PETITIONER:
VISHNU AGENCIES (PVT.) LTD. ETC.

Vs.

RESPONDENT:
COMMERCIAL TAX OFFICER & ORS. ETC.

DATE OF JUDGMENT16/12/1977

BENCH:
BEG, M. HAMEEDULLAH (CJ)
BENCH:
BEG, M. HAMEEDULLAH (CJ)
CHANDRACHUD, Y.V.
BHAGWATI, P.N.
KRISHNAIYER, V.R.
UNTWALIA, N.L.
FAZALALI, SYED MURTAZA
KAILASAM, P.S.

CITATION:
1978 AIR 449 1978 SCR (2) 433
1978 SCC (1) 520
CITATOR INFO :
F 1979 SC1158 (3,4,5)
RF 1980 SC 674 (4)
R 1980 SC1124 (30)
F 1985 SC1199 (6)
R 1988 SC1487 (48)
C 1989 SC1371 (15)

ACT:
Sales-tax-Statutory sale-If sale for the purposes of Sales-tax Acts.
Cement sold to holders of permits issued under the West Bengal Cement Control Act 1948-Sale, if exigible to tax.
Transactions between growers and procuring agents and rice miller and whole-sale agents under A. P. Paddy Procurement (Levy) Order-If exigible to sales-tax.

HEADNOTE:
The Cement Control Order promulgated under the West Bengal Cement Control Act, 1948 prohibits storage for sale and sale by a seller and purchase by a consumer of cement except in accordance with the conditions specified in a licence issued by a designated officer. It also provides that no person shall sell cement at a higher than the notified price and no person to whom a written order has been issued shall refuse to sell cement "at a price not exceeding the notified price". Any contravention of the order becomes punishable with imprisonment or fine or both.
Under the A.P. Procurement (Levy and Restriction on Sale) Order, 1967, (Civil Appeals Nos. 2488 to 2497 of 1972) every miller carrying on rice milling operation is required to sell to the agent or an officer duly authorised by the Government minimum quantities of rice fixed by the Government at the notified price, and no miller or other person who gets his paddy milled in any rice-mill can move or otherwise dispose of the rice recovered by milling at such rice mill except in accordance with the directions of the Collector. Breach of these provisions becomes

punishable.
It was contended in this Court on behalf of the appellants that the word ,sale" in the Bengal Finance Sales Tax Act, 1941, must receive the same meaning as in the Sale of Goods Act, 1930 since the expression "sale of goods" was, at the time when the Government of India Act, 1935 was enacted, a term of well recognised legal import in the general law relating to sale goods and in the legislative practice relating to that topic both in England and in India and (2) since under the Sale of Goods Act there can be no sale without a contract of sale and since the parties had no volition but were compelled by law to supply the goods at prices fixed under the Control Orders by the authorities the transactions were not sales and so were not exigible to tax. Disssing the appeals.
HELD : Per curiam Sale of cement by the allottees to the permit-holders and the transactions between the growers and procuring agents as well as those between the rice millers on the one band and the wholesalers or retailers on the other, are sales exigible to sales-tax in the respective States. [465-F-G]
Per Beg. C.J,
The transactions in the instant cases are sales and are exigible to tax on the ratio of Indian Steel and Wire Products Ltd.. Andhra Sugar Ltd. and Karam, Chand Thapar. In cases like New India Sugar Mills, the substance of the concept of a side itself disappears because the transaction is nothing more than the execution of an order. Deprivation of property for a compensation called price does not amount to a sale when all that is done is to carry out an order so that
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the transaction is substantially a compulsory acquisition. On the other hand, a merely regulatory law, even if it circumscribes the area of free choice, does not take away the basic character or core of sale from the transaction. Such a law which governs a class obliges a seller to deal only with parties holding licences who may buy particular or allotted quantities of goods at specified prices, but an essential element of choice is still left to the parties between whom agreements take place. The agreement despite considerable compulsive elements regulating or restricting the area of his choice, may still retain the basic character of a transaction of sale. In the former type of case, the binding character of the transaction arises from the order directed to particular parties asking them to deliver specified goods and not from a general order or law applicable to a class. In the latter type of cases, the legal tie which binds the parties, to perform their obligations remains contractual. The regulatory law merely adds other obligations, such as the one to enter into such a tie between the parties. Although the regulatory law might specify the terms, such as price, the regulation is subsidiary to the essential character of the transaction which is consensual and contractual. The parties to the contract must agree upon the same thing in the same sense. Agreement on mutuality of consideration, ordinarily arising from an offer and acceptance, imparts to it enforceability in courts of law. Mere regulation or restriction of the field of choice does not take away the contractual or essentially consensual binding core or character of the transaction. [438B-D, EG, 439A-C, 440B]
New India Sugar Mills v. Commissioner of Sales Tax, Bihar, AIR 1963 SC 1207; [1963] Supp. 2 SCR 459 explained.
Commissioner, Sales tax, U.P. v. Ram Bilas Ram Gopal, AIR

1970 All 518, Chittar Mal Narain v. Commissioner of Sales Tax, [1971] 1 SCR 671, Indian Steel and Wire Products Ltd. v. State of Madras, [1968] 1 SCR 479, Andhra Sugar Ltd. v. State of Andhra Pradesh [1968] 1 SCR 705 and State of Rajasthan v. Karam Chand Thapar, AIR 1969 SC 343 referred to.

[Per Chandrachud, Bhagwati, Krishna Iyer, Untwalia, Murtaza Fazal Ali and Kailasam, JJ.]

According to the definitions of "Sale" in the two Acts the transactions between the appellants and the allottees or nominees are patently sales because in one case the property in cement and in the other property in the paddy and rice was transferred for cash consideration by the appellants. [445D]

1. When essential goods are in short supply, various types of Orders are issued under the Essential Commodities Act, 1955 with a view to making the goods available to the consumer at a fair price. Such Orders sometimes provide that a person in need of an essential commodity like cement, cotton, coal or iron and steel must apply to the prescribed authority for a permit for obtaining the commodity. Those wanting to engage in the business of supplying the commodity are also required to possess a dealer's licence. The permit-holder can obtain the supply of goods, to the extent of the quantity specified in the permit, from the named dealer only and at a controlled price. The dealer who is asked to supply the stated quantity to the particular permit holder has no option but to supply the stated quantity of goods at the controlled price. [440 E-G]

2. In State of Madras v. Gannon Dunkerley & Co. Ltd., [1959] SCR 379 after considering a variety of authorities on the subject, this Court held that the expression sale of goods in Entry 48 List 11 Government of India Act, 1935 cannot be construed in its popular sense and that it must be interpreted in its legal sense. Whereas in popular parlance a sale is said to take place when the bargain is settled between the parties through property in the goods may not pass at that stage, as where the contract relates to future or unascertained goods, the essence of sale in the legal sense is the transfer of property in a thing from one person to another for a price. It was further held that according to the law both of England and India in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to the goods which pre-supposes capacity to contract, supported by valuable consideration and that as a result of the transaction property must actually pass

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in the goods. "Unless all these elements are present, there can 'be no sale." The effect of the construction which the Court put on the words of Entry 48 in Gannon Dunkerley is that a sale is necessarily a consensual transaction and if the parties have no volition or option to bargain, there can be no sale. If this view is assumed to reflect the correct legal Position, the transactions in these cases will amount to sales. [447B-C, D-F, 449D-E]

3. Offer and acceptance need not always be in an elementary form, nor does the law of contract or of sale of goods require that consent to a contract must be express. Offer and acceptance can be spelt out from the conduct of the parties which covers not only their acts but omissions as well. On occasions, silence can be more eloquent than eloquence itself. Just as correspondence between the parties can constitute or disclose an offer and acceptance, so can their conduct. This is because law does not require

offer and acceptance to conform to any set pattern or formula. [450D-E]

4. In the instant case, it is not correct to say that the transactions between the dealer and the consumer were not consensual. The limitations imposed by the Control Order on the normal right of the dealers and consumers to supply and obtain goods, the obligations imposed on the parties and the penalties prescribed by the order do not militate against the position that eventually, the parties must be deemed to have completed the transactions under an agreement by which one party bound itself to supply the stated quantity of goods to the other at a price not higher than the notified price and the other party consented to accept the goods on the terms and conditions mentioned in the permit or the order of allotment issued in its favour by the concerned authority. in order, to determine whether there was any agreement or consensuality between the parties regard must be had to their conduct at or about the time when the goods changed hands. In the first place, it is not obligatory on a trader to deal in cement nor on the consumer to acquire it. The primary fact is that the decision of the trader to deal in an essential commodity is volitional. Such volition carries with it the willingness to trade strictly on the terms of the Control Order. The consumer who is under no legal compulsion to acquire or Possess cement, decides as a matter of his volition to obtain it on the terms of the permit or the order of allotment issued in his favour. That brings the two parties together, one of whom is willing to supply the essential commodity and the other to receive it. When the allottee presents his permit to the dealer, he signifies his willingness to obtain the commodity from the dealer on the terms stated in the permit. His conduct reflects his consent. And when, upon the presentation of the permit the dealer acts upon it, he impliedly agrees to supply the commodity to the allottee on the terms by which he has voluntarily bound himself to trade in the commodity. His conduct too reflects his consent. Thus, though both parties are bound to comply with the legal requirements governing the transaction, they agree as between themselves to enter into the tranaction on statutory terms, one agreeing to supply the commodity to the other on those terms and the other agreeing to accept from him on the very terms. [449E-H, 450C, E-H,451A]

5. Secondly, though the terms of the transaction are mostly predetermined by law, it cannot be said that there is no area at all for bargain. The conditions provided in the order that cement shall not be sold at a higher than the notified price and that no dealer shall refuse to sell it at a price not exceeding the notified price leaving it open to the individuals to charge and pay a price which is less than the notified price or charge a lesser price. Within the bounds of reasonableness, it would be open to the parties to fix the time of delivery. The consumer has a right to ask for weighment of goods which shows that he may reject the goods if found short in weight or are not of the requisite quality. The consumer has a right to ask for weighment of goods which shows that he tions have the freedom to bargain militates against the view that the transactions are not consensual. [451-AE]

6. In New India Sugar Mills Ltd. the question was whether sugar supplied by the mills on the orders of the Sugar Controller was exigible to tax. The majority held that a contract of sale between the buyer and the seller, which is a pre-requisite to a sale, being absent the transaction was not exigible to sales

