

(1977) 01 BOM CK 0019

Bombay High Court

Case No: Sales Tax Reference No. 29 of 1973

Commissioner of Sales Tax

APPELLANT

Vs

Devidayal Metal Industries
Private Ltd.

RESPONDENT

Date of Decision: Jan. 21, 1977

Acts Referred:

- Bombay Sales Tax Act, 1959 - Section 2(28), 52(1), 61(1)

Citation: (1977) 6 CTR 424 : (1978) 41 STC 184

Hon'ble Judges: M.H. Kania, J; D.P. Madon, J

Bench: Division Bench

Advocate: T.R. Andhyarujina and M.M. Dadhich, for Jamsedji Rustomji and Devidas and Jani and Merchant, for the Appellant; B.C. Joshi and P.C. Joshi, for the Respondent

Judgement

Madon, J.

In this reference u/s 61(1) of the Bombay Sales Tax Act, 1959, two questions have been referred to us, the first at the instance of the Commissioner of Sales Tax and the second at the instance of the respondents. These two questions are as follows :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the impugned transactions covered by final bill No. B-12/19/Imp-E-30 dated 25th February, 1964, effected by the respondents with the scheduled units were not sales within the meaning of section 2(28) of the Bombay Sales Tax Act, 1959 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in not allowing the applicant to argue that on the facts of the case the sales were protected by articles 286 being sales in the course of import ?"

2. At the hearing of this reference Mr. Joshi, the learned counsel for the respondents, stated that the respondents did not desire this court to answer the

second question, and, accordingly, at the request of the respondents, we are not answering the said question.

3. The facts which have given rise to this reference are that the respondents are established importers of copper. As such established importers, the respondents applied for and obtained an import licence dated 18th May, 1963, for the importation by then of copper scrap, whether ingoted or otherwise, falling under item 42 of Part I of section II of the Schedule to the import policy statement or what is popularly known as the "Red Book", for the period April, 1962-March, 1963, of the approximate c.i.f. value of Rs. 13,33,572. The shipment in respect thereof was to be effected within a period of twelve months. The said item 42 refers to copper scrap, whether ingoted or otherwise, and in the remarks column it is stated, "quota licences will be valid only for import of copper unwrought falling under S. No. 47/I". The description of goods set out in item 47 of Part I of the Import Trade Control Schedule is as follows :

"Copper unwrought in the form of ingots, blooms, slabs, cakes, tiles, bricks, blocks, billets, cathodes, blister, bars, electrolytic wire bars and ingot bars."

4. Remark (i) in the said entry 47 states that quota licences would be granted only to such established importers who are not applying as actual users. Remarks (ii) and (iii) in the said item 42 are as follows :

"(ii) Quota licences will be valid for imports for USA only. The procedure to be followed for imports against quota licences will be amounted separately.

(iii) Quota licences will be issued subject to the following conditions :

(a) Established importers will be required to report particulars of quota licences issued together with licence number, date and value thereof to the Controller appointed under the Non-ferrous Metals Control Order, 1958. The established importers should not place orders on the foreign suppliers for the import of copper unwrought falling under S. No. 47/I, except in accordance with the instructions issued by the "Controller" appointed under the Non-ferrous Metal Control Order, 1958. Established importers will also be required to report actual arrivals of copper unwrought falling under S. No. 47/I to the said Controller.

(b) The sale of imported copper unwrought will be effected by the established importers only against permits issued by the "Controller" appointed under the Non-ferrous Metals Control Order, 1958, at prices not exceeding 3 1/2 per cent. margin over the landed cost.

(c) The established importers will not be permitted to consume and dispose of any portion of the imported stock, except against permits issued by the "Controller" appointed under the Non-ferrous Metals Control Order, 1958."

5. Remarks (ii) and (iii) in the said item 47 are in almost identical terms. The said licence provided that the licensee would comply with the conditions as per remarks (i), (ii) and (iii) in the said item 42 and the remarks in the said item 47.

