

(1992) 12 KAR CK 0033

In the Karnataka High Court

Case No : Writ Petition No's. 25704 and 25705 of 1991 and Writ Appeal No's. 1710, 1711 and 1784 to 1786 of 1992

Karnataka Pawn Brokers" Association (Regd.) and another APPELLANT
Vs

State of Karnataka and another RESPONDENT

Date of Decision : 04-12-1992

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 10, 12 (1), 2 (1), 2 (1) (k), 2 (1) (t)

Citation : (1994) 94 STC 243

Hon'ble Judges : K.A. Swami, Acting C.J.; N.D.V Bhat, J

Bench : Division Bench

Advocate : J. Jeshtmal, for the Appellant; H.L. Dattu, H.C.G.A., for the Respondent

Judgement

K.A. Swami, Ag.C.J.

1. Writ Appeal Nos. 1710 and 1711 of 1992 are preferred against the order dated July 24, 1992 (Reported as Karnataka Pawn Brokers" Association (Regd.) v. State of Karnataka in [1992] 87 STC 366 (Kant)., passed in W.P. Nos. 25704 and 25705 of 1991, whereas, Writ Appeal Nos. 1784 to 1788 of 1992 are preferred against the order dated July 24, 1992, passed in W.P. Nos. 25661 to 25665 of 1991.

2. In the first batch of writ petitions, petitioners sought for a declaration that section 3A of the Karnataka Sales Tax Act, 1957 ("the Act", for short) is unconstitutional. They have also sought for quashing the clarificatory circular No. CLR. Cr. 402 of 1991-92 dated October 30, 1991, issued by the Commissioner of Commercial Taxes produced as annexure D in the writ petitions. They have also sought for a writ in the nature of mandamus or direction forbearing the respondents, their supporters, servants, agents, etc., from demanding the registration of licensed pawnbrokers as "dealers" under the Act and/or assessing/ demanding or collecting from them or taking any proceedings for assessment, demand or collection of sales tax from them in respect of the sale of unredeemed

pledge and/or taking any other proceedings under the Act. In addition, they have also sought for a declaration that the auction of pledged article by pawnbrokers in exercise of their right u/s 12 of the Karnataka Pawn Brokers Act, 1961 (hereinafter referred to as "the Pawn Brokers Act"), does not constitute "sale" within the meaning of the expression u/s 2(1)(t) of the Act. Further they have also sought for a declaration that the pawnbrokers registered and licensed under the Pawn Brokers Act are not "dealers" within the meaning of the expression u/s 2(1)(k) of the Act.

3. In the other batch of writ petitions, the petitioners apart from seeking a writ of certiorari to quash the circular dated October 30, 1991, referred to earlier, issued by the Commissioner of Commercial Taxes, Karnataka, Bangalore, have also sought for quashing the notices dated August 5, 1991, October 28, 1991 and August 14, 1991, marked as annexures A1 to A5 issued by the Commercial Tax Officer to the petitioners under sections 10 and 12(1) of the Act. They also sought for a declaration that the pawnbrokers registered and licensed under the Pawn Brokers Act are not dealers within the meaning of the expression u/s 2(1)(k) of the Act and for a further declaration that the auction of the pledged articles by the pawnbrokers in exercise of their right u/s 12 of the Pawn Brokers Act does not constitute "sale" within the meaning of that expression u/s 2(1)(t) of the Act.

4. The learned single Judge has held that the pawnbrokers become dealers under the Act because they have the right to sell the goods pledged in case of default by the pawners; that this right is exercised by them u/s 12 of the Pawn Brokers Act read with rule 20 of the Pawn Brokers Rules and therefore, their activities come within the definition of the word "dealer" defined under the Act; hence the provisions of the Act are attracted. The other relief, viz., the constitutional validity of section 3A of the Act does not appear to have been urged before the learned single Judge, as there is no reference to the same in the order of the learned single Judge. However, before us, the validity of section 3A also has been urged and it will be considered in the course of our judgment. In view of the conclusion arrived at, the learned single Judge has rejected the writ petitions. Hence the petitioners have come up in appeals.