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tax. But the principle on which the problem should be approached was set out in the dissenting judgment which said that consent may be express or implied and that it could not be said that unless offer and acceptance were present in an elementary form, there could be no taxable sale. Taking the view that on obtaining the necessary permit the seller on the one hand and the buyer on the other agreed to sell and purchase sugar it was pointed out that when the buyer, after receiving the permit, telegraphed instructions to despatch sugar and the seller despatched it, 'a contract emerged and consent must be implied on both sides though not expressed antecendently to the permit". So long as the parties trade under controls at fixed price and accept these as any other law of the realm, the contract is at the fixed price, both sides having or deemed to have agreed to such a price. Consent under the law of contract need not be express; it could be implied. [453B-G; 454A-C]

7.In coming to its conclusion the majority in New India Sugar Mills followed the decision of this Court in Gannon Dunkerley that in a building contract there was no agreement express or implied to sell goods and secondly that property in the building materials does not pass in the materials regarded as goods" but it passes as part of immovable property. The majority in-New India Sugar Mills was in error in saying that the ratio govern that case because the questions involved in both different. In New India Sugar Mills the commodity with concerned was sugar and was delivered as sugar just as in commodity is cement, which was delivered as cement Dunkerley tax was demanded after the commodity had after property in it had passed. The question in this case which was question involved in New India Sugar Mills namely decidendi of Gannon Dunkerley must cases were altogether which the Court was the instant case the Secondly, in Gannon changed hands, that is, the very whether a transaction effected in accordance with the obligatory terms of a statute can amount to a sale, did not arise in Gannon Dunkerley, Gannon Dunkerley is not an authority for the proposition that there cannot at all be a contract of sale if the parties to a transaction are obliged to comply with the terms of a statute. [456C-E]

8. In Gannon Dunkerley this Court was influenced largely by the observations in the 8th edn. of Benjamin on "Sale?' that to constitute a valid sale there must be a concurrence of four elements, one of which is "mutual assent". The majority judgment in New India Sugar Mills also derived sustenance from the same passage in Benjamin's 8th edn. Gannon Dunkerley involved an altogether different point and is not an authority for the proposition that there cannot at all be a contract of sale if the parties to a transaction are obliged to comply with the terms of a statute. [464E-F , 465C-D]

9. With the high ideals of the Preamble and the directive principles of our Constitution, there has to be a fundamental change in the judicial outlook. Freedom of contract has largely become an illusion. The policy of the Parliament in regard to the contracts including those involved in sale of goods, has still to reflect recognition of the necessity for a change, which could be done by a suitable modification of the definition of sale of goods. [464C-D]

Majority decision in New India Sugar Mills v. Commissioner of Sales Tax, Bihar, AIR 1963 SC 1207; [1963] Supp. 2 SCR 459 overruled.

Minority opinion in India Steel & Wire Products v. State of

Madras [1968] 1 SCR 479, Andhra Sugar Ltd. v. State of Andhra Pradesh, [1968] 1 SCR 705, Salar Jung Sugar Mills Ltd. v. State of Mysore [1972] 2 SCR 228 and Oil and Natural Gas Commission v. State of Bihar [1977] 1 SCR 354 approved.
State of Tamil Nadu v. Cement Distributors Pvt. Ltd. [1973] 2 SCR 1019 partly approved.
Chhitter Mal Nazrain Das. v. Commissioner of Sales Tax [1971] 1 SCR 671 explained.
State of Madras v. Gannon Dunkerley [1959] SCR 379 explained and distinguished.
Kirkness v. John Hudson and Co. Ltd. [1955] A.C. 696 held inapplicable.
Ridge No miness Ltd. v. Inland Revenue Commissioners [1962] Ch. 376 referred to.
Commissioner, Sales Tax U.P. v. Ram Bilas Ram Gopal AIR 1970 Allahabad 318 referred to.
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JUDGMENT:
CIVIL APPELLATE JURISDICTION: civil Appeal No. 724 of 1976.
Appeal by Special Leave from the, Judgment and Order dated 13th Dec. 1974 of the Calcutta High Court in Appeal from Original Order No. 240 of 1973.
AND
Civil Appeals. Nos. 2488-2497 (NT) 1972 (From the Judgment and Order dated the 31st March, 1970 of the Andhra Pradesh High Court in Writ Petitions Nos. 3005, 3006, 3085, 3086, 3088, 3090, 4232, 4243 and 4244 of 1969.
Sachin Chowdhary, B. Sen, S. S. Bose, K. K. Chakraborty, A. G. Manzes, J. B. Dadachanji and k. J. John for the Appellant in C.A. 724/76.
L. N. Sinha, D. N. Mukherjee, G. S. Chatterjee and A. K. Ganguli for respondents 1 to 4 in C.A. 724/76.
B. Kanta Rao for the Appellants in C.As 2488-97 of 1972.
Soli J. Sorabjee, Addl. Sol. Genl. (In 2488-97) 72, P. Parameshwara Rao A. K. Ganguli and T. V. S. Narasimhachari for the Respondents in CAs. Nos. 2488-97/72.
A. Subba Rao for the Intervener.
The following Judgment were delivered
BEG, C.J.--I am in general agreement with my learned brother Chandrachud who has discussed all the authorities so admirably and comprehensively. I, however, would like to add a few observations stating the general conclusion, as I see it, emerging from an application of general principles and accumulation of case law on the subject of what may be called "statutory" or "compulsory" sales. Are they sales at all so as to be exigible to sales tax or purchase tax under the relevant statutory provisions ?
The term ’sale? is defined as follows in Eenjamin on Sale (Eighth Edn.) :

> "To constitute a valid sale there must be a concurrences of the following elements, namely :-
> (1) parties competent to contract;
> (2) mutual assent;
> (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and
> (4) a price in money paid or promised."

It is true that a considerable part of the field over which what are called ’sales’ take place under either ’regulatory orders or levy orders passed or directions given under

statutory provisions is restricted and controlled by these orders and directions. If, what is called a "sale"
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is, in substance, mere obedience to a specific order, in which the so called "price" is only a compensation for the compulsory passing of property in goods to which an order relates, at an amount fixed by the authority making the order, the individual transaction may not be a ,,sale" although the compensation is determined on some generally fixed principle and called "price". This was, for example, the position in New India Sugar Mills v. Commissioner of Sales Tax, Bihar(1). That was a case of a delivery according to an order given by the Govt. which could amount to a compulsory levy by an executive order although there was no legislative "levy order" involved in that case. On the other hand,, in Commissioner, Sales Tax, U.P. v. Ram Bilas Ram Gopal,(2) the order under consideration was actually called a levy order, but the case was distinguishable from New India Sugar Mills v. Commissioner of Sales Tax, Bihar (supra) on facts. It was held in the case of Ram Bilas (supra) that the core of what is required for a "sale" was not destroyed by the so called "levy" order which was legislative. It is true that passages from the judgement of Pathak, J., in the case of Ram Bilas Ram Gopal (supra) were cited and specifically disapproved by a Bench of this Court in Chittar Mal Narain v. Commissioner of Sales Tax(3). But, perhaps the view of this Court in Chittar Mal Narain, Das (supra) goes too far in this respect. It is not really the nomenclature of the order involved, but the substance of the transaction under consideration which matters in such cases.
In the first typo of case mentioned above the substance of the concept of a sale, as found under our Law, itself disappears because the transaction is nothing more than the execution of an order. Deprivation of property for a compensation, which may even be described as "price", does not amount to, a sale when all that is done is to, carry out an order so that the transaction is substantially a compulsory acquisition. On the other hand, a merely regulatory law, even if it circumscribes the area of free choice, does not take away the basic character or core of sale from the transaction. Such a law, which governs a class, may oblige sellers to deal only with parties holding licences who may buy particular or allotted quantities of goods at specified prices, but an essential element of choice is still left to the parties between whom agreements take place. The agreement, despite considerable compulsive elements regulating or restricting the area of free choice, may still retain the basic character of a transaction of sale. This was the position in Indian Steel and Wire Products Ltd. v. State of Madras(4). Andhra Sugar Ltd. v. State of Andhra Pradesh(5) and State of Rajasthan v. Karam Chand Thapar(6): There might be borderline cases in which it- may be difficult to draw the line.
(1) AIR 1963 SC 1207 : [1963] (Supp) 2 SCR 459.
(2) AIR 1970 All 518.
(3) [1971] 1 S.C.R. 671.
(4) [1968] 1 S.C.R. 479.
(5) [1968] 1 S.C.R. 705.
(6) A.I.R. 1969 S.C. 343.
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In the former type of case, the binding character of the, transaction arises from the order directed to particular parties asking them to deliver specified goods and not from a general order or law applicable to a class. In the latter

type of cases, the legal tie (vinculum juris) which binds the parties to perform their obligations remains contractual. The regulatory law merely adds other obligations, such as the one to enter into such a tie between the parties indicated there. Although the regulatory law might specify the terms, such as price, or parties, the regulation is subsidiary to the essential character of the transaction which is consensual and contractual. The basis of a contract is : "consensus adem". The parties to the contract must agree upon the same thing in the 'same sense. Agreement on mutuality of consideration, ordinarily arising from an offer and acceptance, imparts to it enforceability in Courts of law. Mere regulation or restriction of the field of choice does not take away the contractual or essentially consensual binding core or character of the transaction.

I may be forgiven for citing a passage from my judgment in Commissioner of State Tax v. Ram Bilas Ram Gopal,(supra) to indicate the setting of such transactions

> "It appears to me to be necessary to distinguish between a restriction in the area of choice of parties and the transaction itself in order to, determine the true character of the transaction. Limitation of the field of choice is a necessary concomitant of a controlled or mixed economy which ours is. Absolute freedom of contract or unregulated operation of the laws of- supply and demand, which an apotheosis of the laissez-faire doctrine demanded, led really to a shrinking of the area of freedom in the economic sphere, producing gross inequalities in bargaining powers and recurrent crises. Therefore, a regulated or a socialistic economy seeks to regulate the play of forces operating on the economic arena so that economic freedom of all concerned, including employers and employees, is preserved and so that the interests of consumers are also not sacrificed by any exploitation of conditions in which there is scarcity of goods,. I think that the regulation or restriction of the area of choice, cannot be held to take away the legal character of the transactions which take place within the legally restricted field. It is too late in the day, when so much of the nation's social and economic activities are guided and governed by control orders, allotment orders, and statutory contracts, to contend that mere State regulation of the economic sphere of life results in the destruction of the nature of the transactions which take place within that sphere." (P. 524)

In Roman Law the contract of sale was classed as a "consensual" contract. The consent could, no doubt, be express or implied. I find that Hidayatullah J., in his very learned dissenting judgment in New India Sugar Mills Case (supra), where some Roman Law is. referred to, thought that even in a case of a 'specific order directing delivery of

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goods there could be an implied consent so as to constitute a safe. I find it, with great respect, difficult to go so far as that. What could be implied, upon the facts of a particular case, must still be a consent to a proposal if

the transaction is to be construed as a "sale". Mere compliance with an order may imply an acceptance of an order but acceptance of a proposal to purchase or sell are of a juristically different genus. It is, however, not necessary for us, in this case, to accept the correctness of the minority view of Hidayatullah, J. in New India Sugar Mills case (supra). The transactions before us are sales on an application of the ratio decidendi of Indian Steel and Wire Products Ltd's case (supra) and other cases decided on similar grounds.

