass to the retailer. I find not a word in the whole agreement which can justify the opinion that this passing of the property was postponed. There are various provisions beginning from paragraph 7 of the agreement regarding the manner in which the retailer was to dispose of his goods. These are conditions which the retailer has accepted or undertaken to comply with in consideration of Government selecting him as a retailer and in consideration of Government entering with him into an agreement of this nature why should the provisions of control after the completion of the sale change the character of the sale is a question to which I can find no answer at all.

63. Had the retailer been an agent of Government and had the property in the wheat not passed to the retailer even when he had taken delivery of it, it must follow with inexorable logic that the retailer upon sale of the wheat to the consumers must hand over the sale proceeds to Government and must be accountable for the sale proceeds. There is nothing in the agreement to show that the retailer was so accountable for the sale proceeds. To argue that the agency

would terminate as soon as the retailer would sell the goods to the consumers and that the agent would at once become the owner of the money representing the sale proceeds of the wheat though he was at no stage the owner of the wheat is a proposition which appears to be fanciful to me. There is not a word in the whole agreement which even remotely suggests that that would be the position. If such an unusual relationship were intended to be introduced that should have been expressly mentioned in the agreement. Questions have been raised that if the sale was a completed act as soon as the goods were delivered to the retailer and if the property in the goods passed to the retailer at once, how could Government impose various restrictions on the retailer. The answer to that question, in my opinion, is very simple. The restrictions are such as came into existence by virtue of the agreement itself. The retailer undertook to subject himself to these restrictions for a specific consideration. If the retailer does not honour those conditions and does not submit himself willingly to those restrictions, he contravenes the provisions of the agreement. He breaks the agreement between the parties. Clause 15 of the agreement clearly contemplates such a contingency and has provided for a remedy.

64. Why should restrictions over the user of something by a person mean that he has not complete ownership in that property? When a person buys a gun nobody would suggest that he is at liberty to use his gun in any manner as he likes. There are specific regulations even about the manner in which he has to store or keep the gun not to speak of the restrictions regarding the user of the gun. The owner of a gun or its ammunition cannot even sell the gun or ammunition to anybody he likes. He can only dispose of it under the strict control of Government. He can sell it only to a person who has licence from Government to buy that weapon. Can anybody possibly argue that because of these restrictions or limitations on the user of the gun and its ammunition a person does not become the owner of a gun or its ammunition even after he has purchased them from a dealer?

65. It is clear too late in the day to believe or to hold that in these days of social welfare legislation either the law of property or the law of contract can be completely immune from the compulsive norms imposed by the State for purposes of better organisation and better protection of the society. It is impossible for any

body to contend these days that a contracting party has a right of unfettered exercise of volition in making its bargain. In fact that the right of an individual to enter into a contract is often subjected to a multitude of statutory control imposed by a welfare state in public interest would not however mean that a contract would cease to become a contract or a sale would cease to become a sale. Partly under the impact of a social philosophy and partly in an attempt to meet competitive demands of the community for a relatively diminishing supply of scarce materials, the relations between a manufacturer of a commodity and the dealer thereof or between the dealer of a commodity and its consumer are regulated and controlled in various ways by the State. The same phenomenon has happened in regard to the relations between a master and a servant, between a landlord and a tenant and so on. It is not possible to argue that the imposition of such control effects any fundamental change in the relationship between these different contracting parties. In recent years we have had a spate of cases particularly with reference to the commodities, the production, distribution and consumption of which are controlled by various statutes in which one of the points which the Courts have been called upon to decide is as to whether the measure of control imposed by the State over the connected commercial transactions alters in any manner the legal content of these transactions. In most cases, the Courts have found that the control measures have not affected the legal character and substance of the transaction. See, for instance, ILR (1947) Cal 97, a case arising out of a control of cement; ILR (1951) 1 Cal 82, a case arising out of a control of textile goods under the Cotton Cloth and Yarn Control Order 1945; AIR 1958 Pat 225, a case arising out of control over movement and distribution of molasses under the Bihar Molasses (Control) Act, 1947; : AIR1963 Cal79 , another case arising out of control over cement under the West Bengal Cement Control Act, 1948; State of West Bengal v. Indian Steel & Wire Products Ltd., A. F. O. O. No. 32 of 1966 (Cal), a case arising in connection with the Iron and Steel (Control of Production and Distribution) Order. 1941. There have been a few cases where the answer has been slightly different from the trend of the cases cited just now, See, for instance, : AIR 1963 SC1207 , in which, however, the difference in answer can be explained by reference to the peculiar facts of the case and also by the fact that the question sought to be answered was not in relation to the impact of control legislation on the legal nature