5. The petitioners are all licensed pawnbrokers. They carry on business of taking the goods and articles on pawn for loan. It is open to the pawner to redeem the goods and chattels either within the period agreed to between the pawner and the pawnee or if such period is not agreed upon, within one year fifteen days from the date of pawn as provided u/s 11 of the Pawn Brokers Act. If the pledge is for a sum which does not exceed Rs. 10 it becomes the absolute property of the pawnee after the expiry of the period mentioned in the contract or agreement and, if no such period is agreed upon, within the period mentioned in section 11 of the Pawn Brokers Act. In the event a pledge for a sum exceeding Rs. 10 is not redeemed within the period allowed, the pawnbroker would become entitled to bring the goods and chattels for sale to recover his money due on the

pawn. Of course, in that event it would be open to the pawner to redeem the same by payment of the amount due. After the expiry of the period mentioned in section 11 of the Pawn Brokers Act, the pawnbroker would be entitled to sell the pawned articles through the auctioneer. That the petitioners are carrying on this business in the aforesaid manner in accordance with the provisions of the Pawn Brokers Act and Pawn Brokers Rules, is not in dispute. However, they contend that though they are entitled to bring the pawned articles for sale, they cannot be considered to be the "sellers" within the meaning of that expression under the Sale of Goods Act, 1930 and as such they do not become "dealers" as defined under the Act. It is their contention that as they are not owners of the articles pawned with them, they will not be entitled to or competent to pass the general property in goods to the purchaser. Therefore, they cannot at all be considered as "sellers" so as to attract the definition of the word "dealer" contained in the Act.

6. On the contrary, Sri Dattu, learned High Court Government Advocate, appearing for the State-respondent, contends that the pawnbrokers are "dealers" within the meaning of that expression as defined in the Act, because, it is their business to sell the pawned articles in the event the pawners do not redeem the articles, and they cannot otherwise dispose of the pawned articles the pledge for which exceeds Rs. 10 and the only way to recover the sum due on the pawn is to bring the pawned articles for sale as such, they carry on the business of taking the goods and articles pawned for loan and in the course of that business they recover the amount due, upon the sale of the pawned articles. They are even entitled to purchase the goods also. Therefore, it is the contention of the learned Government Advocate that they carry on the business of sale and purchase and as such they have turnover of the business as contemplated under the Act and hence they come clearly within the definition of the expression "dealer" as defined in the Act.

7. Alternatively it is contended that even if it is construed that the main business of the pawnbrokers is only taking the goods and chattels in pawn for loan, but to sell and purchase the pawned articles become incidental to the main business, then also it attracts the provisions of the Act because it would be the turnover within the meaning of the Act and the person who brings the articles for sale, becomes the dealer within the meaning of that expression as defined in the Act.

8. With regard to the validity of the circular dated October 30, 1991, issued by the Commissioner of Commercial Taxes in Karnataka, it is contended by the counsel for the appellants that the same is bad in law because it is issued without affording an opportunity of hearing to the petitioners and it is necessary to afford an opportunity of hearing to the petitioners because the circular holds that the pawnbrokers are dealers within the meaning of the Act and, therefore, such a determination should not have been arrived at without affording an opportunity of hearing to the petitioners. It is further contended that opportunity of being heard must be held as being inherently present in the provisions of

section 3A of the Act before the circular is issued to the individuals or institutions who carry on business, since the circular binds the subordinate authorities and consequently, it would not be open to the petitioners to contend before the latter to the contrary. Therefore, such a circular should not have been issued without hearing the petitioners. Though section 3A of the Act, does not in explicit terms provide for affording an opportunity before issuing such a circular, it would be bad in law because it would result in arbitrary exercise of the power which would be opposed to article 14 of the Constitution.

9. On the contrary, it is contended by Sri Dattu, learned Government Advocate, that such an opportunity is not given because neither section 3A of the Act explicitly or implicitly provides for it, nor any right of the petitioners is affected by reason of issuing such a circular, because it would be still open to them to contend that their activities do not attract the provisions of the Act. It is further contended that the circulars contemplated u/s 3A of the Act, are of a general nature applicable to one and all belonging to the categories mentioned therein and do not deal with any individual; therefore, the question of affording opportunity of hearing does not arise.

10. In support of their contentions, both sides relied on various decisions which will be referred to at the appropriate place.

11. In the light of the aforesaid contentions, the following points arise for consideration :

(i) Whether the pawnbrokers could be considered as "dealers" u/s 2(1)(k) of the Act ?

(ii) Whether the provisions contained in section 3A of the Act, are violative of article 14 of the Constitution ?

(iii) If point No. (i) is answered in the affirmative, whether it is necessary to consider the validity of the provisions contained in section 3A and the circular dated October 30, 1991 ?

12. Point No. (i) : In order to determine whether a pawnbroker becomes a "dealer" under the Act, it is first necessary to examine the provisions contained in the Pawn Brokers Act. The Pawn Brokers Act, is enacted with a view to regulate and control the business of pawnbrokers in the State of Karnataka. It may be pointed out here that in the absence of the provisions contained in the Pawn Brokers Act, the activities of a pawnbroker or the rights and liabilities of pawnbrokers and the pawners are governed by the provisions contained in Chapter IX of the Contract Act.