The difficulty arises from the fact that, although the ingredients of a "sale," as defined in Benjamin's treatise on "Sale?', may seem to be satisfied even if delivery of goods is in obedience to "an order to deliver them for a consideration, fixed or to be fixed if we stretch mutual assent to cover assent resulting from orders given, yet, it is difficult to see how such a transaction would be based on a contractual tie. According to Sec. 4(3) of our Sale of Goods Act, a sale results only from a contract which presupposes a minimal area of freedom of choice where the ordinary mechanism of proposal and acceptance operates.

For the reasons indicated above, while I agree with the answer given by my learned brother Chandrachud to the question before us and also practically with all the views expressed by my learned brother, yet, I hesitate to hold that the majority opinion expressed by Shah J., in New India Sugar Mills case (supra), is erroneous. I think the case is distinguishable. Ibis, however, makes no difference to the common conclusion reached by us on the facts of the cases before us.

CHANDRACHUD, J. These appeals have been placed for hearing before a seven-Judge Bench in order to set at rest, to the extent foreseeable, the controversy whether what is conveniently, though somewhat loosely, called a 'compulsory sale? is exigible to sales tax. When essential goods are in short supply, various types of Orders are issued under the Essential Commodities Act, 1955 with a view to making the goods available to the consumer at a fair price. Such Orders sometimes provide that a person in need of an essential commodity like cement, cotton, coal or iron and steel must apply to the prescribed authority for a permit for obtaining the commodity. Those wanting to engage in the-business of supplying the commodity are also required to possess a dealer's licence. The permit holder can obtain the supply of goods, to the extent of the quantity specified in the permit, from the named dealer only and at a controlled price. The dealer who is asked to supply the stated quantity of goods at the particular permit holder has no option but to supply the stated quantity of goods at the controlled price. The question for our consideration not easy to decide, is whether such a transaction amounts to a sale in the language of the law.

We will refer to the facts of civil appeal 724 of 1976, in which a company called M/s Vishnu Agencies (Pvt.) Ltd., is the appellant. It carries on business. as an agent and distributor of cement in the

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State of West Bengal and is a registered dealer under the Bengal Finance (Sales Tax) Act, 1941, referred to hereinafter as the Bengal Sales Tax Act. Cement being a controlled commodity, its distribution is regulated by the West Bengal Cement Control Act, 26 of 1948, referred to hereinafter as the Cement Control Act, and by the Orders made under section 3 (2) of that Act. Section (3) (1) of the Cement Control Act provides, inter alia, for regulation

of production, supply and distribution of cement for ensuring equitable supply and distribution thereof at a fair price. By the Cement Control Order, 1948 framed under the Cement Control Act, no sale, or purchase of cement can be made, except in accordance with the conditions contained in the written order issued by the Director of Consumer Goods, West Bengal or the Regional Honorary Adviser to the Government of India at Calcutta or by officers authorised by them, at prices not exceeding the notified price.

The appellant is a licensed stockist of cement and is permitted to stock cement in its godown, to be supplied to persons in whose favour allotment orders are issued, at the price stipulated and in accordance with the conditions of permit issued by the authorities concerned. The authorities designated under the Cement Control Order issue permits under which a specified quantity of cement is allotted to a named permit-holder, to be delivered by a named dealer at the price mentioned in the permit. A permit is generally valid for 15 days and as soon as the price of cement allotted in favour of an allottee is deposited with the dealer, he is bound to deliver to the former the specified quantity of cement at the specified price.

A specimen order issued in favour of an allottee, under which the appellant had to supply 10 metric tons of cement at Rs. 144.58 per M.T., exclusive of sales tax, reads thus

> "LICENCE FOR CEMENT
> The quantities of cement detailed below are hereby allotted to M/s. Marble & Cement products Co. Pvt. Ltd., 2, Braboume Road, Calcutta-1 to be supplied by M/s. Vishnu Agencies Pvt. Ltd., 3, Chittaranjan Avenue, Calcutta-13, on conditions detailed below.
> The price of material involved must be deposited with the Stockist within 15 days and the actual delivery must be taken within 15 days from the date of issue of the permit.
> The licence is issued only for the purpose of Mfg. of Mosaic Tiles at 188, Netaji Subhas Road, Calcutta-40.
> Under no circumstances will the validity of the permit be extended beyond the period of 15 days from the date of its issue.
> Cement
> Total Tonnge
> Country Cement at Rs. 144.58 Ton Cwt. per M.T. exclusive of S. T. 10 M/T (Ten M/T only)"

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The appellant supplied cement to various allottees from time to time in pursuance of the allotment orders issued by appropriate authorities and in accordance with the terms of the licence obtained by it for dealing in cement. The appellant was assessed to sales tax by the first respondent, the Commercial Tax Officer,, Sealdah Charge, in respect of these transactions. It paid the tax but discovered on perusal of the decision of this Court in New India Sugar Mills Ltd. v. Commissioner of Sales Tax(1) that the transactions were not exigible to sales tax. Pleading that the payment was made under a mistake of law, it filed appeals against the orders of assessment passed by respondent 1. It contended in appeals before the Assistant Commissioner of Commercial Taxes that by virtue of the provisions of the Cement Control Act and the Cement Control Order, no volition or bargaining power was left to it and since there was no element of mutual consent aggreement between it and the allottees, the transactions were not

sales within the meaning of the Sales Tax Act. The appellant further contended that if the transactions were treated as sales, the definition of "sale" in the Sales Tax Act was ultra vires the legislative competency of the Provincial Legislature under the Government of India Act, 1935 and of the State Legislature under the Constitution. The appellate authority rejected the first contention and upheld the assessments. It did not, as it could not, go into the second contention regarding legislative competence. The appellant adopted the statutory remedies open to it but since the arrears, of tax were mounting up and had already exceeded a sum of rupees eight lacs, it filed a writ petition in the Calcutta High Court praying that the various assessment orders referred to in the petition be quashed and a writ of prohibition be issued directing the sales tax authorities to refrain from making any further assessments for the purpose of sales tax on the transactions between the appellant and the allottees.

A learned single Judge of the High Court allowed the writ petition and issued a writ of mandamus restraining the respondents from imposing sales tax on the transactions. between the appellant and the allottees. That judgment having been set aside in appeal by a Division Bench of the High Court by its judgment dated December 13, 1974, the appellant has filed appeal No. 724 of 1976 by special leave. Civil appeals No. 2488 to 2497 of 1972 raise a similar question under the Andhra Pradesh Paddy Procurement (Levy) Orders, under which paddy growers in the State are under an obligation to sell the paddy to licensed agents appointed by the State Government at the prices fixed by it. The High Court of Andhra Pradesh by its judgment dated March 31, 1970 has taken the, same view as the Calcutta High Court, namely, that the transactions amount to sales and are taxable under the Sales Tax Act. Counsel appearing in the Andhra Pradesh appeals agree that the decision in the Calcutta case will govern those appeals also.

(1) [1963] Supp. 2 S.C.R. 459.

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Since the crux of the appellant's contention is that the measures adopted to control the supply of cement leave no consensual option to the parties to bargain, it is necessary first to notice the relevant provisions of law bearing on the matter. The West Bengal Cement Control Act, 26 of 1948, was enacted in order. to "confer powers to control the production, supply and distribution of, and trade and commerce in, cement in West Bengal." Section 3(1) of the Act empowers the Provincial Government to provide, by order in the Official Gazette, for regulating the supply and distribution of cement and trade and commerce therein. Section 3(2) provides by clauses (b) to (o) that an order made under sub-section (1) may provide for regulating or controlling the prices at which cement may be purchased or sold and for prescribing the conditions of sale thereof, regulating by licences, permits or otherwise, the storage, transport, movement, possession, distribution, disposal, acquisition, use of consumption of cement; prohibiting the withholding from sale of cement ordinarily kept for sale; and for requiring any person holding stock of cement to sell the whole or specified part of the stock at such prices and to such persons or classes of persons or in such circumstances, as may be specified in the order. If any person contravenes an order made under section 3, he is punishable under section 6 with imprisonment for a term which may extend to three years or with fine or with both, and, if the order so provides, any Court, trying such con-

tranvention, may direct that a property in respect of which the Court is satisfied that the order been contravened shall be forfeited to the Government.

In exercise of the powers erred by section 3(1) read with clauses (b) to (h) of section (2) of the Act, an Order which may conveniently be called the Cement Control Order was promulgated by the Governor on August 18, 1948. The relevant clauses of that Order contain the following provisions. By paragraph 1, no person shall after the commencement of the order sell or store for sale any cement unless he holds a licence and except in accordance with the conditions specified in such licence obtained from the Director of Consumer Goods, West Bengal, or any officer authorised by him in writing in this behalf. By paragraph 2, no person shall dispose of or agree to dispose of any cement except in accordance with the conditions contained in a written order of the Director of Consumer Goods, West Bengal or the authorities specified in the paragraph. By paragraph 3, no person shall acquire or agree to acquire any cement from any person except in accordance with the conditions contained in a written order of the Director of Consumer Goods, West Bengal, or the authorities specified in the paragraph. By paragraph 4, no person shall sell cement at a "higher than notified price". By Paragraph 8, no person or stockist who has any stock of cement in his possession and to whom a written order has been issued under paragraph 2 shall refuse to sell the same, "at a price not exceeding the notified price", 'and the seller shall deliver the cement to the buyer "within a reasonable time after the payment of price". By paragraph 8A, every stockist or every person employed by him shall, if so re

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quested by the person acquiring cement from him under a written order issued under paragraph 3, weigh the cement in his presence or in the presence of his authorised representative at the time of delivery.