of the transaction under the ordinary commercial law or the law of contract, but in relation to the impact of the control legislation on the Bihar Sales Tax Act, 1947, where the word 'sale' has been given a specially technical definition. The cases of : AIR 1959 AP352 and : AIR 1963 AP394 , have, if I may say with respect, presented me with a little difficulty. Those decisions in my opinion, have to be explained, if they can be explained at all by the special terms of the agreement that came to be construed by their Lordships of the Andhra High Court. If that is not possible. I would prefer, with great respect, to disagree with their Lordships. I am not dealing with all these eases in details as My Lord the Chief Justice has dealt with them adequately and my own views regarding these decisions will be amply clear from what I have already said.

66. After having set out the various considerations that arise in this matter I can now go straightway to the questions that have been posed before us:--

Q. No. (1): The answer must, of course, be in the negative.

Q. No. (2): The answer should be in the affirmative.

Q. No. (3): The answer should be in the negative. The case of Cri. Appeal No. 303 of 1960 (Cal), was a case in which the facts were very similar to the facts of the case before us. The accused there was a retailer who had a fair price shop under an agreement with Government. The terms of the agreement were closely similar, if not identical, with the terms of the agreement in the present case. After a suspicious attempt on the part of the accused to sell a bag of atta to a Marwari gentleman, there was stock-taking in the shop which revealed an unaccountable large shortfall. The question arose whether the property in the goods had passed to the accused and also as to whether there was an entrustment. The owner of the shop was prosecuted under Section 406 of the Indian Penal Code and was convicted. He came up on appeal before this Court which rejected the appeal, that is to say, the learned Judge hearing the appeal came to the finding, firstly that the dealer was an agent of the Government under the terms of the agreement and that the property in the goods had not passed to him. I have not the slightest doubt that the decision in that case on both these points was a wrong decision. It militates against the fundamental principles of the law of agency as well as law of Sale of

Goods.

67. In view of what I have said. I would allow the appeal and set aside the order of conviction and sentence, dated 9th June, 1959, passed by the Judge. West Bengal Third Special Court, Alipore. The accused should be acquitted forthwith and the bailbond, if any, should stand discharged.

**A.C. Sen, J.**

68. I agree with My Lord the Chief Justice that the appeal should be allowed and I am stating the reasons in the following judgment prepared by me.

69. The present Reference to the Full Bench was made by a Division Bench consisting of S.K. Sen and K.C. Sen, JJ. The case was referred to the determination of the following points:--

(1) Can the holder of a fair price shop bound by an agreement similar to the agreement. Ext. 4/8 be regarded as an agent of the Government in respect of the stock of wheat or rice received by him on deposit of the agreed wholesale price from the Government godown, or does the property in wheat or rice pass to him?

(2) Was the case Cri. Appeal No. 303 of 1960 (Cal) rightly decided?

70. At hearing the questions were refrained as follows:-

Was the appellant by virtue of the agreement, dated 8th October. 1966, Ext. 4/8, be regarded as an agent of the Government in respect of the wheat received by him under the said agreement?

Question No. 2 Did the property in the stock of wheat received by the appellant under the said agreement pass to him?

Question No. 3: Was the case Cri. Appeal No. 3 of 1960 (Cal), rightly decided?

71. The facts of the case are stated below The appellant. Ghasiram Agarwala, was appointed retailer of Fair Price Shop No. 1766 situated at 45/19, Beliaghata Main Road, Calcutta The appointment was made as per agreement, dated 8th October,

1956, by and between the appellant and the Governor of the State of West Bengal. The agreement has been marked as Ext. 4/8.