12.1 Section 176 of the Contract Act deals with the right of the pawnee if a pawner makes default. It specifically provides that if the pawner makes default in payment of the debt, or performance at the stipulated time, of the promise in respect of which the goods were pledged, the pawnee may bring a suit against the pawner upon the debt or promise, and retain the goods pledged as a

collateral security or he may sell the thing pledged, on giving the pawner reasonable notice of the sale. It also further provides that if the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawner is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawner. Section 177 of the Contract Act deals with the question as to the default of the pawner to redeem the goods pledged.

12.2 The Pawn Brokers Act came to be enacted within the four corners of the provisions contained in the Contract Act only with a view to regulate and control the business of pawnbrokers. It may be pointed out that none of the provisions contained in the Pawn Brokers Act runs counter to the provisions contained in the Contract Act. The provisions contained in the Pawn Brokers Act are only intended to exercise control, and regulate the business from the point of taking goods and chattels in pawn for a loan till the disposal of the same. It only provides details of the manner in which the business of a pawnbroker should be carried on and how the rights and liabilities of the pawner and the pawnee should be adjusted and settled. These aspects which are contained in the Pawn Brokers Act are not found in the Contract Act. In specific terms, they are found in the judicial pronouncements which have been made while considering the provisions of the Contract Act. It is only to codify, exercise control, and regulate the business of the pawnbrokers, the Pawn Brokers Act is enacted. Therefore, the provisions of the said Act are to be understood and construed in the background in which it is enacted.

12.3 The definition of the expression "pawnbroker" as contained in clause (7) of section 2 of the Pawn Brokers Act is as follows :

"(7) "Pawnbroker" means a person who carries on the business of taking goods chattels in pawn for a loan.

Explanation. - Every person who keeps a shop for the purchase or sale of goods or chattels and who purchases goods or chattels and pays or advances thereon any sum of money, with or under an agreement or understanding expressed or implied that the goods or chattels may be afterwards repurchased on any terms, is a pawnbroker within the meaning of this clause."

From the aforesaid definition, it is clear that a pawnbroker is a person who carries on the business of taking goods or chattels in pawn for a loan. The explanation even takes into its fold every person who keeps a shop for the purchase or sale of goods or chattels and who purchases goods or chattels and pays or advances thereon any sum of money with or under an agreement or understanding expressed or implied that the goods or chattels may be afterwards repurchased on any terms. Therefore, even a person who purchases the goods for any sum of money but with a condition that those goods should be returned if the seller pays the amount within the stipulated period also becomes a pawnbroker. In this case, it is not necessary to go into that aspect of the matter,

because, admittedly, the petitioners are the licensed pawnbrokers.

Section 11 of the Pawn Brokers Act provides under what circumstances a pawned article can be redeemed. It specifically provides the period within which a pledged article could be redeemed and it also further provides that if a pledge pawned for a sum not exceeding Rs. 10 is not redeemed within the period of redemption and days of grace, at the end of the days of grace, it becomes the pawnbroker's absolute property. Of course such article becomes his absolute property not because of the sale transaction but because the Pawn Brokers Act provides that in the event of failure on the part of the pawner to redeem the pledge pawned for a sum not exceeding Rs. 10 it would become the absolute property of the pawnbroker. Learned counsel for the respondent fairly submitted that such an event is not considered as sale and does not come u/s 5 of the Act. In this case, we are also not concerned with such a transaction of a pledge pawned for a sum not exceeding Rs. 10.

Section 11 further provides that a pledge pawned for a sum exceeding Rs. 10 shall continue to be redeemable until it is disposed of as provided in the Act, although the period of redemption and days of grace have expired. Therefore, it is clear from the provisions contained in section 11 that on the expiry of the period of redemption, if the pledged article is not redeemed by the pawner, it is open to the pawnbroker either to bring that article for sale to recover the amount due on the pledge pawned or to keep it without sale, in which event the pledge or the pawner would be entitled to redeem the same only if that article is not sold. Thus, it becomes clear that in the course of business as a pawnbroker, the pawnbroker is entitled to sell the pawned articles and recover the amount due on the pawn.

Under sub-rule (4) of rule 20 of the Pawn Brokers Rules, a pawnbroker is also entitled to bid in auction and purchase he pawned articles. Therefore, in the course of carrying on the business of taking the goods and chattels in pawn for loan, a pawnbroker also sells and purchases the pawned articles; as such it becomes a regular course of business.

Section 12 of the Pawn Brokers Act provides for sale of pledge and inspection of sale book. It specifically provides that a pledge pawned for a sum exceeding Rs. 10 shall, when disposed of by the pawnbroker, be disposed of by sale by auction and not otherwise and the sale shall be conducted in accordance with such rules as may be prescribed.