We are not concerned with the amendments made by the Government of West Bengal to the, Cement Control Order on December 30, 1965 by which, inter alia paragraphs 2, 3, 4, 8 and 8A of that Order were deleted. The,appeal from the decision of the Calcutta High Court is limited to the transactions between the appellant and the allottees from the years 1957 to 1960.

As regards the batch of appeals from Andhra Pradesh, the levy of tax was challenged by three sets of persons, the procuring agents, the rice-millers and the retailers with the difference that the procuring agents were assessed to purchase tax, while the others to sales tax under the Andhra Pradesh General Sales Tax Act, 1957. By virtue of the provisions of the, Andhra Pradesh Paddy Procurement (Levy) Orders, the paddy-growers can sell their paddy to licensed procuring agents appointed by the State Government only and at the prices fixed by the Government. The agriculturist has the choice to select his own procuring agent but he cannot sell paddy to a private purchaser. The procuring agents in their turn have to supply paddy to the rice-millers at controlled prices. The millers, after converting paddy into rice, have to declare their stocks to the Civil Supplies Department. Pursuant to the Orders issued by the Department, the rice-millers-have to supply a requisite quantity of rice to the wholesale or retail dealers at prices fixed by the Department. Orders for such supply by the millers are passed by the authorities under the A.P. Procurement (Levy) and Restriction on Sale Order, 1967.

Under this Order, every miller carrying on rice-milling operations is required to sell to the agent or officer duly authorised by, the Government the minimum quantities fixed by the Government at the notified price; and no miller or other person who gets his paddy milled in any price mill can move or otherwise dispose of the, rice recovered by milling at such rice mill except in accordance with the, directions of the Collector. A breach of these provisions is liable to be punished under section 7 of the Essential Commodities Act 1955 and the goods are liable to be forfeited under section 6A of that Act. The A.P. sales tax authorities levied purchase tax on the purchase of paddy made by the procuring agents from the agriculturists and they levied sales tax on the transactions relating to the sup of rice by the millers to the wholesale and retail dealers and on the supply made, by the retailers to their customers. The case as regards the sales tax imposed on the transactions between the retail dealers and the consumers stood on an altogether different footing, but the writ petitions filed by the procuring agents and rice-millers raised questions similar to those involved in the writ petition filed in the Calcutta High Court.

These then are the provisions of the respective Orders passed by the Governments of West Bengal and Andhra Pradesh.

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We may now notice the provisions of the Sales Tax Acts. Section 2(g) of the Bengal Finance (Sales Tax) Act, 6 of 1941, defines a sale" to mean "any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of ,property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge." Section 2 (1) provides that the word "turnover" used in relation to any period means "the aggregate of the sale-prices or parts of sale-prices receivable, or if a dealer so elects, actually received by the dealer..... By clause (h) of section 2, "sale-price" is defined to mean the amount payable to a dealer as valuable consideration for "the sale of any goods". By section 4(1), every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded the taxable quantum is liable to pay tax under the Act on all "sales" effected after the date notified by the State Government.

Section 2(n) of the Andhra Pradesh General Sales Tax Act 1957 defines a "sale" as "every transfer of the property in goods by one person to another in the course of trade or commerce, for cash, or for deferred payment or for any other valuable consideration. Section 5 of that Act is the charging section.

According to these definitions of ’sale’ in the West Bengal and Andhra Pradesh Sales Tax Act, transactions between the appellants on one hand and the allottees or nominees on the other are patently ,sales because indisputably, in one case the property in cement and in the other, property in paddy and rice was transferred for cash consideration by the appellants; and in so far as the West Bengal case is concerned, property in the goods did not pass to the transferees by way of mortgage, hypothecation, charge or pledge. But that is over- simplification. To counteract what appears on the surface plain enough, learned. counsel for the appellants have advanced a two fold contention. They contend, in the first place,’ that the word ’sale’ in the Sales Tax Acts passed by the Provincial or State legislatures must receive the same meaning as in the Sale of Goods Act, 1930; or else, the definition of sale in these

Sales 'Tax Acts will be beyond the legislative competence of the Provincial and' State legislatures. Secondly, the appellants contend that since under the Sale of Goods Act, there can be no sale without a contract of sale and since the parties in these matters had no volition of their own but were compelled by law to supply and receive the goods at prices fixed under the Control Orders by the prescribed authorities, the transactions between them are not sales properly so palled and therefore are not exigible to sales tax.

For examining the validity of the first contention, it is necessary to turn to the appropriate entries in the legislative lists of the Constitution Acts, for the contention is founded on the premise that the word sale' which occurs in those entries must receive the same meaning as in the Sale of Goods Act, 1930 since the expression "sale of goods" was, at the time when the Government of India Act was enacted, a term of well-recognised legal import in the general law relating to sale

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of goods and in the legislative practice relating to that topic both in England and in India. Entry 48 in the Provincial List, List II of Schedule VII to the Government of India Act, 1935 relates to; "Taxes on the sale of goods." Entry 54 of List II, of the Seventh Schedule to the Constitution reads to say: "Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of the Union List but we may refer to it in order to complete the picture. It refers to: "Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course, of inter-State trade or commerce."

The contention of the appellants that the expression 'sale of goods' in entry 48 in the Provincial List of the, Act of 1935 and in entry 54 in the State List of the constitution must receive the same meaning as in the Sale of Goods Act is repelled on behalf of the State Governments with the argument that constitutional provisions which confer legislative powers must receive a broad and liberal construction and therefore the expression 'sale of goods' in entry 48 and its successor, entry 54, should not be construed in the narrow sense in which that expression is used in the Sale of Goods Act, 1930 but in a broad sense. The principle that in interpreting a constituent or organic statute, that construction most beneficial to- the widest possible amplitude of its powers must be adopted has been examined over the years by various courts, including this Court, and is too firmly established to merit reconsideration. Some of the leading cases on this point are the Privy Council decisions in British Coal Corporation v. king(1), Edwards v. A. G. for Canada(2) and James v. Commonwealth of Australia("); the Australian decisions in Morgan v. Deputy Federal Commissioner of Land Tax, N.S.W.(4) and Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.) (5) ; the Federal Court decisions in In re the Central Provinces and Berar Act No. XIV of 1938(6) and United Provinces v. Atiqa Begum;(7) and the decisions of this Court in Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City(8) and The State of Madras v. Gannon Dunkerley & Co. (Madras), Ltd. (9) These decisions have taken the view that a constitution must not be construed in a narrow and pedantic sense, that a board and liberal spirit should inspire those whose duty it is to interpret it, that a Constitution of a Government is a living and organic thing which of all instruments has the

greatest claim to be construed ut res magis valeat quam pereat, that the legislature in selecting subjects of taxation is entitled to take things as it finds them in remum natura and that it is not proper that a Court should deny to such a legislature the right of solving taxation problems unfettered by a priori legal categories which often derive from the exercise of legislative power in the same constitutional unit.

(1) [1935] A.C. 500. (6) [1939] F.C.R. 18.
(2) [1930] A.C. 124. (7) [1940] F.C.R. 110.
(3) [1936] A.C. 578. (8) [1955] 1 S.C.R. 529..
(4) [1912] 15 C.L.R.661. (9) [1959].S.C.R. 379.
(5) [1937] 56 C.L.R. 33.

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On a careful examination of various decisions bearing on the point this Court speaking through Venkatarama Aiyar J. in Gannon Dunkerley (supra) upheld the contention of the State of Madras that the words "sale of goods" in Entry 48 which occur in-the Constitution Act and confer legislative powers on the State Legislature in respect of a topic relating to taxation must be interpreted not in a restricted but broad sense. But as observed by the learned Judge in that case, this conclusion opens up questions as to what that sense is, whether popular or legal, and what its connotation is, either in the one sense or' the other. After considering text-book definitions contained in Blackstone, Benjamin on Sale, Halsbury's Laws of England, Chalmer's Sale of Goods Act, Corpus Juris, Williston on Sales and the Concise Oxford Dictionary, the Court held that the expression 'sale of goods' in Entry 48 cannot be construed in its popular sense and that it must be interpreted in its legal sense. Whereas in popular parlance a sale is said to take place when the bargain is settled between the parties though property in the goods may not pass at that stage, as where. the contract relates to future or unascertained goods, the essense of 'sale' in the legal sense is the transfer of the property in a thing from one person to another for a price.

The Court then proceeded to determine, the connotation of the expression 'sale of goods' in the legal sense and held, having regard lo the evolution of the law relating to sale of goods, the scheme of the Indian Contract Act and the provisions of the Sale of Goods Act, 1930, which repealed Chapter VII of the Indian Contract Act relating to sale of goods, that according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to the goods, which pre-supposes capacity. to contract, that the contract must be supported by valuable consideration and that as a result of the transaction property must actually pass in the goods. "Unless all these elements are present, there can be no sale,"