6. The position under the said items 42 and 47, so far as is relevant for the purpose of deciding this reference, therefore, was that the goods were to be imported from U.S.A. alone and the quota licences which would be issued would contain certain conditions. Under these conditions, the respondents would have to report particulars of the quota licences issued to them, together with licences number, dates and value thereof to the Controller appointed under the Non-ferrous Metals Control Order, 1958. The respondents were further prohibited from placing any orders on the foreign suppliers for the import of unwrought copper falling under the said item 47, except in accordance with the instructions issued by the said Controller, and had further to report to the said Controller the actual arrivals of unwrought copper. So far as the sale of imported unwrought copper concerned, it could only be effected by the respondents against permits issued by the said Controller at prices not exceeding three and a half per cent. margin over the landed cost. Further, the respondents were prohibited from consuming or disposing of any portion of the imported stock, except under and in pursuance of permits issued by the said Controller. These conditions were incorporated in the licence and in the import policy for the relevant period, as contained in what is popularly known as the "Red Book" by reason of the provisions of the Non-ferrous Metals Control Order, 1958, made by the Central Government u/s 3 of the Essential Commodities Act, 1955. Under the said Order copper unwrought in the form of ingots, blooms, slabs, cakes, tiles, bricks, blocks, billets, cathodes, blister bars, electrolytic wire bars and ingot bars is non-ferrous metal. Clause 3 of the said Order, as it stood at the relevant time, provided as follows :

"Controlled price of non-ferrous metals. - (1) No person shall sell or offer to sell any non-ferrous metal at a price which exceeds the amounts represented by an addition of 3 1/2 per cent. to its landed cost.

Explanation : "Landed cost" means the aggregate of

(i) the c.i.f. India Port price,

(ii) the bank charges for opening letter of credit,

(iii) the bank's interest charges for payment against the letter of credit or sight draft,

(iv) the actual expenses incurred by way of (a) port trust and clearing charges and (b) charges for transport from docks, jetties to warehouse, subject to maximum of Rs. 30 per metric ton.

(2) No person shall purchase or offer to purchase from any person any non-ferrous metal at a price higher than that at which it is permissible for that other person to

sell to him under sub-clause (1)."

7. The relevant provisions of clause (iv) of the said Order, as it stood at the relevant time, provided as follows :

"(iv) In issuing any permit under this clause in respect of any non-ferrous metal, the Controller shall have regard to the following, namely :

(a) the requirement for a period of six months of industries which are schedule industries within the meaning of the Industries (Development and Regulation) Act, 1951 (65 of 1951), based on the consumption in the said industries of the non-ferrous metal in the previous year or years."

8. Thus, the position under the said Order was that no person could sell non-ferrous metal at a price which exceeded the maximum price fixed by the said clause 3, such maximum price being three and a half per cent. above the landed cost as defined by the explanation to sub-clause (1) of that clause. There was also a corresponding prohibition against a purchaser from purchasing or offering to purchase any non-ferrous metal at a price higher than the one specified above. Secondly, before any person could acquire or even enter into an agreement to acquire non-ferrous metal, he would have to obtain a permit issued by the Controller appointed under the said Order, which permit would be valid for a period of two months and could be renewed as often as occasion might require. The quantity which would be released at any one time to any person under a permit granted under the said Order would ordinarily be less than the quantity required by him for a period of one month, but discretion was conferred upon the Controller to issue permits for larger quantities at any one time having regard to the availability for distribution and the requirement of the person concerned. In issuing such permit the Controller would have to take into account the requirements for a period of six months of industries which were scheduled industries within the meaning of the Industries (Development and Regulation) Act, 1951. Clause 4A of the said Order prohibited a person from selling or transferring any non-ferrous metal except to a permit-holder. It also prohibited a person acquiring any non-ferrous metal from fabricating it or converting it into any alloy, except under and in accordance with a permit issued by the said Controller. Clause 5 of the said Order casts an obligation upon every importer to notify immediately to the Controller about any quantity of non-ferrous metal imported by him on or after 3rd April, 1958, as also any quantity of a non-ferrous metal cleared by him through the customs after it was notified to the Controller. Clause 6 of the said Order required the importers to maintain certain books, and clause 7 conferred powers of entry, search and seizure upon the Controller and officers authorised by him in that behalf.

9. After the said import licence was issued to them, the respondents by their letter dated 17th June, 1963, wrote to the Controller of Non-ferrous Metal informing him about the licence issued to them. The concluding paragraph of the said letter was as

follows :

"We shall thank you if you will kindly issue linking letters linking us with the actual users (scheduled units) so that the orders may be placed with the foreign suppliers against the abovementioned import licences for importing the goods according to the requirement of the linked up units. The first licence mentioned above is valid only up to 17th November, 1963, and, therefore, expeditious action should please be taken by your goodself so that goods may be imported within the validity period of the licence."