While dealing with section 11 we have pointed out that it would be open to a pawnbroker either to bring the pledged articles for sale on the expiry of the period of redemption, or to keep them without bringing them for sale. However, section 12 specifically provides that if in the event the pawnbroker intends to dispose of the pawned articles, he can do so only by sale by auction and not otherwise. Therefore, in law, he can dispose of the pawned articles pledged for a sum exceeding Rs. 10 only by way of sale by auction and not otherwise and that

auction also shall be conducted in accordance with the Pawn Brokers Rules and not otherwise.

Sub-section (2) of section 12, as already pointed out, gives a right to the pawnbroker to bid and purchase, in public auction, conducted u/s 12(1) of the Pawn Brokers Act, a pledge pawned with him and on such purchase he shall become the absolute owner of the pledge. Sub-section (3) of section 12 enjoins a duty on the pawnbroker that he shall maintain a book which is called sale book of pledges for a period of three years in which necessary entries have to be made regarding pawn including the amount fetched in auction and also a catalogue of the auction as prescribed under the Rules. Within three years, it would be open to the pawner to approach the pawnbroker and produce the pawn ticket and collect the excess money if any, recovered during the auction by sale of the pawned articles. Of course, if the sale has not resulted in fetching the amount greater than the amount due to the pawnbroker, it is open to the pawnbroker to recover the said amount from the pawner. The other provisions in the Pawn Brokers Act, for our purpose are not necessary.

12.4 Now, we go to Pawn Brokers Rules. For our purpose, rule 20 is relevant. It provides for the procedure for sale by public auction of pledges. The pawnbroker/auctioneer is required to adhere to the procedure prescribed under rule 20 of the Pawn Brokers Rules. Sub-rule (1) of rule 20 provides that the sale shall be conducted by an auctioneer approved by the licensing authority or by the Inspector of Moneylenders and the Pawnbrokers. Thus, the Rules provide as to who shall be the auctioneer. It is specifically provided in the Rules that the auctioneer is one who is approved by the licensing authority or by the Inspector of Moneylenders and the pawnbrokers. No other auctioneer shall conduct the sale of pawned articles. Sub-rule (2) of rule 20 further prescribes the procedure and manner in which the auction shall have to be conducted by the auctioneer. Sub-rule (3) of rule 20 provides that the pledges of each pawnbroker in the catalogue shall be separate from the pledges of any other pawnbroker notifying the sale in a newspaper approved by the licensing authority or the Inspectors of Moneylenders and the Pawnbrokers furnishing the details of the pawnbroker's name and place of business and the months in which the pledges were pawned. Thus rule 20(3) ensures that not only the bidder comes to know of the pledged articles but also the name of the pawnbroker, and also as to whether the articles pledged and brought for sale are ripe for sale. It has also taken care to ensure that other particulars are mentioned so that the purchaser shall know about the nature of the articles to offer proper bid.

Sub-rule (4) of rule 20 provides that where the pawnbroker himself bids at the sale, the auctioneer shall not take the bidding in any form other than that in which he takes, the bidding of other persons at the same scale, and the auctioneer on knocking down any article to a pawnbroker shall forthwith declare audibly the name of the pawnbroker as purchaser.

Sub-rule (5) of rule 20 provides that the auctioneer shall, within fourteen days,

after the sale, deliver to the pawnbroker an authenticated copy of the catalogue, or of so much thereof as relates to the pledges of that pawnbroker indicating also the charges for the sale of each article. Under sub-rule (6) of rule 20, the pawnbroker shall preserve every such catalogue for at least three years after the auction.

Thus it is relevant to notice that once the article is pledged with a pawnbroker, the pawner or the pledge will come into picture only if he wants to redeem the pledged article within the period stipulated or within the grace period or even thereafter, in the event the pawnbroker chooses not to bring the pledged article for sale. When once the article is brought for sale and sold, the pawner would not have any say in the matter nor he can prevent the passing of general property in goods to the purchaser in the auction held by the auctioneer. The general property in the goods passes to the purchaser as a result of the auction sale held by the auctioneer, because the pawner ceases to have any right to claim the pawned article. Consequently when the auction sale takes place at the instance of the pawnbroker, the pawner ceases to hold the general property in the pawned article. Consequently, the general property in the pawned article passes to the auction purchaser. Thus, on a reading of the provisions contained in sections 11 and 12 read with rule 20 of the Rules, it becomes clear that a pawnbroker is competent to sell the pawned articles through the auctioneer and such sale results in passing general property in goods and as a result thereof, the pawnbroker receives the amount due on the pawn and thereby he not only receives the principal sum but also the interest. In addition to that, he is entitled to retain the full sum recovered until the pawner demands it and asks for the payment of the same. As a result of sale of pawned article the pawnbroker ceases to possess special property in the pawned article as such interest of the pawnbroker along with general property in the article passes to the purchaser because the pawner also ceases to possess the general property in the pawned article consequent to such sale.