Basing itself on this position, the Court finally concluded in Gannon Dunkerley (supra) that the expression 'sale of goods' was, at the, time when the Government of India Act was enacted, a term of wellrecognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic both in England and in India and therefore that expression, occurring in entry 48, must be interpreted in the sense which it bears in the Sale of Goods Act, 1930. In coming to this conclusion, the Court relied upon the, American decisions in United States v. Wong Kim Ark, South Carolina v. United States(2) and Ex Parte. Grossman(3); the Privy Council decisions in L'Union St. Jacques De Montreal v. Be Lisle (4) , Royal Bank of Canada

v. Larue,(5) The Labour Relations Board of
(1) [1898] 169 U.S. 649.
(2) [1905] 199 U.S. 437.
(3) [1925] 267 U.S. 87.
(4) [1874] L.R. 6 P.C.31.
(5) [1928] A.C. 187.
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Saskatochewan v. John East Iron Works Ltd.(1); Croft v. Dunphy(2), and Wallace Brothers and Co. Ltd. v. Commissioner of Income-tax, Bombay City and Bombay Suburban District;(3) the decision of the Federal Court in In re The Central Provinces and. Berar Act No. XIV of 1938; (supra); and the decisions of this Court in The State of Bombay v. F. N. Balsara(4) and The Sales Tax Officer, Pilibhit v. Messrs Budh Prakash Jai Prakash(5). In a nutshell, these decisions have taken the view that the Constitution must be interpreted in the light of the common-law, the principles and history of which were familiarly known to the framers of the Constitution, that the language of the Constitution cannot be understood without reference to the common law, that to determine the extent of the grants of power, the Court must place itself in the position of the men who framed and' adopted the Constitution and inquire what they must have understood to be the meaning and scope of those grants, that when a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embarced within that topic in-legislative practice and particularly in the legislative practice of the State which has conferred that power, that the object of doing so is emphatically not to seek a pattern to which a due exercise of the power must conform, but to ascertain the general conception involved in the words of the Act, and finally, that Parliament must be presumed to have had Indian legislative practice in mind and unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply.
The view expressed in Gannon Dunkerley (supra) that the, words "sale of goods" in entry 48 must be interpreted in the sense which they bear in the Sale of Goods Act, 1930 an$ that the, meaning of those words should not be left to fluctuate with the definition of 'sale in laws relating to sales of goods which might be in force for the, time being. may, with respect, bear further consideration but that may have. to await a more suitable occasion. It will then be necessary to examine whether the words "sale of goods" which occur in entry 48 should not be construed so as to extend the competence of the legislature to enacting laws in respect of matters which might- be unknown in 19 3 5 when the Government of India Act was passed but which may have come into existence later, as a result of a social and economic evolution. In Attorney General v. Edison Telephone, Company of London(,,) a question arose whether the Edison Telephone Company London, infringed by installation of telephones, the, exclusive privilege, of transmitting telegrams which was conferred; upon- the Postmaster-General under an Act of 1869. The decision depended on the meaning of the
(1) [1949] A.C. 134.
(2) [1933] A.C. 156.
(3) [1948] L.R. 75 I.A. 86.
(4) [1951] S.C.R. 682.
(5) [1955] 1 S.C.R. 243.
(6) [1880] L.R. 6 Q.B.D. 244.

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word "telegraph" in the Acts of 1863 and 1869. The company contended that since-telephones were unknown at the time when these Acts were passed, the definition of 'telegraph' could not comprehend 'telephones. That contention was negatived by an English Court. In the Regulation and Control of Radio Communication in Canada, In re(1) a similar question arose as to whether 'broadcasting" was covered by the expression "telegraph and other works and undertakings" in section 92(10) (a) of the Constitution Act of 1867. The Privy Council answered the question in the affirmative and was apparently not impressed by the contention that broadcasting was not known as a means of communication at the time when the Constitution Act was passed. These decisions proceed on the principle that if after the enactment of a legislation, new facts and situations arise which could not have been in the contemplation of the legislature, statutory provisions can justifiably be applied to those facts and situations so long as the words of the statute are in a broad sense capable of containing them. This principle, according to the view expressed in Gannon Dunkerley, (supra) did not apply to the interpretation of Entry 48, a view which in our. opinion is capable of further scrutiny. It is, however, unnecessary in these appeals to investigate the matter any further because, the position which emerges after putting on the words of Entry 48 the same meaning which those words'-bear in the Sale of Goods Act, 1930 is that in order to constitute a sale, it is necessary that there should be an agreement between the parties. In other words, the effect of the construction which the Court put on the words of Entry 48 in Gannon Dunkerley (supra) is that a sale is necessarily a consensual transaction and if the parties have no volition or option to bargain, there can be no sale. For the present purposes, this view may be assumed to reflect the correct legal position but even so, the transactions which are the subject matter of these appeals will amount to sales.

Applying the ratio of Gannon Dunkerley, (supra) the true question for decision, therefore, is whether in the context of the Control Orders issued by the Government of West Bengal for regulating the supply and distribution of cement, the transactions under which the, appellant supplied cement to persons who were issued permits by the authorities to obtain the commodity from the appellant, involved an element of volition or consensuality. If they did, the transactions would amount to sales, but not otherwise. It is undeniable that under paragraph 2 of the West Bengal Order of 1948, which we have for convenience designated as the Cement Control Order, no person can dispose of or agree to dispose of any cement except in accordance with the conditions contained in a written order of the Director of Consumer Goods or the authorities specified in that paragraph. That is a limitation on the dealer's right to supply cement. Correspondingly by paragraph 3, no person can acquire or agree to acquire cement from any person except in accordance with the conditions contained in a written order of the Director of Consumer Goods or the authorities specified in that paragraph. That is a limitation on the consumer's right to obtain cement. Paragraph 4 puts a restriction on the price which a dealer

(1) [1932] A.C. 304.

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may charge for the commodity by providing that no person shall sell cement at a price higher than the notified price. Paragraph 8 imposes on the dealer the obligation to supply

cement by providing that no person or stockist who has any stock of cement in his possession and to whom a written order has been issued under paragraph 2 shall refuse to sell the same at a price not exceeding the notified price. person who contravenes the provisions of the Cement Control Order is punishable under section 6 of the West Bengal Cement Control Act, 1948 with imprisonment for a term which may extend to three years

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

In order, therefore, to determine whether there was any agreement or consensuality between the parties, we must have regard to their conduct at or about the time when the goods changed hands. In the first place, it is not obligatory on a trader to deal in cement nor on any one to acquire it. The primary fact, therefore, is that the decision of the trader to deal in an essential commodity is volitional. Such volition carries with it the willingness to trade in the, commodity strictly on the terms of Control Orders. The consumer too, who is under no legal compulsion to acquire or possess cement, decides as a matter of' his volition to obtain it on the terms of the permit or the order of allotment issued in his favour. That brings the two parties together, one of whom is willing to supply the essential commodity and the other to receive it. When the allottee presents his permit to the dealer, he signifies his willingness to obtain the commodity from the dealer on the terms stated in the permit. His conduct reflects his consent. And when, upon the presentation of the permit, the dealer acts upon it, he impliedly agrees to supply the commodity to the allottee on the terms by which he has voluntarily bound himself to trade in the commodity. his conduct too reflects his consent. Thus, though both parties are bound to comply with the legal requirements governing the transaction, they agree as between themselves to enter into the transaction on statutory terms,

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one agreeing to supply the commodity to the other on those terms and the other agreeing to accept it from him on the very terms. It is therefore not correct to say that the transactions between the appellant and the allottees are not consensual. They, with their free consent, agreed to enter into the transactions.

We are also of the opinion that though the terms of the transaction are mostly predetermined by law, it cannot be

said that there is no area at all in which there is no scope, for the parties to bargain. The West Bengal Cement Control Act, 1948 empowers the Government by section 3 to regulate or control the prices at which cement may be purchased or sold. The Cement Control Order, 1948 provides by paragraph 4 that no person shall sell cement at a "higher than notified price", leaving it open to the parties to charge and pay a price which is less than the notified price, the notified price being the maximum price which may lawfully be charged. Paragraph 8 of the Order points in the same direction by providing that no dealer Who has a stock of cement in his possession shall refuse to sell the same "at a price not exceeding the notified price", leaving it open to him to charge a lesser price, which the allottee would be only too agreeable to pay. Paragraph 8 further provides that the. dealer shall deliver the cement "within a reasonable time" after the payment of price. Evidently, within the bounds of reasonableness, it would be open to the parties to fix the time of delivery. Paragraph 8A which confers on the allottee the right to ask for weighment of goods also shows that he may reject the goods on the ground that they are short in weight just as indeed, he would have the undoubted right to reject them on the ground that they are not of the requisite quality. The circumstance that in these areas, though minimal, the parties to the transactions have the freedom to bargain militates against the view that the transactions are not consensual.

While on this aspect, we may usefully draw attention to two important decisions of this Court, the first of which is Indian Steel & Wire Products Ltd. v. State of Madras(1). The appellant therein supplies certain steel products to various persons in Madras at the instance of the Steel Controller exercising powers under the Iron and Steel'(Control of Production and Distribution) Order, 1941. The State of Madras assessed the turnover of the appellant to sales tax upon which, the appellant contended that the deliveries of steel products were made under compulsion of law since it was the controller who determined the persons to whom the goods were to be supplied, the price at which they were to be supplied, the manner in which they were to be transported and the mode in which the payment of the price was to be made. Since every facet of the transaction was prescribed by the controller, so it was argued, there was no agreement between the parties and therefore the transaction could not be considered as a sale. Rejecting this contention, it was observed by Hegde J., who spoke for the Constitution Bench, that though the controller fixed the base price of the steel products and determined the

(1) [1968] 1 S.C.R. 479.

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buyers, the parties were stiff 'free to decide the other terms of the bargain, as for example, the time and date of delivery and the time and mode of payment and therefore it could not be said that there was no agreement between the parties to sell and buy the goods. It was held that though the area within which it was possible for the parties to bargain was greatly relieved on account of the Iron and Steel Control Order, it was not correct to contend that because law imposes restrictions on freedom of contract, there could be no contract at all. "So long as mutual assent is not completely excluded in any dealing, in law it is a contract."

The second decision is reported in Andhra Sugar Ltd. v. State of Andhra Pradesh(1). In that case, the occupier of a sugar factory had to buy sugarcane from cane-growers in

conformity with the directions. of the Cane Commissioner issued under the Andhra Pradesh (Regulation of Supply and Purchase) Act, 1961. Under section 21 of that Act, sales and purchase of sugarcane were exempt from tax under the Andhra Pradesh General Sales Tax Act, 1957, but under section 2(1), of the Act of 1961, the State Government had power by notification, to levy a tax "on the purchase of cane required for use, consumption or sale in a sugar factory". Various sugar factories in the State filed writ petitions under Article 32 of the Constitution challenging the- validity of section 21 mainly on the ground that since they were compelled by law to buy cane from the cane-growers, their purchases were not- made under agreements and were not taxable under entry 54, List 11 of the Seventh Schedule to the Constitution having regard to-the decision in Gannon Dunkerley (supra). The writ petitions were- decided by a Constitution Bench of this Court which delivered its un- animous judgment through Bachawat J. It is necessary in the first place to state that though it was argued on behalf of the State Government in that case that the occupier of the factory had some option of not buying the sugarcane from the grower and had some freedom of bargaining about the terms and conditions of the agreement, that point was not pursued any further and the writ petitions proceeded on the basis that there was no option left for any bargain in the transaction. After referring to the definition of "contract of sale of goods" in section 4(1) of the Indian Sale of Goods Act, 1930, and the relevant provisions of the Contract Act relating to offer and acceptance,. the Court observed that under section 10 of the Contract Act, an agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not by the Act expressly declared to be void. Section 13 of the Contract Act defines "consent" and section 14 says that consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake as defined in sections 15 to 22. In the background of those provisions, the Court observed that the cane-grower in the factory zone was free to make or, not to make an offer of sale of cane 'to the occupier of the factory. But if be made an offer, the occupier of the factory was bound to accept it and the consent of the occupier not being caused by coercion, undue influence, fraud, misrepresentation or mistake was "free

(1) [1968] 1 S.C.R. 705.