72. The appellant obtained an indent of 10 bags of wheat weighing 25 mds. from a Government godown on 16th May 1957 in the early part of the night of the 16th May some local people found him removing three bags containing grain from the Fair Price Shop by a push cart Suspecting something wrong they reported the matter to the checker of the ration shops and accordingly P.W. 6, Krishna Prosad Bose, who was in 1957, a checker of the Rationing Department, went at about 9 or 9-30 a.m. to the Fair Price Shop in question and checked the stock. At that time not a single grain of wheat was found in the shop. According to the stock book there should have been a stock of 7 maunds and 10 srs. Accordingly, this officer submitted a report. Ext. 5 to the Officer-in-Charge, North Zone, for taking necessary action. Thereafter, P.W. 1. Bhubaneswar Chakravarty. Inspector of Rationing. Food Department, went to the shop at about 4-15 p.m. He also did not find any wheat in the ration shop in question, but he noticed 2 bags of wheat three or four cubits outside the shop room and another bag of wheat on the doorstep of the shop room, and the appellant said that the said three bags of wheat belonged to the shop. There was the evidence of two local gentlemen, namely, P.W. 2, Madan Mohan Ghosh and P.W 3, Ananda Mohan Bose, that shortly after P.W. 6, Krishna Prosad Bose, had gone away after holding his inspection and making an endorsement in the stock book that nothing had been found, the appellant brought back three bags of wheat to his shop and attempted to put them inside the shop; but that as these gentlemen prevented him from doing so, the bags were deposited outside the shop and that the said bags were thus found outside the shop when at about 4-15 p.m. P.W. 1. Inspector of the Rationing Department, came for inspection.

73. It seems Bhubaneswar Chakravarti, P.W 1, on arrival at the Fair Shop at about 4-15 p.m. sent information to the Enforcement Police at Hungerford Street, Calcutta. According to Bhubaneswar Chakravarti P.W. 1, Sub-Inspector Paritosh Chatterjee of Enforcement Branch came to the shop at about 12 in the midnight on that date, namely 16th May, 1957, arrested the appellant and prepared the seizure list Ext. 1/1. Paritosh Chatterjee, as PW. 11, however, says in his deposition that

he went to the Fair Price Shop in question on 16th May. 1957, at about 9-30 a.m. P.W. 11 evidently made a confusion as to the exact time of his arrival. He could not have come at 9-30 a.m. because information was sent to the Enforcement Police at Hungerford Street by P.W. 1 after 4-15 p.m. on 16th May, 1957. From the seizure list. It appears that the articles were seized at 2 a.m. on 17th May. 1957. Therefore the version of P.W. 1 that P.W. 11 arrived at the shop at about 12 in the midnight of 16th May, 1957, seems to be correct P.W. 11 was deposing nearly two years after the incident; therefore this discrepancy as to the time of his arrival should be ignored.

74. The following facts can be gathered from the deposition of P.W. 11. P.W. 11 took the seized books into his custody and he also took the three bags of wheat lying in front of the shop and made over the same to the Malkhana of the Enforcement Branch at Chetla. He arrested the appellant then and there. He then applied to the Magistrate for permission to sell the wheat seized by him, and the necessary order was passed by the Police Magistrate, Sealdah. The seized wheat was then sold by P.W. 11 in the presence of the Inspector of the Rationing Department in the shop of the accused.

75. It further transpires from the deposition of P.W. 11 that a case against the appellant was originally filed before the Police Magistrate at Sealdah. P.W. 11 submitted a final report before the Police Magistrate on the ground of insufficient evidence and the appellant was discharged by the Magistrate. Thereafter, under the orders of the Deputy Commissions. P.W. 11 submitted charge sheet to the West Bengal Third Special Court. Alipore.

76. The following charge was framed by Sri Sital Prosad Chatterjee, Judge, West Bengal, Third Special Court, Alipore, on 17th January, 1959, against the appellant under Section 409, I.P.C.

'That you, on or about the 16th day of May. 1957, at 45/19. Beliaghata Main Road, Police Station. Beliaghata. District 24-Parganas, being the proprietor of the Fair Price Shop No. 1766 at 45/19. Beliaghata Main Road, Police Station, Beliaghata, and thus being the retail dealer in wheat of that shop and being in such capacity and as an agent of the Government of West Bengal entrusted with 25 maunds of

wheat in ten bags and having dominion over the same in your capacity as an agent of the Government of West Bengal committed criminal breach of trust out of the same in respect of 7 maunds 10 seers of wheat and thereby committed an offence punishable under Section 409 of the Indian Penal Code, and within my cognizance.'

77. As to the removal of 7 maunds 10 seers of wheat from the shop the learned Judge of the Special Court found as follows:

'... the circumstances indicate that actually the wheat had been removed on the previous night (15-5-57). But when it was detected and when actually this was brought to the notice of the authorities and there was checking, the accused tried to bring them back but failed.'

78. It was contended before the learned Trial Judge that the prosecution had failed to establish mens rea or mala fides. An attempt was made to justify the action of the appellant by saying that the bags of wheat were removed from the shop for the sake of safety, because nobody slept in the shop at night. According to the trial Judge, the circumstances indicated dishonest intention. The plea that the bags of wheat were removed for the sake of safety was also rejected by the trial Judge as other commodities in the shop were in the shop during the night.