10. A reply was sent to this letter by the Controller by his letter dated 27 September, 1963. After referring to the said letter and the Import Trade Control Policy and after pointing out to the respondents that under the said policy the imported copper was to be distributed to the scheduled units on the list of the Directorate General of Technical Development, the Controller stated as follows :

"It has, therefore, been decided to link the following actual users borne on the list of Directorate General of Technical Development with you for the purpose of distribution of the stock of copper unwrought to be imported by you against your said established importer's licence."

11. The scheduled unit mentioned in the said letter was Messrs. Devidayal Metal Industries of Bombay (hereinafter referred to as "the said unit"), and they were to be supplied industrial quality copper of the c.i.f. value of Rs. 10,24,548 and commercial quality copper of the c.i.f. value of Rs. 1,78,670. By the said letter the respondents were advised to contract the said unit and to ascertain from it its requirements as regards quantity and specification of the materials and the programme of delivery, to enable the respondents to place orders with foreign suppliers. By the said letter the respondents were directed to supply to the said unit the maximum quantity of copper unwrought as might as imported by them within the c.i.f. value mentioned against the said unit, depending on the quality of copper required by it. By the said letter the respondents were asked to intimate to the Controller that immediate action was being taken by them to contact the said unit. The respondents' attention was also drawn to the fact they had to intimate to the Controller about the arrival or expected arrival of a particular shipment and to the fact that they were not to make any supply without a valid permit issued by the Controller. A copy of the said letter was endorsed to the said unit with the following remark :

"They are requested to intimate their requirements of copper in detail including delivery programme to the established importer mentioned above (that is, the said unit) so that they may obtain regular supplies of the materials from them according to their production programme."

12. The respondents thereafter imported under the said import licence 96.259 tonnes of fire-refined copper ingot bars by S. S. "Brooklyn Heights". The landed cost of the consignment as per the definition given in the said Non-ferrous Metals

Control Order, 1958, came to Rs. 3,33,233.81. After the said goods were shipped, it appears that a permit to purchase the said goods and to utilise the goods so purchased for the manufacture of industrial and commercial quality copper/brass sheets, circles and strips was issued to the said unit on 20th January, 1964. After clearing the said goods through the customs, the respondents submitted to the said unit their final bill dated 25th February, 1964, for a sum of Rs. 3,44,896.96 plus a sum of Rs. 3,448.97 as deposit for sales tax at the rate of 1 per cent, this amount of deposit being described in the said final bill as "Contingent S.T. Deposit". A break-up of the amounts billed was enclosed along with the said final bill, and this break-up shows that the said sum of Rs. 3,44,896.96 made up of the landed cost of Rs. 3,33,233.81 plus three and a half per cent. commission for the respondents, amounting to Rs. 11,663.15. Thus, the respondents charged to the said unit the maximum price which they were permitted to charge under the said Non-ferrous Metals Control Order, 1958. It further appears that the said amount of deposit by way of sales tax was taken by the respondents from the said unit because when the respondents wanted to recover from the said unit this amount by way of sales tax, the said unit objected to pay the same on the ground that the transaction did not amount to a sale and, therefore, no sales tax was payable.

13. The respondents thereafter filed an application before the Deputy Commissioner of Sales Tax on 30th April, 1964, u/s 52(1) of the Bombay Sales Tax Act, 1959. To the said application the respondents annexed copies of their import licence, an extract from the "Red Book", the letter they had written to the Controller and the Controller's reply referred to above and a copy of the permit issued to the said unit as also a copy of their said final bill together with its enclosure. Thereafter, the respondents stated in their said application as follows :

"Dispute having arisen whether the transaction is a sale and whether it is exigible to tax, the applicant (that is, the respondents) was advised to recover contingent sales tax deposit at 1 per cent. with an assurance from the allottee that they shall submit form 15 against the allotment.

The allottees (that is, the said unit) contended that the transaction is not a sale and no tax can be charged."