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consent as defined in section 14 of the Contract Act, even though he was obliged by law to enter into the agreement. "The compulsion of law is not coercion as defined in section 15 of the Act" and "in the eye of the law, the agreement is freely made." Since the, parties were competent to contract, the agreement was made for a lawful consideration and with a lawful object, the agreement was not void under any provision of law and it was enforceable at law, the Court held that the purchases of sugarcane were taxable by the State legislature under Entry 54, List 11 of the Seventh Schedule of the Constitution.

Strong reliance was placed by the factory owners in Andhra Sugars (supra) on the majority' judgment of Kapur and Shah JJ. in New India Sugar Mills Ltd. v. Commissioner of Sales Tax (supra) to which we must refer here. The "admitted course of dealing" between the parties in that case was that the Governments of various consuming States used to intimate

to the Sugar Controller of India, from time to time, their requirements of sugar and similarly, the factory owners used to send to the Sugar Controller of India statements of stocks of sugar held by them. On a consideration of the requests received from the State Governments and the statements of stock received from the factories, the Sugar Controller used to make allotment of sugar. The. allotment order was addressed by the Sugar Controller to the factory owner directing him to supply sugar to the State Government in question in accordance with the despatch instructions received from the competent officer of the State Government. A copy of the allotment order was simultaneously sent to the State Government concerned on receipt of which the competent authority of the State Government sent to the factory concerned detailed instructions about the destinations to which the sugar was to be despatched as also the quantities of sugar to be despatched to each place. The Madras Government which, under this arrangement, received its quota of sugar from the New India Sugar Mills, also laid down the' procedure of payment. The Patna High Court having held that the supply of sugar by the mills to the Province of Madras was liable to be taxed under the Bihar Sales Tax Act, 1947, the mills filed an, appeal to this Court which was decided by a Bench of three learned Judges. Kapur and Shah J. held that since the mills were compelled to carry out the directions of the Controller and since they had no volition in the matter of supply of sugar to the State of Madras, there was no offer by them to the State Government and no acceptance by the latter. Shah J., speaking for the majority observed that a contract of sale between the seller and the buyer is a prerequisite to a sale and since there was no such contract, the transaction in question which the Bihar Sales Tax authorities sought to tax was not exigible to sales tax.

Hidayatullah J. who 'delivered a dissenting opinion observed-after reviewing the position both under the English and the Indian Law, that though it was true that consent makes a contract of sale, such consent "may be express or implied and it cannot be said that unless the offer and acceptance are there in an elementary form, there can be no taxable sale." Taking the view that on obtaining the necessary permit, the sugar mills on the one hand and the Government of

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Madras on the other agreed to "sell" and "purchase" sugar could admit of no doubt, the learned Judge said that when the Province of Madras after receiving the permit, telegraphed instructions to despatch sugar and the mills despatched it, "a contract emerged and consent must be implied on both sides though not expressed antecedently to the permit." The Controller brought the seller and the purchaser together, gave them permission to supply and receive sugar leading thereby to an implied contract of sale between the parties. The learned Judge accepted that there was an element of compulsion in both selling and buying, perhaps more for the supplier than for the receiver, but, according to him, "a compelled sale is nevertheless a sale" and "sales often take place without volition of party." The learned Judge summed up the matter pithily thus : "So-long as the parties trade under controls at fixed price and accept these as any other law of the realm because they must, the contract is at the fixed price both sides having or deemed to have agreed to' such a price. Consent under the law of contract need not be express, it can be im-plied.. . . . The present is just another example of an

implied contract with an implied offer and implied acceptance by the parties." Adverting to the construction of the legislative entry 48 of List 11, VII Schedule to the Government of India Act, 1935, the learned Judge observed that the entry had to be interpreted in a liberal spirit and not cut down by narrow technical consideration. "The entry in other words should not be shorn of all its content to leave a mere husk of legislative power. For the purposes of legislation such as on-sales tax it is only necessary to see whether there is a sale, express or implied..... The entry has its meaning and within its meaning there is a plenary power. If a sale express or implied is found to exist then the tax must follow."

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

The majority judgment in New India Sugar Mills (supra) is based predominantly on the decision of this Court in Gannon Dunkerley (supra) to which we have referred at length in another context. In fact, Shah J. observes at page 459 of the report after discussing the judgment in Gannon Dunkerley (supra) that "the ratio decidendi of that decision must govern this case." The decision in Gannon Dunkerley (supra) really turned on a different point, the question for consideration therein being whether the value of the materials used in the execution

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of building contracts could be included within the taxable turnover of the company. It was contended on behalf of the company that the power of the Madras Legislature to impose a tax on sales under entry 48, List 11 of Schedule VII of the government of India Act, 1935 did not extend to unposing a tax on the value of materials used in construction works, as there was no transaction of sale in respect of those goods, and that the provisions introduced in the Madras General Sales Tax Act, 1939, by the Madras General Sales Fax (Amendment) Act, 1947, authorising the imposition of such tax were ultra vires. Venkatarama Aiyar J. posed the question thus : "The sole question for determination in this appeal is whether the provisions of the Madras General Sales Tax Act are ultra vires, in so far as they seek to impose a tax on the supply of materials in execution of works contract treating it as a sale of goods by the contractor. . . . . ". The Court accepted that building materials were 'goods' and limited the inquiry to whether there was "a sale of those materials within the meaning of that word in entry 48". Reference was then made to Benjamin on Sale in which it is said that in order to constitute a 'sale, four elements must concur "(1) Parties competent to contract; (2) mutual assent, (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (c) a price in money paid or promised." (Vide

8th Edn., p.. 3). On the strength of this statement and on a consideration of the provisions of the Contract Act and the Sale of Goods Act, 1930 it was concluded that "according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods". The Court then proceeded to examine the true nature of a building contract and held

> "It has been already stated that, both tinder the common law and the statute law relating to sale of goods in England and in India, to constitute A transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this-concept that both the agreement and the sale, should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for,, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression'sale of goods' there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such An agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there
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> is implicit in a building contract a sale of materials as understood in law." (pages 413-414)
>
> The final conclusion on the point involved in the appeal was expressed thus
>
> "To sum up, the expression 'sale of goods' in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one entire and indivisible--and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale." (pages 425-426)

Thus, the, two reasons given by the Court in support of its conclusion were, firstly, that in a building contract there was no agreement, express or implied, to sell 'goods' and secondly, that property in the building materials does not pass in the materials regarded a; 'goods' but it passes as part of immovable property. In New India Sugar Mills.

(supra) the commodity with which Court was concerned was sugar and was delivered as sugar just as in the instant case the commodity with which we are concerned is cement which was delivered as cement. That meets the first reason in Gannon Dunkerley (supra). As regards the second, it is quite clear that the tax was demanded after the commodity had changed hands or putting it in the words of the Sale of Goods law, after property in it had passed. With great respect therefore, the majority in New India Sugar Mills (supra) was in error in saying that "the ratio decidendi of that decision (Gannon Dunkerley) must govern this case'. The question before us which was the very question involved in New India Sugar Mills (supra) viz., whether a transaction effected in. accordance with the obligatory terms of a statute can amount to a 'sale did not arise in Gannon Dunkerley. (supra). Just as the, majority Judges in New India Sugar Mills (supra) applied to the case before them the ratio of Gannon Dunkerley, (supra) the Court in the latter case applied the ratio of the House of Lords decision in Kirkness v. John Hudson and Co. Ltd.(1) observing categorically that "the derision in Kirkness must be hold to conclude the matter" (P. 412). We think it necessary to lay particular emphasis on this aspect because it shows how the question for decision in Gannon Dunkerley (supra) was basically different from the question in New India Sugar Mills (supra) or in, the appeals before us. In Kirkness (supra), railway wagons belonging to the respondent company were taken over by the Transport Commission compulsorily it) exercise of the powers conferred by section 29 of the Transport Act, 1947, and compensation was paid therefor. The question was whether this amount was liable to income-tax on the footing of sale of the wagons by the company.

The contention on behalf of the revenue if was that compulsory acquisition being treated as sale under the English law, the taking over of the wagons and payment of compensation

(1) [1955] A.C. 696.

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therefor must also be regarded as sale for purpose of income-tax and therefore, the company was liable to a balancing charge under section 17 of the Income-tax Act, 1945. The case turned on the meaning of the word sale' for the purposes of the Excess Profits Tax legislation and the income-tax Act, 1945 (8 & 9 Geo. 6, c. 3). Lord Morton in his dissenting speech found it "impossible to say that the only construction which can fairly be given to the word 'sold' in section- 17(1) (a) of the Income Tax Act, 1945, is to limit it to a transaction in which the element of mutual assent is present." But the majority of the House came to A different conclusion, and held that the element of bargain was essential to constitute a sale' and to describe compulsory taking over of property as a sale was a misuse of that word. We are not concerned in these appeals with 'Compulsory acquisition' of goods nor indeed, was the Court concerned with it in Gannon Dunkerley (supra). The majority in New India Sugar Mills (supra) was right in saying that the decision in Kirkness (supra) and the "observations made therein have little relevance in determining the limits of the, legislative power of the Provincial legislature under the Government of, India Act, 1935, and the interpretation of statutes enacted in exercise of that power." In fact, if we may say so with great respect', the observation in Gannon Dunkerley (supra) that the decision in Kirkness (supra) concluded the question before the Court. seems to us somewhat wide of the mark. Since Kirkness (supra) involved

an altogether different point, we would have avoided referring to it put the reliance upon it 'in Gannon Dunkerley (supra) may lead to a misunderstanding regarding its true ratio which needs to be clarified. Besides Kirkness (supra) has been referred to in various decisions and has been considered as an authority for apparently conflicting propositions, which too made it necessary to understand the decision in a proper perspective.