12.5 It is in this background, we have to consider the contentions of the petitioners that a pawnbroker has only to pass special property in articles pawned and he is not empowered to pass general property in the articles pledged with the pawnbroker and as such he cannot at all be considered to be the seller; therefore, there cannot be any sale by the pawnbroker as defined in the Sale of Goods Act.

12.6 It is no doubt true that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another and a contract of sale may be absolute or conditional as defined in section 4 of the Sale of Goods Act, 1930. The expression "property" is defined in section 2(11) of the Sale of Goods Act. According to the definition, "property" means the general property in goods and not merely a special property. Therefore, it is contended that in order that a sale of goods is completed as per section 4 of the Sale of

Goods Act, general property in goods and not merely a special property must pass to the purchaser, and that the general property will be always with the pawner and not with the pawnbroker. Therefore, it is contended, that the fact that the Pawn Brokers Act and the Pawn Brokers Rules enable the pawnbrokers to dispose of the pawned articles for sale by way of public auction through auctioneer; but it does not in any way amount to and cannot also be construed as resulting in or amounting to, transferring the general property in goods by the pawnbroker to the purchaser.

In support of the contentions, reliance is placed on the decision of the Supreme Court in *Jaswantrao Manilal Akhaney Vs. The State of Bombay*, In the said decision, the Supreme Court has considered the provisions of sections 176 and 179 of the Contract Act and also dealt with pledges and securities. In addition to this, certain provisions in the Indian Penal Code and Companies Act have also been considered. For our purpose, reference to the same is not necessary. However the portion of the judgment relevant to the case on hand is as follows :

"The pledge has in the present case only transferred his possession of the property to the pledgee who has a special interest in the property of enforcing his charge for payment of an overdraft, if any, whereas the property continues to be owned by the pledge.

.....

The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him."

We have already made it clear that a pawnbroker has only special interest in the articles pledged which is equivalent to the right to recover the amount advanced under pledge and the interest accrued thereon and the general property in the articles continues with the pawner. In addition to this, it has also been pointed out that on the sale of the pawned article the pawner in whom the general property in the pawned article resides, ceases to possess the same because when once the sale takes place, the pawner loses all his right in the pawned article except to claim the balance of the amount if the sale of pawned article has fetched higher amount than the amount due under the pawn.

The next decision relied upon is in the case of *Lallan Prasad Vs. Rahmat Ali and Another*, In this case also the provisions contained in sections 172 to 176 of the Contract Act are considered and it has been held thus :

"Under section 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain

the goods pledged as security for payment of a debt and u/s 175 he is entitled to receive from the pawner any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the, rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security, and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right u/s 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner. So long, however, the sale does not take place the pawner is entitled to redeem the goods on payment of the debt. It follows, therefore, that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and, therefore, if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree."

In addition to the aforesaid decisions, the learned counsel placed reliance on the decision of the Supreme Court in *Deputy Commercial Tax Officer, Saidapet and Another Vs. Enfield India Ltd., Co-operative Canteen Ltd.*, In that case, the provisions of section 2(d) and (g) of the Madras General Sales Tax Act, 1959, came up for consideration. While considering the meaning of the expression "sale of goods" and a transaction lacking element of transfer of property from one person to another and making it sale by a deeming clause in a taxing statute, the Supreme Court has held thus :

"For turnover from a transaction to be taxable under the Act, the transaction must have constituent elements, viz., (1) parties competent to contract; (2) mutual assent; (3) thing, the absolute or general property in which is transferred from the seller to the buyer, and (4) price in money paid or promised..... The expression "sale of goods" used in the legislative entries in the Constitution and the Government of India Act, 1935, bears the same meaning which it has in the Sale of Goods Act, 1930 and, therefore, the State Legislature may under entry 54, List II, legislate in respect of the series of acts beginning with an agreement of sale between the parties competent to contract and resulting in transfer of property from one of the parties to the agreement to the other for a price, and matters incidental thereto, but cannot make a transaction which is not a sale within the Sale of Goods Act, a sale by a statutory fiction and imposes tax thereon."