14. By the said application the respondents requested the Deputy Commissioner of Sales Tax to determine whether the said transaction was a sale and whether any tax was payable in respect of the said transaction. It may be mentioned that the said final bill mentions that the supply was "against sales tax from No. 15", that being the form to be given by a manufacturer who holds a recognition to the person from whom he purchases, inter alia, raw materials required for his manufacture. It is also significant to note from the statements made in the said application that the said unit refused to pay sales tax claimed by the respondents not on the ground that there was no agreement between the parties under which the respondents could recover the amount of sales tax payable by them in their assessment from the said

unit but only on the ground that the said transaction was not a sale and that no tax could be charged. It is also significant to note that the said unit paid to the respondents the amount of Rs. 3,448.97 as a deposit so that it could be returned to the said unit if the said transaction was held not to be a sale and in case it was held to be a sale it could be utilised by the respondents for payment of sales tax.

15. The Deputy Commissioner of Sales Tax by his order dated 31st July, 1964, held that the transaction was a sale. Against this order, the respondents filed an appeal to the Tribunal. The Tribunal, following the decision of the Supreme Court in [New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar](#), held by its judgment and order dated 15th November, 1966, that the transaction was not a sale. Arising from this order and judgment of the Tribunal, the present reference has been made to us.

16. Now, the question on which the decision of the Deputy Commissioner of Sales Tax was based was whether the transaction between the respondents and the said unit was a sale. Thus, what the Deputy Commissioner of Sales Tax had to consider was the transaction which took place between the respondents and the said unit. It was the contention of the respondents that there was no contract arrived at between the parties, but the transaction was under statutory directions given to them by the Controller appointed under the Non-ferrous Metals Control Order, 1958, in exercise of the power vested in him under the said Order. In order to examine the validity of this contention, the Deputy Commissioner of Sales Tax was really required to examine and consider all that took place in connection with the import, the supply and delivery of the goods imported by the respondents to the said unit and whatever took place between the respondents and the said unit. Strangely enough, the only document exchange between the respondents and the said unit, a copy of which the respondents annexed to their said application u/s 52(1) of the Bombay Sales Tax Act, 1959, was the final bill submitted by them to the said unit along with a copy of the enclosure thereto. The final bill comes at the last stage of a transaction. In order to determine the true nature of a transaction what the court has to look at is each and every stage of that transaction. From the said letter dated 27th September, 1963, addressed by the respondents to the said unit it is clear that the respondents were asked to contact the said unit to ascertain from it its requirements as also to arrange with it the delivery programme. It is further clear that the respondents contacted the said unit for this purpose. It is also clear that there must have been an agreement between the respondents and the said unit under which the said unit agreed to pay to the respondents a commission of three and a half per cent., being the maximum allowed under the said Non-ferrous Metals Control Order, 1958. It is also clear that there was an agreement with respect to sales tax payable by the respondents to the Government. No documents whatsoever in connection with any of the above stages have been referred to by the respondents in their said application nor have copies of any such documents annexed to their application. Assuming all this took place orally between the parties,

nothing of what was agreed upon between the parties has been set out in the said application. In our opinion, in this unsatisfactory state of affairs the Deputy Commissioner of Sales Tax should not have proceeded to determine the question submitted to him and should have either asked the respondents to produce all these documents or present before him the necessary facts or should have rejected their said application. u/s 52(1) of the Bombay Sales Tax Act, 1959, the Commissioner of Sales Tax is not bound to determine every question submitted to him if the facts on which such question arises have not been fully presented to him or brought out before him. Since, however, the Deputy Commissioner of Sales Tax had determined this question and the matter has also proceeded before the Tribunal on the basis of the materials, which were before the Deputy Commissioner of Sales Tax and also in view of the fact that this reference has been fully argued before us, we will proceed to dispose it of on the merits in the light of the materials on the record.

17. In his order u/s 52(1) of the Bombay Sales Tax Act, 1959, the Deputy Commissioner of Sales Tax has held that in spite of the regulatory provisions of the Non-ferrous Metals Control Order, 1958, the parties were left with their right to contract, and though that right was a limited one it could not be said that the parties were deprived of all freedom of choice. The Tribunal has, on the other hand, held that the respondents had no volition left in the said transaction and that on the authority of the decision of the Supreme Court in [New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar](#), , referred to earlier, there was no sale involved in the said transaction.