It is not the decision in Kirkness (supra) but another English decision which may with advantage be noticed. That is the decision of the Court of Appeal in Ridge Nominees Ltd. v. Inland Revenue Commissioners.(1) The question in that case was whether a transfer of shares executed under section 209 of the Companies Act, 1948 on behalf of a stockholder who declined to accept the offer of purchase was required to be stamped as a transfer on sale. Under section 209, the transferee company was entitled in certain circumstances to give a notice to a dissenting shareholder that it desired to acquire his shares. Upon such notice being given, the transferee company became entitled to acquire the shares of the dissenting shareholder at a particular price. If the dissenting shareholder did not transfer the shares, then subsection (3) provided for the execution of a transfer on behalf of the shareholder by a person appointed by the transferee company. In the First Schedule to the Stamp Act, 1891 was included the item "Conveyance or transfer on sale of any property..... In the light of this entry under which stamp duty was payable, the question which the Court had to consider was whether a transfer executed on behalf of a dissenting shareholderwasa"transferonsale". Theanswerdepended upon whether there could be a sale even though the essential element

(1) [1962] Ch 376.

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of mutual assent was totally absent. Lord Evershed M.R. observed in his judgnient that what the Companies Act had done, by file machinery it had created, was that in truth it brought into being a transaction which ex facie in all its essential characteristics and effect was a transfer on sale. Donovan L.J. in his concurring judgment said that when the legislature by section 209 of the C Act empowered the transferee company to appoint an agent on behalf of a dissenting shareholder 3 for thempurpose of executing a transfer of his shares against a price to be paid to the transferor company and held in trust for the dis- senting-shareholder, it was clearly shring his dissent and putting him in the same position as if he had. For the purpose of considering whether the transaction amounted to a sale, one must, according to the learned Judge, regard the dissent of the shareholder as overriden by an assent which the statute imposed upon him, fictional though it may be. Danckwerts L.J., also by a concurring judgment, said that a sale may not always require the consensual element and that there may, in truth, be a compulsory sale of property in which the owner is compelled to part with Ws property for a price, against his will.

We will proceed to refer to the Other decisions of this Court bearing on the point under discussion. In State of Rajasthan v. M/s Karam Chand Thapper & Bros. Ltd.(1) the respondent-assessee which was registered as a dealer under the Rajasthan Sales Tax Act, 1954, entered into a contract with the Equitable Cod Company under which it acquired monopoly rights to supply coal in_Rajasthan as an agent of the Coal Company. The respondent supplied coal to

the State of Rajasthan under an agreement with it and that transaction was included in the respondent's turnover by the Sales Tax Officer, Jaipur. The High Court of Rajasthan allowed the respondents writ petition against the order of assessment on the,, ground, inter alia, that the supply of coal by the respondent to the State of Rajasthan did not constitute salt as the, supply was controlled by a statutory order, namely, the Colliery Control Order, 1945. In appeal to this Court by the State of Rajasthan, it was held that under the Colliery Control Order, coal could be supplied under a contract and the effect of the Control Order was only to superimpose upon the agreement between the parties the rate fixed by the Control Order. The four elements required to constitute a sale, namely, competency of parties, mutual assent of the parties, passing of property in the goods supplied to the purchaser, and lastly, payment or promise of payment of price were all present to render the turnover liable to sales tax" Shah J. who spoke for the Court relied upon the judgments in Indian Steel and Wire Products, (supra) and Andhra Sugar (supra) observing that in these two cases the Court had held that "when goods, supply of which is controlled by statutory orders, are delivered pursuant to a contract of & The, the principle of the case in M/s New India Suqar Mills Ltd. case (supra) has no application.." The Court distinguished the decision in New India Sugar Mills (supra) on the ground that it was founded on a different principle since the condition requiring mutual assent of the parties was lacking in that case.

(1) [1969]. 1 S.C.R. 861.

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In Chhitter Mal Narain Das v. Commissioner of Sales Tax(1) the appellants who were dealers in food grains supplied to the Regional Food Controller diverse quantities of wheat in compliance with the provisions of the U.P. Wheat Procurement (Levy) Order, 1959. The High Court held in a reference made to it under the Sales Tax Act that the transaction amounted to a sale And was exigible to sales tax. In appeal to this Court it was held by a Bench consisting of Shah and Hegde JJ. that clause 3 of the U.P. Procurement (Levy) Order, 1959 sets up a machinery for compulsory acquisition by the State Government of stocks of wheat belonging to the licensed dealers, that the Order contains a bald injunction to supply wheat of the specified quantity day after day, that it did not envisage any consensual arrangement and that the Order did not even require the State Government to enter into an informal contract with the supplier. Delivering the judgment of the Bench, Shah J. observed that the transaction in which an obligation to supply goods is imposed, and which does not involve an obligation to enter into a contract, cannot be called a 'sale', even if the person supplying goods is declared entitled to the value of goods which is determined in the prescribed manner. It was observed that the decision in Indian Steel and Wire Products (supra) does not justify the view that even if the liberty of contract in relation to the fundamentals of the transaction is completely excluded, a transaction of supply of goods pursuant to directions issued under a Control Order may be regarded as a sale. This decision is clearly distinguishable since the provisions of the Wheat Procurement Order were construed by the Court as being in the nature of compulsory acquisition of property obliging the dealer to supply wheat from day to day. Cases of compulsory acquisition of property by the State stand on a different footing since there is no question in such cases

of offer and acceptance nor of consent, either express or implied.

We would, however, like to clarify that though compulsory acquisition of property would exclude the element of mutual assent which is vital to a sale, the learned Judges were, with respect, not right in holding in Chitter Mal(1) that even. if in respect of the place of delivery and the place of payment of price, there could be a consensual arrangement the transaction will not amount to a sale (p. 677). The true position in law is as stated above, namely, that so long as mutual assent, express or implied, is not totally excluded the transaction will amount to a sale. The ultimate decision in Chitter Mal (supra) can be justified only on the view that clause 3 of the Wheat Procurement Order envisages compulsory acquisition of wheat by the State Government from the licensed dealer. Viewed from this angle, we cannot endorse the Court's criticism of the Full Bench decision of the Allahabad High Court in Commissioner, Sales Tax U.P. v. Ram Bilas Ram Gopal(2) which held while construing clause 3 that so long as there was freedom to bargain in some areas the transaction could amount to a sale though effected under compulsion of a statute. Looking at the scheme of the U.P. Wheat Procurement Order, particularly clause 3 thereof. this Court in Chitter Mal (supra) seems to have concluded that the transaction was, in truth and substance, in the nature of

(1) [1971] 1 S.C.R. 671.

(2) AIR 1970 Allahabad 518.

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compulsory acquisition, with no real freedom to bargain in any area. Shall J. expressed the Court's interpretation of clause 3 in no uncertain terms by saying that "it did not envisage, any consensual arrangement."

In Salar Jung Sugar Mills Ltd. v. State of Mysore, (supra) which was decided by a Bench of seven learned Judges, the appellants were subjected to levy of tax on purchase of sugarcane after the inclusion of sugarcane in the Third Schedule to the; Mysore Sales Tax Act, 1957. They challenged the levy on the ground that on account of the Central and State Control Orders applicable to the transactions, there was no mutual assent between them and the growers of sugarcane in regard to supply of sugarcane by the latter and since there was no purchase and sale of sugarcane, they were not dealers within the meaning of section 2(k) of the Mysore Sales Tax Act. After referring to the cases which we have considered above, it was held by the Court that the decisions relating to 'compulsory sales? establish that statutory orders regulating. the supply and distribution of goods do not absolutely impinge on the freedom of contact. In spite of the fact that under the relevant Control Orders the parties, the minimum price and the minimum quantity of supply were, determined or regulated, the Court held that the Control Orders left to the parties the option in regard to a higher quantity then was stipulated in the Orders, It higher price than the minimum as also the form and manner of payment. A factory could reject goods after inspection which indicated not only freedom in the formation but also in the performance of the contract. A combination of all these factors, according to Ray- J. who spoke for a unanimous Court, indicated with unerring accuracy that the parties entered into agreement with mutual assent and with volition for transfer of' goods in consideration of price. The transactions were accordingly held as amounting to sales within the meaning of section

2(t) of the, Mysore Sales Tax Act. In coming to this conclusion the Court relied on the statement in Benjamin on Sale, 8th ed. page 68 that though a contract of sale requires mutual assent, "The assent need not as a general rule be express" and that, it may be implied from the language of or conduct of parties and indeed it may even be inferred from the silence on the part of parties in certain cases. As an instance, the Court referred to the common case of a person buying rationed articles from a ration shop. "The parties, the price, the shop, the supply and the acceptance of goods in accordance with the provisions of the Ration Order ,ire all regulated." All the same, said the Court, when the customer presents the ration card to the shopkeeper, the shopkeeper delivers the rationed articles, the customer accepts the articles and pays their price "there is indisputably a sale".

In State of Tamil Nadu v. Cement Distributors Private Ltd.() the principal question which arose for decision was whether producers who supplied cement to the State Trading Corporation or its agents in gunny bass in pursuance of the directions given by the Government were liable to pay sales tax on the turnover relating to the price of gunny bags. In some of the connected appeals the question also arose whether the

(1) [1973] 2 S.C.R. 1019.

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selling agents of the, State Trading Corporation were liable to, pay sales lax in respect of the price of the gunny bags in which, they sold cement to, the consumers. As regards the question whether the transactions between producers and the State Trading Corporation in so far as the supply of cement was concerned amounted Lo sales within the meaning of the Madras General Sales Tax Act, 1959, Hegde, J. who spoke for the three Judge Bench observed that there was "no dispute" that those transactions could not amount to sales in view of the Cement Control Order, 1958. On the question whether the gunny bags, in which the cement was supplied, can be considered to have been sold it was observed that there was "no dispute' that if the price of gunny bags was held to have been wholly controlled, then the supply of gunny bags also could not be considered as sales. This position was held to have been concluded by the decisions in New India Sugar Mills Ltd. (supra) and Chittar Mal Narain Das (supra). The only question which the Court considered was whether, in fact, the price of the gunny bags in which cement was supplied to the State Trading Corporation was controlled by the Cement Control Order of 1958. On that question it was held that since the Central Government had fixed the actual price of the gunny bags also, the supply of gunny bags did not amount to sales. In the first place, the, decision proceeds on a concession in so far as the supply of cement is concerned as is shown by the statement that there was "no dispute' that "the same cannot be considered as sales". As regards the other question concerning gunny bags, the Court did not allow the Advocate-General of Tamil Nadu to contend that since. tinder clause 6(4) of the Cement Control Order the Central Government could have fixed the maximum and not the actual price of gunny bags, was scope for bargaining between the parties. That question not having been raised in the High Court or in the appeal memo filed in this Court and the Central Government not having put in its appearance in this Court, permission was declined to raise the questions Thus the decision is not an authority for the, proposition for which

the appellant contends. Besides. the judgment rests partly on the decision in New India Sugar Mills (Supra) which we have dissented from and partly on Chitter Mal (supra) which, by reason of the 'compulsory acquisition' inferred therein, was distinguishable.