79. The learned lawyer for the appellant lastly argued that the appellant could not be convicted of an offence under Section 409, I.P.C. because he was the absolute owner of the wheat obtained by him from the Government. The last argument too was not accepted by the trial Judge, who reasoned as follows: 'One cannot be convicted of criminal breach of trust in respect of commodities of which he is the owner . . . But in the instant case the sale of the commodities was restricted and fettered by conditions imposed by the agreement between the owner and the Government. In view of these condition and restriction the correct way of describing the accused would be that he held the commodity, e.g. wheat, in trust for the Government and was only a custodian of the same. He had not the full-fledged right of an owner to dispose of the commodity in any way he liked. In the circumstances, I find no bar to his conviction under Section 409, I.P.C., if all the ingredients of an offence under that section are present in this case.' The trial

Judge convicted the appellant under Section 409. I.P.C., and sentenced him to rigorous imprisonment for two months and a fine of Rs. 100, in default, imprisonment for a further period of one month.

80. The accused preferred an appeal to the High Court. According to the High Court, the offence of the criminal breach of trust was not completed because the stock was ultimately brought back. As there was no dishonest disposal of the stock of wheat in violation of the legal contract for the distribution of the wheat, the High Court held that there was merely an attempt to commit criminal breach of trust. Their Lordships, however, were of the view that when the appellant had been convicted for criminal breach of trust he might be found guilty of the lesser offence of attempting to commit criminal breach of trust, if the ingredients of the criminal breach of trust were fully established in the case.

81. Their Lordships then proceeded to deal with the next point in the appeal, namely whether there could be criminal breach of trust or attempt to commit criminal breach of trust in respect of the stock of wheat for which the appellant as retailer had paid at the wholesale rate fixed by the Government but was bound under the agreement, Ext. 4/8 to retail the same at the fixed price to consumers. It may be noted at this place that the learned Judges of the Division Bench were under the impression that under the agreement, Ext. 4/8, the appellant was bound to sell the stock of wheat to ration card holders. But in Ext. 4/8 there is no mention of ration card holders. Clause 4 of Ext. 4/8 simply says that the retailer will sell to consumers at the prescribed price and Clause 8 says that the retailer shall sell wheat to consumers of the respective zone.

82. Their Lordships thought that as the appellant paid for the goods at the agreed wholesale price he became the owner of the goods and that consequently he could not be guilty of criminal breach of trust even though he made an attempt to sell a certain quantity of wheat contrary to the conditions for sale laid down in Ext. 4/8. The relevant portion from the Order of Reference is quoted below: 'The terms of agreement. Ext. 4/8, go to show that the price of wheat is to be deposited by the retailer at a prescribed wholesale price (vide paragraph 4) and that the retailer would sell it at the prescribed price mentioned in the same paragraph The holder

of the fair price shop who is a party to the agreement, is described as retailer and not as agent of the Government. He is no doubt directed to maintain a stock book and a daily sales register and to issue cash memo for every sale, but these are provisions for preventing stock marketing and they do not go to indicate that the retailer after payment of the wholesale price does not become the owner of the property. In paragraph 17 it is provided that any stock of wheat left with the retailer after cancellation of his appointment as retailer shall be dealt with or disposed of according to the directions given by the Director and not otherwise it has been urged that this condition indicates that the Government retains control over the wheat; but if the retailer has paid for the wheat at a wholesale price and if he is described as a retailer, it is difficult to accept the proposition that he really becomes an agent of the Government and the Government remains the owner of the goods.. . . Certainly the retailer commits a great wrong if he disposes of or attempts to dispose of the stock of foodgrains received by him in the black market in contravention of the agreement. It appears to us, however, that the offence committed does not come within the definition of criminal breach of trust, because once the retailer has paid for the goods.. it is difficult to say on the terms of the agreement that he does not become the full owner of the stock of foodstuff.'

83. On behalf of the State reference was made to a decision of a Division Bench of which one of the referring Judges, namely S.K. Sen, J., happened to be a member in Criminal Appeal No. 303 of 1960. D/- 7-6-1960 (Cal), where a retailer of a fair price shop bound by an agreement similar to Ext. 4/8 was held to be an agent of the Government for the specific purpose of distribution of the foodgrains at the retail price fixed by the Government. It was held in that case, namely, Cri. App No. 303 of 1960, D/- 7-6-1960 (Cal), that the offence of criminal breach of trust was committed by him when he disposed of in the black market a certain quantity of the stock received by him.