18. Before us Mr. Andhyarujina, the learned counsel for the applicant, has relied upon a later decision of the Supreme Court, namely, [Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others](#), , in which all the earlier cases of the Supreme Court, including those relied upon before us at the Bar by Mr. Joshi, the learned counsel for the respondents, have been considered. In that case, a Bench of seven Judges of the Supreme Court had to consider a similar question under the Mysore Sugarcane (Regulation and Supply) Order, 1963, and the Mysore Sugarcane (Regulation and Supply) (Munirabad) Order, 1965. Sugarcane was declared to be an essential commodity under the Essential Commodities Act, 1955. Under the said Orders a minimum price of sugarcane was grown were reserved to the factories of the appellants, and the annual quantity of sugarcane required for the factories were determined, and the factories were to secure the quantity of sugarcane so determined from the areas respectively reserved for them. The sugarcane growers in the reserved areas were to supply 95 per cent. of the sugarcane grown by them to the respective factories. The writ petitions filed by the appellants in the Mysore High Court challenging the demand of sales tax made against them were dismissed. In appeal the decision of the Mysore High Court was affirmed. After analysing the provisions of the said two Orders and after considering in detail all the previous judgments of the Supreme Court, their Lordships of the Supreme Court held as

follows :

"The Control Orders are to be kept in the forefront for appreciating the true character of transactions. It is apparent that the area is restricted. The parties are determined by the order. The minimum price is fixed. The minimum quantity of supply is also regulated. These features do not complete the picture. The entire transaction indicates that the parties agree to buy and sell. The parties choose the terms of delivery. The parties have choice with regard to obtaining supply of a quantity higher than 95 per cent. of the yield. The parties can stipulate for a price higher than the minimum. The parties can have terms for payment in advance as well as in cash. A grower may not cultivate and there may not be any yield. A factory may be closed or would up and may not buy sugarcane. A factory can reject goods after inspection. The combination of all these features indicates that the parties entered into agreement with mutual assent and with volition for transfer of goods in consideration of price. Transactions of purchase and sale may be regulated by schemes and may be liable to restrictions as to the manner or mode of sale. Such restrictions may become necessary by reason of co-ordination between production and distribution in planning the economy of the country. The contention of the appellant fails. The transactions amount of sales within the meaning of the Mysore Sales Tax Act."

19. The six propositions laid down in [Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others](#), were thus enunciated by the Supreme Court in [Oil and Natural Gas Commission Vs. State of Bihar and Others](#), :

"This court in [Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others](#), laid down the following propositions : First, statutory orders regulating the supply and distribution of goods by and between the parties under Control Orders in a State do not absolutely impinge on the freedom to enter into contract. Second, directions, decisions and orders of agencies of the Government to control production and supply of commodities, may fix the parties to whom the goods are to be supplied, the price at which these are to be supplies, the time during which these are to be supplied, and the person who has to carry out these directions. In such cases, it cannot be said that compulsive directions rob the transactions of the character of agreement. The reason is that the transaction of property which constitutes the agreement in spite of the compulsion of law is neither void nor voidable. It is not as a result of coercion. The statute supplies the consensus and the modality of consensus is furnished by the statute. There is privity of contract between the parties.

..... Third, such a transaction is neither a gift nor an exchange nor a hypothecation nor a loan. It is a transfer of property from one person to another. There is consideration for the transfer. There is assent. The law presumes the assent when there is transfer of goods from one to the other. Fourth, a sale may not require the consensual element and that there may, in truth, be a compulsory sale of property

with which the owner is compelled to part for a price against his will and the effect of the statute in such a case is to say that the absence of the transferor's consent does not matter and the sale is to proceed without it. In truth, transfer is brought into being which ex facie in all its essential characteristics is a transfer of sale. Fifth, delimiting areas for transactions or denoting parties or denoting price for transactions are all within the area of indivisible freedom of contract with limited choice by reason of ensuring the greatest good for the greatest number of achieving proper supply at standard or fair price to eliminate the evils of hoarding and scarcity on the one hand and ensuring availability on the other. Sixth, after all the transactions in substance represent the outgoing of the business and the price would come into the computation of profits."