In oil and Natural Gas Commission v. State of Bihar(1) a three Judge Bench speaking through Ray CJ. held, following the judgment in Salar Jung Sugar Mills Ltd., (supra) that the supplies of crude oil by the Oil and Natural Gas Commission to a refinery of the Indian Oil Corporation amounted to sales, even though the supplies were made pursuant to the directions and orders of the Central Government and the Commission had no volition in the matter. Law presumes assent of parties, it was observed, when there is transfer of goods from one party to the other.

This resume of cases, long as it is, may yet bear highlighting the true principle underlying the decisions of this Court which have

(1) [1977] 1 S.C.R. 354.

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taken the view that a transaction which is effected in compliance with the obligatory terms of a statute may nevertheless be a safe in the eye of law. The Indian Contract Act which was passed in 1872 contained provisions in its seventh chapter comprising sections 76 to 123 relating to sale of goods which were repealed on the enactment of a comprehensive law of sale of goods in 1930. The Contract Act drew inspiration from the English law of contract which is almost entirely the creation of English courts and whose growth is marked by features which are peculiar to the social and economic history of England. Historically the English law of contract is largely founded upon the action on the case for assumpsit, where the essence of the matter was the undertaking. The necessity for acceptance of the undertaking or the promise led the earlier writers on legal theories to lay particular emphasis on the consensual nature of contractual obligations. It was out of the importance, which political philosophers of the eighteenth century gave to human liberty that the doctrine was evolved that every person should be free to pursue his own interest in the way he thinks best and therefore law ought to give effect to the will of the parties as expressed in their agreement. Adam Smith in his famous work on "The-Wealth of Nations" propounded in 1776 the view that the freedom of contract must as far as possible be left unimpaired. Gradually, as would appear from Friedman's statement in Law in a Changing Society (1959), ch. 4 freedom of contract the freedom to contract on whatever terms might seem most advantageous to the individuals-become a cornerstone of nineteenth centuary laissez faire economics. Champions of individualist social philosophy who protested against legal and social restrictions in order to advance the policies of expansion and exploitation pursued by I industry and commerce won their battle and "freedom of contract was one of the trophies of victory" (see Anson's Law of Contract, 23rd Ed. page 3). The freedom and sanctity of contract thus became "the necessary instruments of laissez faire, and it was the function of the courts to foster the one and to vindicate the other. Where a man sowed, there he should be able to reap". is Cheshire and Fifoot's Law of Contract, 8th Ed. page 19). it is significant that the maxim itself laissez faire, laissez passer which derived from eighteenth century France has been commonly attributed to Gournay, at first a

merchant and later one of the intendants of commerce and a friend of Turgot. Turgot attributes the phrase laissez nous faire to another merchant, Legendre, who is said to have used it in impressing upon Colbert the desire on the part of the mercantile community for non-interference by the state .

When Colbert asked a meeting of French businessmen what the state might do to assist them, Legendre pointedly replied, "laissez-nous faire" The underlying assumption-of the laissez faire doctrine turns on an optimistic view of the nature of the universe and on the conception of a "natural order' or system of economic harmonies which will prevail and work out to mankind's advantage in the absence of positive regulation. (see International Encyclopaedia of the Social Sciences, 1968 Ed. edited by David L. Sills, Vol. 8, page 546 and Encyclopaedia of the Social Sciences edited by Edwin R. A. Seligman, Vol. IX, pages 15-16).

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Towards the close of the nineteenth century it came to be realised that private enterprises, in order to be socially just, had to ensure economic equality.

> "The very freedom on contract with its corollary, the freedom to complete, was merging into the freedom to combine; and in the last resort competition and combination were, incompatible. Individualism was yielding to monopoly, where strange things might well be done in the name of liberty. The twentieth century has seen its progressive erosion on the one hand by opposed theory and on the other by conflicting practice. The background of the law, social, political and economic, has changed Laissez fare as an ideal has been supplanted by, 'social security'; and social security suggests status. rather than contract. The State may thus compel persons to make contracts, as where, by a series of Road Traffic Acts from 1930 to 1960, a motorist must insure against third party risks; it may, as by the Rent Restriction Acts, prevent one party to a contract from enforcing his right under it; or it may empower a tribunal either to reduce or to increase the rent payable under a lease. In many instances a statute prescribes the contents of the contract. The Moneylenders Act 1927 dictates the terms of any loan caught by its provisions; the Carriage of Goods by Sea Act 1924, contains six pages of rules to be incorporated in every contract for 'the carriage of goods by sea from any port in Great Britain or Northern Ireland to any other port;' the Hire-Purchase Act 1965, inserts into hire-purchase contracts a number of terms which the parties are forbidden to exclude; successive Landlord and Tenant Acts from 1927 to 1954 contain provisions expressed to apply ,notwithstanding any agreement to the contrary'. The erosion of contract by statute continues briskly; and there are no immediate signs of a reaction." (Cheshire and Fifoot's Law of Contract, 8th Ed. pages 21-22).

In the words of Anson,

> "Freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of a collectivist society it has ceased to have much idealistic attraction. It is now realised that economic equality Often does not exist in any real sense, and that individual interests have to be made to subserve those of the cornmunity. Hence there has been a fundamental change both in our social outlook and in the policy of the legislature towards contract, and the law today interferes at numerous points with the freedom of the parties to make what contract they like . ...
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> " This intervention is especially necessary today when most contracts entered into by ordinary people are not the result of individual negotiation. It is not possible for a private person to settle the terms of his agreement with the British Railways Board or with the local electricity authority. The 'standard form contract is the rule. He must either accept the terms of this contract in toto, or go without. Since, however, it is not feasible to deprive oneself of such necessary services, the individual is compelled to accept on those terms. In view of this fact, it is quite clear that freedom of contract is now largely an illusion." (Anson's Law of Contract, 23rd Ed. pages 3-4).

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

It all began with the reliance in Gannon Dunkerley (supra) (pages 396-398) on the statement in the 8th Edition (1950) of Benjamin on Sale. that to constitute a valid tale there must be a concurrence of four elements, one of which is "mutual assent". That statement is a reproduction of what the celebrated author had said in the 2nd and last edition prepared by himself in 1873. The majority judgment in New India Sugar Mills (supra) (page 467) also derives, sustenance from the same passage in Benjamin's 8th edition. But as observed by Hidayatullah J. in his dissenting judgment in that case, consent may be express or implied and offer and acceptance need not be in an elementary form (page 510). It is interesting that the General Editor of the 1974 edition of 'Benjarnin's Sale of Goods" says in the preface that the editors decided to produce an entirely new work partly because commercial institutions, modes of transport and of payment, forms of contract, types, of goods, market areas and marketing methods, and the extent of legislative

and governmental regulation and intervention, had changed considerably since 1868, when the 1st edition of the book was published. The formulations in Benjamin's 2nd edition, relating to the conditions of a valid 'sale' of goods, which are reproduced in the 8th edition evidently require modification in the light of regulatory measures of social control. Hidayatullah J., in his minority judgment referred to above struck the new path; and Bachawat J. Who spoke for the Court in Andhra Sugars (supra) went a step ahead by declaring that "the contract is a contract of sales and purchase of cane, though the buyer is obliged to give his assent under compulsion of a statute". (page 716). The concept of freedom of contract, as observed by Hedge J. in Indian Steel and

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Wire Products, (supra) has undergone a great deal of change even in those countries where it was considered as one of the basic economic requirements of a democratic life. (page 490). Thus, in Ridge Nominees Ltd., (supra) the Court of Appeal, while rejecting the argument that there was no sale because the essential element of mutual assent was lacking, held that the dissent of the shareholder was overridden by an assent which the statute imposed on him, fictional though it may be, that a sale may not always require the consensual element mentioned in Benjamin on Sale, 8th Edition, page 2, and that there may in truth be a compulsory sale of property with which the owner is compelled to part for a price against his will. (pages 405-406). Decisions in case of 'compulsory acquisition, where such acquisition is patent as in Kirkness (supra) or is inferred as in Chitter Mal (supra) fall in a separate and distinct class. The observations of Lord Reid in Kirkness (supra) that 'sale' is a women juris the name of a particular consensual contract-have therefore to be understood in the context in which they were made, namely, that compulsory acquisition cannot amount to sale. In Gannon Dunkerley, (supra) Venkatarama Aiyar J. was influenced largely by these observations (see pages 411, 412 and 425) and by the definition of 'sale' in Benjamin's 8th edition' Gannon Dunkerley _(supra) involved an altogether different point and is not an authority for the proposition that there cannot at all be a contract of sale, if the parties to a transaction are obliged to comply with the terms of a statute. Since we are putting in a nutshell what we have discussed earlier, we would like to reiterate in the interest of uniformity and certainty of law that, with great deference the majority decision in New India Sugar Mills (supra) is not good law. The true legal position is as is stated in the minority judgment in that case and in Indian Steel and Wire Products, (supra) Andhra Sugars, (supra) Salar Jung Sugar Mills (supra) and Oil and Natural Gas Commission. (supra). To the extent to which Cement Distributors Pvt. Ltd. (supra) is inconsistent with these judgments, it is also, with respect, not good law.

The conclusion which therefore emerges is that the transactions between the appellant, M/s. Vishnu Agencies (Pvt.) Ltd., and the allottees are sales within the meaning of section 2(g) of the Bengal Finance (Sales Tax) Act, 1941. For the same reasons, transactions between the growers and procuring agents as also those between the rice-millers on one hand and the wholesalers or retailers on the other are sales within the meaning of section 2(n) of the Andhra Pradesh General Sales Tax Act, 1957. The turnover is accordingly'exigible to sale tax or purchase tax as the case may be.

The appeals are accordingly dismissed with costs, with one hearing fee.
P.B.R.
Appeals dismissed.
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