84. Their Lordships thought it to be a fit case for reference to the Full Bench for decision in view of the importance of the matter and in view of the contrary decision in Cri. App No, 303 of 1960, D/- 7-6-1960 (Cal). It may be noted that the agreement in the instant case. Ext. 4/8, and the agreement in the case of Pashupati, are identical and not merely similar as mentioned in the Order of

## Reference.

85. In Pashupati's case the judgment was delivered by Mitter J and S.K. Sen, J., concurred Mitter, J. on an examination of the terms of agreement, identical with the terms of agreement in the present case, came to the following conclusion: 'Having carefully examined the terms and conditions of that agreement, we hold the appellant to have been an agent of Government for the specific purpose of distribution of rice in accordance with the terms and conditions contained in that agreement. Under Clause 4 the appellant was required to deposit the price of the rice to be delivered to him. That clause and other clauses of the agreement clearly show that the property in the rice did not pass upon any deposit by him under Clause 5. The agreement further shows that the appellant was entrusted with the rice for the purpose mentioned in the agreement, namely, fair distribution according to the conditions laid down in the agreement itself. . Had the property in the goods passed to the appellant the position might well have been different in view of exhibit 1 we are bound to hold that the appellant was entrusted with the rice or with dominion over it and that any disposal of that property in violation of the contract between the parties exposed him to a charge of criminal breach of trust.'

86. The trial Judge in delivering the charge against the appellant has described the appellant as the proprietor of the Fair Price Shop No. 1766 at 4/10. Beliaghata Main Road. I must therefore proceed on the footing that at all relevant times the appellant was the proprietor of the shop in which the wheat obtained from the Government for sale was stocked. The charge against the appellant is that he as the retail dealer in wheat of that shop and as an agent of the Government of West Bengal was entrusted with 25 maunds of wheat in ten bags and that having dominion over the same in his capacity as an agent of the Government of West Bengal he committed criminal breach of trust in respect of 7 mds 10 srs of wheat out of the said 25 maunds and thereby committed an offence punishable under Section 409, Indian Penal Code.

87. It is to be seen whether the appellant acted as the agent of the Government of West Bengal in the matter of selling as a retailer the 25 maunds of wheat obtained

by him from the Government on 15th May, 1957. It will be necessary to examine the relevant clauses of the agreement (Ext 4/81 made on 8th October, 1956 between the Governor of the State of West Bengal and the appellant.

88. The agreement is headed 'Agreement for distribution of wheat through fair price shops.' In the recitals there is a reference to 'the Government scheme for distribution of wheat to consumers through Fair Price Shops', and therein it is stated that the Government of West Bengal has agreed to appoint the appellant as a retail dealer under the said scheme But no such scheme has been produced before us. Therefore. I must proceed on the footing that there is no scheme other than the agreement itself.

89. Though in the recitals it has been stated that the Government of West Bengal has agreed to appoint the appellant as a retail dealer in wheat, in the operative portion of the agreement there is no clause appointing the appellant as a retail dealer in wheat. On the other hand, the Governor entered into agreement with the appellant on the footing that he had been carrying on business as a retail dealer in charge of a Fair Price Shop at 45/19, Beliaghata Main Road, As indicated above, the appellant has been charged with an offence punishable under Section 409. I.P.C., as proprietor of the said Fair Price Shop. Therefore, the appellant was not only in charge of the said Fair Price Shop, as stated in the recitals to the agreement, dated 8-10-66, but he was actually the proprietor.

90. There is no mention of the word 'agent' in any part of the agreement; the appellant has throughout been described as 'retailer'. It is true, that this description by itself is not conclusive. If on an examination of the agreement it is found that in fact he was appointed as an agent within the meaning of the Indian Contract Act, it is immaterial that he has throughout been described as retailer and that the word 'agent' has nowhere been used.

91. But on an examination of the terms of the agreement it is difficult to say that the appellant was appointed as the agent of the Government for the sale of wheat belonging to the Government at the date of sale. Section 182 of the Indian Contract Act defines an 'agent' as 'a person employed to do any act for another or to represent another in dealing with third person.' So far as the second alternative

of the definition is concerned it cannot be doubted for a moment that the element of representation is totally absent in the present case. It cannot be said that the appellant was to sell to the consumers within his zone as the representative of the Government. In Clauses 4, 8 and 12 the expression used is: 'the retailer shall sell' They clearly indicate that the wheat was to be sold by the appellant as his wheal and not as wheat belonging to the Government.