20. Applying the principles laid down in [Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others](#), and [Oil and Natural Gas Commission Vs. State of Bihar and Others](#), , we find that in the transaction before us there was an area of consensual freedom left to the parties to the transaction. For a transaction of this type to amount to a contract it is not necessary that each and every feature which would amount to consensual freedom should be found in it. The court has to judge each case on its own facts and the provisions of the relevant control order and determine whether there is an area of freedom to contract left to the parties or whether each and every incidence of the transaction is subject to statutory compulsion and direction. It is true that under the terms of the licence granted to the respondents and the provisions of the Non-ferrous Metals Control Order, 1958, the respondents could not place order for import on foreign suppliers except in accordance with the instructions issued by the Controller of Non-ferrous Metals and further he could not sell the goods imported by him to anyone other than a permit-holder. To this extent the respondents' freedom to import as much as they liked at one time is restricted, so also their freedom to sell to whom they liked. The number of customers to whom they can sell is also limited to permit-holders only. It is true that there is a restriction on the price which the respondents could charge, but this is not an absolute restriction. There is not one fixed price at which the respondents have to sell. What is fixed is the ceiling, namely, three and a half per cent. over the landed cost. Within that range of three and a half per cent. the respondents are left free to bargain with their purchasers. They may agree upon selling the goods imported by them for a commission of 2 per cent., or it may be 3 per cent. or it may be maximum amount permitted under the said Non-ferrous Metals Control Order, 1958, as in fact they did in this case. Further, there is no compulsion upon the respondents to import at any particular time. So long as they import within the period of their licence and quota, they are left free to negotiate the terms of supply with their purchasers. They can negotiate with their purchasers about the place and mode of delivery, the time of delivery and the terms of payment. Further, the purchasers have their normal right under the Sale of Goods Act, 1930, to inspect the goods and reject them if they do not conform to the contracted quality and specifications. Further, it is pertinent to

note that the Non-ferrous Metals Control Order, 1958, itself speaks of a sale and a purchase. It, therefore, contemplates a sale of non-ferrous metals by one person to another person, though both may require a permit to do so. What the Non-ferrous Metals Control Order, therefore, envisages is a contract between two parties in respect of a commodity declared to be an essential commodity under the Essential Commodities Act, 1955, subject to the regulatory provisions necessitated by the requirements of the supply and distribution of an essential commodity. In a modern State, whether economic factors have to be taken into account in view of the complexities of present-day transactions, it is not required that there should be a complete freedom of contract or that freedom of contract should be wholly unrestricted. Merely because there are regulatory controls on the import or sale or distribution of a particular commodity and contracts have to be entered into within the framework of such controls, it does not follow that all freedom to contract is abolished.

21. We will now turn to the decisions relied upon by Mr. Joshi, the learned counsel for the respondents, in support of his submission that there was no volition left to the parties in this case. The case upon which Mr. Joshi placed the strongest reliance is the very decision of the Supreme Court on the basis of which the Tribunal held in favour of the respondents, namely, [New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar](#), referred to earlier. In that case, by a majority judgment, the Supreme Court held that the despatches of sugar by the assessee pursuant to the directions of the Sugar Controller under the Sugar and Sugar Products Control Order, 1946, was not the result of any contract of sale and, therefore, there was no sale and the assessee was not liable to pay any sales tax on the amounts received by them. The assessee in that case was a manufacturer of sugar in the State of Bihar. In compliance with the directions issued to them by the Sugar Controller they despatched large quantities of sugar to different States. What used to happen was that the various State Governments used to intimate to the Sugar Controller their requirements of sugar and, similarly, the factory owners sent to the Sugar Controller the statements of stocks of sugar held by them. After considering these requirements and statements, the Sugar Controller used to make the allotments. In each case, the allotment order was addressed to the factory owner, directing him to supply sugar to the State Government in accordance with the despatch instructions received from the competent officer of the State Government. A copy of the allotment order used simultaneously to be sent to the State Government concerned. The price which the factory owners were to receive was fixed by the Sugar Controller. The Supreme Court held that under the provisions of that Order the factory owner was compelled to carry out the instructions of the Sugar Controller and no volition was left to him. This is, however, not the case here. In [Indian Steel and Wire Products Ltd. Vs. State of Madras](#), where the question arose under the Iron and Steel (Control of Production and Distribution) Order, 1941, the Supreme Court held that the transaction in question amounted to a sale. The Supreme Court

pointed out that under the said Order what the Iron and Steel Controller fixed was the base price of the steel products and determined the buyers, but in other respects the parties were free to decide their own terms by consent. Referring to the case of [New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar,](#) the Supreme Court pointed out that in that case the court had reached the conclusion that there was no room left for mutual assent. Their Lordships observed :

"It would be incorrect to contend that because law imposes some restrictions on freedom to contract, there is no contract at all. So long as mutual assent is not completely excluded in any dealing, in law it is a contract."