Placing reliance on the aforesaid observations, it is strenuously contended that in the instant case also the sale that would be effected through the auctioneer at the instance of the pawnbroker would be for and on behalf of the pawner only because the pawnbroker is not competent to pass the general property in goods. Therefore, the Legislature cannot be deemed to have termed such a transaction as sale by the pawnbroker which would be opposed to entry No. 54 of List II of

the Seventh Schedule. Therefore, it is contended that it is not permissible to construe that the sale conducted through the auctioneer under the provisions of the Pawn Brokers Act of the pawned articles amounts to sale by the pawnbroker as it would result in artificial definition of "sale" which would be opposed to the provisions of the Sale of Goods Act and entry 54, List II of the Seventh Schedule to the Constitution. Hence it is the contention of the appellants that the pawnbrokers cannot at all be considered to the sellers of the pawned articles.

In support of the aforesaid contention, reliance was also placed on the decision of the Constitution Bench of the Supreme Court in *K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III*, of the judgment (page 226 of STC) it is observed thus :

"The essence of sale under the Sale of Goods Act is that the property should pass from the seller to the buyer when a contract of sale is made except in a case of conditional sale. Hire-purchase agreements are not conditional sales. Therefore, any legislation by the State Legislature making any agreement or transaction in which the property does not pass from the seller to the buyer a sale would be beyond its legislative competence."

We may also at this stage, refer to another decision relied upon by the learned counsel for the appellants in *The Bank of Bihar Vs. The State of Bihar and Others*, In that case, it was held thus :

"According to the statement in Halsbury's Laws of England "pawn" has been described as a security where by contract a deposit of goods is made a security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt; in this sense it is intermediate between a simple lien and a mortgage which wholly passed the property in the thing conveyed. "The pawnee has a special property or special interest in the thing pledged, while the general property therein continues in the owner. That special property or interest exists so that the pawnee can compel payment of the debt or can sell the goods when the right to do so arises. This special property or interest is to be distinguished from the mere right of detention which the holder of a lien possesses, in that it is transferable in the sense that a pawnee may assign or pledge his special property or interest in the goods." "Where judgment has been obtained against the pawner of goods and execution has issued thereon, the sheriff cannot seize the goods pawned unless he satisfied the claim of the pawnee." (based mainly on *Rogers v. Kennay* [1846] 9 QB 592. "On the bankruptcy of the pawner the pawnee is a secured creditor in the bankruptcy with respect to things pledged before the date of the receiving order and without notice of a prior available act of bankruptcy." It has not been shown how the law in India is in any way different from the English law relating to the rights of the pawnee vis-a-vis other unsecured creditors of the pawner."

From the aforesaid statement of law made by the Supreme Court, it is also clear that a special property or interest of the pawnee exists so that the pawnee can

compel payment of debt or sell the goods when the right to do so arises. That special property or the interest is distinguished from the mere right of detention which the holder or a lien possesses in that it is transferable in the sense that a pawnee may assign or pledge his special property or interest in the goods. Further, in view of section 11 of the Pawn Brokers Act, the impact of which is referred to earlier, the general property in the goods also passes because a pledge pawned for a sum exceeding ten rupees shall continue to be redeemable only until it is disposed of. Further the sale takes place at the instance of the pawnbroker and the sale held through the auctioneer results in passing in the general property in the goods to the purchaser. Therefore, such a sale results in turnover within the meaning of its definition in the Act.

We considered it necessary to deal with the aforesaid aspects in greater detail since the same would provide a proper background to resolve the crux of the question, viz., whether a pawnbroker would be a dealer within the meaning of that expression as defined u/s 2(1)(k) of the Act, which reads thus :

""dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes -

(i) an industrial, commercial or trading undertaking of the Government of Karnataka, the Central Government, a State Government of any State, other than the State of Karnataka, a local authority, company, a Hindu undivided family, an Aliyasanthana family, a firm, a society, a club or an association which carries on such business;

(ii) a casual trader;

(iii) a commission agent, a broker or a del credere agent or an auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal;

(iv) a non-resident dealer or an agent of a non-resident dealer, a local branch of a firm or company or association situated outside the State;

(v) a person who sells goods produced by him by manufacture or otherwise;

(vi) a miller who carries on such business;

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

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

(ix) a person engaged in the business of delivery of goods on hire purchase or any system of payment by instalments;

(x) a person engaged in the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration).

Explanation 1 - A society (including a co-operative society), club or firm or an association which, whether or not in the course of business, buys, sells, supplies or distributes goods from or to its members for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;

Explanation 2 - The Central Government or a State Government which whether or not, in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or deferred payment or for commission, remuneration or other valuable consideration shall be deemed to be a dealer for the purposes of this Act.

Explanation 3 - In respect of the transfer of the right to use feature films, the person who transfers such right to the exhibitor and from whom the exhibitor derives the right to make such use shall be deemed to be the dealer under this clause.

Exception - An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally or a person who is exclusively engaged in poultry farming and sells the products of such poultry farm shall not be deemed to be a dealer within the meaning of this clause."