92. The next question is whether the appellant can be said to be a person 'employed to do any act for another' within the first part of Section 182. Indian Contract Act. The appellant was to sell the wheat at a specified price, namely Rs. 15 per maund, that is six annas per seer to the consumers of the respective zone; on price being offered by the customers, the retailer was bound to supply wheat until the stock with him was completely exhausted: the retailer was required to issue cash memo and maintain daily sales register: and the appellant was required to offer all facilities to the inspecting staff for holding inspection of his stock and books of accounts. All these obligations relate to the sale of wheat. As the sale was to be effected by the appellant on his own behalf and not on behalf of the Government, it cannot be said that because certain obligations were imposed upon the appellant in the matter of sale he was employed to do any act for the Government, The appellant was not employed to do any act for the Government; only certain restrictions were imposed upon him while doing some act, namely sale of wheat, on his own; account.

93. Reference may be made in this connection to the case of Ganesh Export and Import Co. v. Mahadeolal, 0065/1956 : AIR1956 Cal188 , cited by Mr. Roy on behalf of the appellants. There the respondent entered into an agreement purporting to be an agreement for sole agency with a Company. The Company was described as the principal and the respondent as the agent. By Clause 1 the respondent was appointed as the sole agent for the sale of the entire product of the company Clause 2 provided that the agent would sell the goods of the principal in its own name as the products of the principal and that the agent would be treated as purchaser of the goods ordered by the agent Under Clause 5 the agent was to procure orders for the products of the principal and to forward the same to the principal for execution on behalf of the agent Clause 8 provided that the

principal would be responsible for the quality of the goods consigned by the principal to the buyers introduced by the agent. Under Clause 10 the agent was to use his best endeavour to promote the sale of the products of the principal. The agent was entitled to get a commission of 2 per cent on the values of the goods sold. Clause 3 provided that the agent should keep rupees three lakhs as security, carrying interest at the rate of 5 per cent per annum. On a construction of this agreement it was held that the agreement did not constitute agency but created a relation of vendor and purchaser. Lahlrl, J., who delivered the judgment of the Court observed as follows:

'In order to constitute the relationship of agency it is, in my opinion, essential that the goods should be sold to customers introduced by the agent not on behalf of the agent, but on behalf of the principal, If the goods are sold on behalf of the alleged agent and if the alleged agent is to be treated as the purchaser, he ceases to be an agent and becomes a principal.'

In the instant case, there is nothing in the agreement, Ext 4/8 which required the appellant to sell the wheat on behalf of the Government There is nothing in the agreement making the Government responsible for the quality of the wheat sold to the customer If the respondent in the case just cited was not to be treated as an agent, a fortiori, the appellant in the present case cannot be held to be an agent of the Government of West Bengal in the matter of the sale of wheat supplied by the Government. Then again, if the contract was one of agency there was no need to mention the price as between the Government, and the retailer. As has been pointed out by the Supreme Court in Civil Appeal No. 164 of 1964 (unreported)=(now reported in) 0065/1966 : AIR 1967 SC181 if any person is to obtain goods from another on payment of price he cannot be said to be the agent for sale of the latter In that case the plaintiff was made answerable for weight as well as quality: but still the Supreme Court held that the relationship between the plaintiff and defendant was that of buyer and seller and not that of principal and agent In the instant case the Government is not answerable either for weight or for quality. Therefore, there cannot be any question of holding the appellant as the agent of the Government.

94. The question of agency is intimately connected with the passing of property in the stock of wheat received by the appellant from the Government under the said agreement. Ext. 4/8. This brings us to the second question to be decided by us. If it is found on an examination of the terms of the agreement that the appellant was required to purchase wheat outright from the Government before selling it to the consumers of the particular zone the conclusion is inevitable that the appellant was to sell the stock purchased by him from the Government on his own account and not on behalf of the Government. In other words, if it is found that the parties intended that the property in the stock of wheat was to pass to the appellant before sale to the consumers, then it cannot be said that the appellant was required to sell the stock as the agent of the Government.

95. Clause 3 of the agreement provides that the retailer shall obtain his supply of wheat on indents placed by him with the Officer-in Charge on the Zonal Office it further provides that the officer concerned shall sanction such quantity of wheat to each retailer on presentation of his indent, as is considered necessary Clause 4 says that the retailer is required to deposit Rs. 14 per maund as price of wheat The word 'price' is significant. The retailer is required to deposit the price.