22. The case of [New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar,](#) again fell to be considered by a Bench of five Judges of the Supreme Court in [Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others,](#) and the Supreme Court observed :

"That decision should not be treated as an authority for the proposition that there can be no contract of sale under compulsion of a statute. It depends upon the facts of each case and the terms of the particular statute regulating the dealings whether the parties have entered into a contract of sale of goods."

23. Mr. Joshi next relied upon the decision of the Supreme Court in [Chhitter Mal Narain Das Vs. Commissioner of Sales Tax,](#) . This was a case under the U.P. Wheat Procurement (Levy) Order, 1959. Under that Order a dealer was directed to sell to the State Government at controlled prices 50 per cent. of the stock of wheat held in stock-market at the commencement of the Order and 50 per cent. of wheat procured or purchased by him every day beginning with the date of commencement of the Order until such time as the State Government otherwise directed. The dealer had to deliver the wheat to the Controller or other authorised person. To ensure that the dealer carried out his obligation, the Enforcement Officer were empowered to enter any premises where they had reason to believe that wheat was procured, purchased or stocked, to make inquiries, examine books and to search premises, etc. If the dealer failed to carry out his obligation under the Order, he was liable to be penalised. The Supreme Court held that the Order ignored the volition of the dealer, and the source of the obligation to deliver the specified quantities of wheat and to pay for them was not in any contract but in the statutory Order. The provisions of the levy order in that case are very different from the provisions of the Non-ferrous Metals Control with which we are concerned. The provisions of the levy order can be said to be more akin to an order compulsorily acquiring a property. This case, therefore, does not in any way help the respondents.

24. Mr. Joshi next relied upon another decision of the Supreme Court in [State of Tamil Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc.,](#) . In that case, the question was whether gunny bags in which cement was supplied were sold by the respondent-assessees. The case proceeded upon certain agreed basis. The parties

were agreed that, so far as the supply of cement was concerned, it could not be considered as "sales" within the meaning of the Madras General Sales Tax Act, 1959, in view of the Cement Control Order, 1958. The parties were further agreed that, if the price of gunny bags was also held to have been wholly controlled, then the supply of gunny bags could not be considered as "sales". Therefore, all that the court had to see was whether the price of gunny bags in which the cement was supplied was controlled under clause 6(4) of the Cement Control Order, 1958. The court found that under the said Control Order the price of gunny bags was fixed and, in accordance with the agreed basis upon which that case proceeded, held that there was no sale.

25. Mr. Joshi also relied upon a decision of the Punjab High Court in Jagatjit Distilling and Allied Industries Ltd. v. State [1971] 28 S.T.C. 709. This case is wholly distinguishable on facts. There the question was whether the price of bottles in which liquor was sold was liable to sales tax. The court held that, though the price of bottles was liable to sales tax when bottled liquor was sold, as there was no voluntary contract as such for the sale of liquor, there was no sale of liquor within the meaning of that expression in the Sale of Goods Act, 1930, and there was, therefore, no sale of the bottles also. The court came to the conclusion that there was no sale of liquor, because on an examination of the relevant statutory provisions, the High Court found that the producer of liquor was bound to sell the liquor at fixed prices to permit-holders and that the only volition left to the permit-holders was to ask for a permit for one particular distillery or another.

26. The last two cases relied upon by Mr. Joshi have equally little relevance to the question to be decided by us. The first of them was a decision of the Punjab and Haryana High Court, namely, Food Corporation of India v. State of Punjab [1976] 38 S.T.C. 144, in which the question was whether the procurement of rice under the Punjab Rice Procurement (Levy) Order, 1958, was a purchase. The court held that this was a levy order under which the State compulsorily acquired rice and then supplied it to the Food Corporation of India, that there was no profit-motive at all at any stage and the transaction could not be called a sale. The second of these two cases was a judgment of the Madras High Court in Sivaji Films Private Limited v. State of Madras [1972] 30 S.T.C. 66. That was a case where the question to be decided was whether a film producer who imported raw films and transferred the balance of the stock left with him and not required by him to another after obtaining the permission of the licensing authority was a dealer. Following an earlier decision of the Madras High Court, the court held that, even though the transaction might amount to a sale, it did not constitute the petitioners a dealer. The questions arising in that case were different from those which we have to consider.

27. For the reasons set out above, we answer the first question referred to us, being the only question in respect of which this reference has proceeded, in the negative.

28. The respondents will pay to the applicant the costs of this reference fixed at Rs. 300.

29. Reference answered accordingly.