We may also point out here that a "pawnbroker" falls within the compass of the general definition, as he would not fit in, in any of the items of the inclusive definition. A pawnbroker can be said to be a dealer if it can be held that he is a person who carries on business of buying and selling, supplying or distribution of goods directly or otherwise whether for cash or deferred payment or for commission or remuneration or other valuable consideration. In the earlier portion of our judgment we have already extracted the provisions contained in section 2(7) of the Pawn Brokers Act. It is significant to notice here that the explanation to the definition has enlarged the meaning of the said term. As per the explanation every person who keeps a shop for the purchase or sale of goods or chattels and who purchases goods or chattels and pays or advances thereon any sum of money, with or under an agreement or understanding expressed or implied that the goods or chattels may be afterwards repurchased on any terms, is a pawnbroker within the meaning of this clause. We have also pointed out that though the general property in the goods is with the pawner or pledge but once the sale of such goods takes place at the instance of the pawnbroker and when such sale takes place, the pawner or pledge loses all his rights on such sale. At this stage, we may also even point out that it is the established position of law that a pawnbroker has an implied authority to sell as pointed out in *Lallan Prasad Vs. Rahmat Ali and Another*, Therefore, it is clear that the business of a pawnbroker carries with it regular activity of sale of pledged or pawned articles

for a sum exceeding Rs. 10 for recovery of the amount due under the pawn ticket in case the pawner does not pay the amount within the time. We are aware that it is possible to argue that the activity of sale involved is only incidental to the main business of taking goods and chattels in pawn for loan. However, as pointed out in Member, Board of Revenue, West Bengal Vs. Controller of Stores, Eastern Railway, Calcutta and Others, every activity which may be regarded as necessarily incidental or ancillary to the business also constitutes business. This is also clear from the definition of the term "business" contained in section 2(1) (f-2) of the Act which reads thus :

""business" included, -

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

(ii) any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure or concern;"

Therefore, it is clear that the sale of pledged or pawned articles, value of which is more than Rs. 10 becomes incidental or ancillary to the business of a pawnbroker and as such the sale and purchase also becomes his business because, the Pawn Brokers Act and the Rules framed thereunder permit a "pawnee" to purchase the pawned article. Similar proposition has been laid down in the aforesaid case reported in [1989] 74 STC 5 (Member, Board of Revenue v. Controller of Stores, Eastern Railway). To the same effect are the decisions in United India Insurance Co. Ltd. Vs. Commissioner of Commercial Taxes, Bangalore and Another, The District Controller of Stores, Northern Railway, Jodhpur Vs. The Assistant Commercial Taxation Officer and Another, Bagal Kot Cement Co. Vs. State of Mysore, and in Braemore Estates Ltd. Vs. State of Kerala, . However, it is contended that if the pawnbroker is considered as a dealer, section 11 of the Act will be rendered meaningless. We now, advert to section 11 of the Act, which reads thus :

"11. Agents liable to pay tax. - (1) Notwithstanding anything contained in any law for the time being in force including this Act, every person who for an agreed commission or brokerage buys or sells on behalf of any principal who is a resident of the State of Karnataka shall, subject to the provisions of sub-section (5) of section 5 or section 6-B be assessed to tax or taxes under this Act at the rate of rates leviable thereunder in respect of such purchase or sale notwithstanding that such principal is not a dealer or that the turnover of sale or purchase relating to such principal is less than the minimum specified in sub-section (5) of section 5 or section 6B :

Provided that the principal, shall not be assessed to tax on his turnover in respect of which, the agent is liable to tax or taxes under sub-section (1) and the

burden of proving that the turnover has been effected through an agent liable to tax under the said sub-section, shall be on such principal.

(2) Notwithstanding anything contained in sub-section (1), in respect of goods taxable at the point of purchase by the last dealer in the State liable to tax under this Act, the agent (other than the agent of a non-resident principal) purchasing such goods shall not be assessed to tax but the principal who has effected such purchases through the agent shall be assessed to tax as if he is the last dealer in the State.

(3) Without prejudice to his other rights, the agent who is assessed under sub-section (1), may retain out of the moneys payable to his principal other than a principal who is an agriculturist a sum equal to the amount of tax assessed on or paid by the agent."