96. The word 'deposit' creates some difficulty. Has the word 'deposit' been used in the sense of 'pay'? The word 'deposit' also occurs in Clause 5, which provides that the retailer shall deposit the money for the indented quantity of wheat with the State Bank of India or with the Reserve Bank of India and that the heads of accounts for such deposit will be 'Regional Director of Food, Government of India. Calcutta' One thing may be pointed out at this stage. The retailer is to deposit the money for the indented quantity But the Zonal Officer is not bound to sanction the quantity for which indent is made The quantity sanctioned may be less than the quantity indented The agreement does not say that when the indented quantity is less than the quantity sanctioned the amount of money in excess of the price of the quantity sanctioned is to be returned to the retailer Nor is there any provision for keeping the money to be deposited in suspense account As to the amount that may be paid in excess of the total price for the sanctioned quantity it may be said that there is an Implied contract for the return of the same. But as there is no provision for keeping the deposit in suspense account or for adjusting the deposit

against sale proceeds it must be held that the price for the sanctioned quantity is to be paid in advance. Again, if an amount equal to the price is to be deposited every time wheat is supplied, the making of such deposit is indistinguishable from the payment of price. Such deposit is entirely different in character from the deposit made by an agent for sale as security for the due performance of the contract including rendering of accounts. Therefore the word 'deposit' used in Clauses 4 and 5 of the agreement means 'pay'. So under the contract the retailer is to pay the price in advance.

97. Under Clause 6 the retailer is to take delivery of wheat from the appropriate godown of the Government. There cannot be any doubt that as soon as the retailer will take delivery of the wheat the property in the wheat shall forthwith pass to the retailer. The subsequent clauses, namely, Clauses 7 to 13, no doubt impose certain conditions as to how the wheat purchased from the Government is to be disposed of. But these are conditions of resale, it cannot be said that the Government as seller has reserved the right of disposal, until the said conditions are fulfilled. Therefore Section 25(1) of the Indian Sale of Goods Act has no application. As a matter of fact the right of disposal has not been reserved either expressly or impliedly by Clauses 7 to 13; therefore the conditions contained in these clauses have nothing to do with the right of disposal by the Government as seller.

98. Clause 17 of the agreement may lend some support to the suggestion that the Government as seller has reserved the right of disposal or that the property in the wheat supplied by the Government will never pass to the retailer. The said clause runs thus: 'Any stock of wheat left with the retailer after cancellation of his appointment or termination of this agreement shall be dealt with or disposed of according to the direction issued in this behalf by the Director and not otherwise'. This clause also relates to the resale of the wheat sold to the retailer. Therefore, this clause is not inconsistent with the passing of property to the retailer on delivery. Neither does this clause indicate that the Government as retailer reserves the right of disposal throughout. Moreover, this clause is to come into operation on a certain contingency, namely cancellation of the retailer's appointment or termination of the agreement, but that contingency has not happened in the instant

case.

99. Let us look to the facts of this case. On 8-5-57 permit No. Ws 4943 for 26 mds. of wheat was issued in favour of the Fair Price Shop No. 1766 owned by the appellant. The permit was issued in triplicate; one copy was handed over to the proprietor of the shop, one copy was despatched to the godown concerned and the other copy was kept in the Office of the Regional Director of Food. Government of India. The appellant sent a letter of authority in favour of PW. 8, J.C. Saha, a transport agent for the consignment of wheat. The price of wheat was deposited in the State Bank of India P.W. 7 laid in his cross-examination that the dealer had to pay the price of the commodity. Therefore, it is also the prosecution case that the appellant paid the price of the wheat covered by the permit. The evidence of PW 8, J.C. Saha, the transport agent, is that he took delivery of 25 mds. of wheat on the strength of the permit, and thereafter he delivered the 25 maunds of wheat to the Fair Price Shop of the appellant. P.W. 10, the godown-keeper says that the transport agency of every Fair Price Shop owner is required to submit a letter of authority from the proprietor of the shop along with a release order from the Food Department, and that P.W 8. J.C. Saha, the transport agent produced the letter of authority and release order and took delivery of 25 mds. of wheat from Cossipore godown on 11-5-57. From the evidence it transpires that the appellant paid the price in advance and that the 25 mds. of wheat was delivered to P. W. 8 as the agent of the appellant from the Government godown. It is difficult to say that the property in the wheat supplied did not pass to the appellant.

100. Therefore, both on the terms of the agreement, Ext. 4/8 as well as on the facts revealed by evidence it cannot be said that the appellant received 25 mds. of wheat from the Government as an agent of the Government and that the property in the said wheat did not pass to the appellant.

101. The question may be examined from another angle. If the appellant acted merely as the agent of the Government and if the property in the wheat did not pass to the appellant but remained with the Government, the appellant would have been obliged to make over the sale proceeds to the Government. In any event in the agreement, Ext. 4/8, there would have been provision for accounting between

the parties. An agent for sale is entitled to some remuneration, generally by way of commission, but Ext. 4/8 is silent about commission. Clause 4 simply says that Rs. 14 per maund is to be deposited as price by the retailer and the retail price will be Rs. 15 per maund. From this it does not follow that the difference is the commission of the agent; rather it represents the margin of profit to the retailer. Clause 8 says that the retailer shall sell at the rate of 6 annas per seer, that is, Rs. 15 per maund, but says nothing as to the appropriation of the sale proceeds. It, therefore, follows that the sale proceeds are to be appropriated by the retailer. In other words, it must be held that under the agreement the retailer is to sell on his own account and on his own responsibility and not on behalf of the Government. Accordingly, I hold that the appellant obtained the wheat from the Government after paying the price at the wholesale rate of Rs. 14 per maund in order to sell on his account and on his own responsibility at the retail price of Rs. 15 per maund. Simply because he agreed not to charge more than Rs. 15 per maund as retail price, from that alone it cannot be inferred that he acted merely as the agent of the Government or that the property in the wheat did not pass to him.

102. The learned Advocate-General argues that as the appellant was required under the agreement to sell the entire stock and as he could not retain a single grain for his personal use, it cannot be said that property in the wheat passed to him on delivery. In other words, as the appellant had not the unrestricted right of user he was not the owner. Absolute ownership in the Austinian sense is rarely to be found in modern times. Here the appellant was at liberty to sell the wheat and appropriate the sale proceeds. That is enough for the purpose of establishing ownership.

103. Having regard to the legal position indicated above, the appellant cannot be held guilty either of criminal breach of trust or an attempt to commit criminal breach of trust. As has been pointed out by the Supreme Court in AIR 1963 SC 478, 'It follows almost axiomatically from this definition (of criminal breach of trust) that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.' I have found that the appellant himself was the owner of the 25

maunds of wheat delivered to him through his agent P W 8 because the property passed at least on delivery if not on appropriation, the price having been paid in advance. He was no doubt required to sell the wheat to the consumers of the particular zone at a fixed price, but it cannot be said that the beneficial interest in the said stock of wheat was in the consumers. No interest was created by Ext. 4/8 in favour of the consumers in the wheat sold to the appellant. A contract of sale is certainly compatible with a distinct collateral contract between the same parties as to the buyer's subsequent disposal of the thing sold. Clauses 7 to 13 of Ext. 4/8 are in the nature of a collateral contract regulating the subsequent disposal by the retailer of the wheat supplied. There was really no entrustment of the 25 maunds of wheat by the Government to the appellant. The said wheat was merely delivered to the appellant as purchaser subject to collateral contract as to its subsequent disposal. Therefore, if any part of the wheat supplied is sold in contravention of the collateral contract as to subsequent disposal that may amount to a breach of contract but certainly not to a criminal breach of trust.

104. As I have found that the appellant was not the agent of the Government for the sale of the 25 maunds of wheat, the appellant cannot, in any event, be held guilty of any offence under Section 409 of the Indian Penal Code because the appellant was not in any manner entrusted with property, or with any dominion over the property in the way of his business as an agent. As neither entrustment nor agency has been proved the appellant cannot be convicted of any offence under Section 409, I.P.C.

105. Having regard to what has been held above I am bound to conclude that Pashupati's case, Cri. App No. 303 of 1960, D/- 7-6-1960 (Cal), was not correctly decided.

106. The question referred to us should, in my opinion, be answered as follows:--

Question No. 1--No.

Question No. 2--Yes

Question No. 3--No.

107. In the result, the conviction and sentence should be set aside; the appellant should be released; and if any amount has been realised from the appellant as fine, that should be refunded to him.

108. The Court: In view of our unanimous judgment, this appeal is allowed, the conviction and sentence of the accused-appellant set aside and he is acquitted, and his bail bond discharged. The fine. If paid, must be refunded to him.

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