This section mainly deals with the agent's liability to pay sales tax. Therefore, it is contended that if the agent is liable to pay the sales tax, the principal is not liable to pay and the sales tax is not liable to be recovered from him. Therefore, it is contended by the learned counsel for the appellants that as the sale of pawned articles takes place through the auctioneer, the auctioneer becomes the agent for selling the pawned articles and he becomes liable for sales tax and if he becomes liable for payment of sales tax, the pawnee will not be liable for payment of sales tax. It is not possible to accept this contention. Auctioneer cannot at all be considered as an agent of the pawnee. The auctioneer is not appointed by the pawnee. Auctioneer is appointed under rule 20 of the Pawn Brokers Rules by the licensing authority or by the Inspector of Money-lenders and the Pawnbrokers. There is a list of auctioneers approved and maintained by the licensing authority or the Inspector of Moneylenders and the Pawnbrokers. Therefore, the pawnbroker has no control over the auctioneer. He has to entrust to the auctioneer the pawned articles to be sold and the auctioneer has to auction them in accordance with the provisions contained in rule 20 of the Pawn Brokers Rules and submit the sale details to the pawnbroker as provided by the said rule. The auctioneer will be under the control of the licensing authority or the Inspector of Moneylenders and the Pawnbrokers. Therefore, we are of the view that the auctioneer cannot at all be considered to be the agent of the pawnbroker. If that be so, application of section 11 of the Act does not arise. In addition to this, it is also necessary to notice that an auctioneer simply conducts the sale and remits the money recovered in the sale after deducting the expenses incurred by him for conducting the sale. The amount has to be disbursed by the auctioneer to the pawnbroker, and the latter has to keep the amount with him and pay the same to the pawner as and when he approaches pawnbroker for the refund of the money recovered in excess of the amount due to the pawnbroker. Therefore, we are of the view that section 11 of the Act will be of no assistances to the appellants.

It is contended by the learned counsel for the appellants that if it is held that the sale of pawned articles conducted at the instance of the pawnbroker results in

passing property to the purchaser, it would be contrary to the concept of sale as contained in the Sale of Goods Act and the law does not recognise such a transaction as a sale as it would be contrary to the provisions contained in entry 54 of List II of the Seventh Schedule to the Constitution. In support of this contention, learned counsel placed reliance on a decision of the Supreme Court in Deputy Commercial Tax Officer, Saidapet and Another Vs. Enfield India Ltd., Co-operative Canteen Ltd., In that case, it has been held that the expression "sale of goods" used in the legislative entries in the Constitution and the Government of India Act, 1935, bears the same meaning which it has in the Sale of Goods Act, 1930 and therefore the State Legislature may under entry 54, List II, legislate in respect of the series of acts beginning with an agreement of sale between the parties competent to contract and resulting in transfer of property from one of the parties to the agreement to the other for a price, and matters incidental thereto, but cannot make a transaction which is not a sale within the Sale of Goods Act, a sale by a statutory fiction and impose tax thereon. Consequently, if the element of transfer of property from one person to another is lacking in any transaction, there is no sale and the State Legislature cannot treat it as a sale by a deeming clause, and bring it within the ambit of the taxing statute. In the instant case, the Act does not purport to tax a transaction which is not a sale but by treating it as a sale. The sale of pawned articles actually takes place as per the provisions of the Pawn Brokers Act. The pawnbroker has authority under the statute to bring the pawned articles for sale and the pawner loses all his right in the articles sold through the auctioneer at the instance of the pawnbroker. This is not a case in which one can say that sale does not take place and nevertheless it is deemed as a sale and subjected to tax. In the case before the Supreme Court there was no actual transaction of sale, nevertheless it was treated as sale and was brought under the Act for the purpose of imposing sales tax. Whereas in the instant case, the position is quite different as has been already pointed out by us in greater detail. Therefore, we are of the view that the decision in Deputy Commercial Tax Officer, Saidapet and Another Vs. Enfield India Ltd., Co-operative Canteen Ltd., has no application. A contention is also urged before us that it is not the regular business of the pawnbroker to bring the pawned articles for sale. The sale of the pawned articles takes place occasionally and in many cases the sale conducted at his instance will not be sufficient to attract the provisions of the Sales Tax Act because the amount of turnover does not exceed the prescribed limit and that therefore, he cannot at all be considered to be a dealer. We may point out that this contention suffers from an infirmity. It is only when the turnover of the pawnbroker exceeds the limit prescribed under sub-section (5) of section 5 of the Act, he becomes liable for filing the return and paying the sales tax. Therefore, we are of the view that this contention will not have any bearing on the question as to whether the pawnbroker can be considered to be a dealer within the meaning of and as defined under the Act. In the view that we have taken it is not necessary for us to allude to the other decisions cited at the Bar since in the said decisions there is nothing which would compel us to take a view different from the view which we have taken as above.

Further the various decisions of the Supreme Court referred to and discussed earlier are exhaustive on the question in controversy.

For the reasons stated above point No. 1 is answered in the affirmative.

Point Nos. 2 and 3 : It is contended on behalf of the appellants that section 3A of the Act is violative of article 14 of the Constitution and that the Commissioner cannot issue the circular without affording an opportunity to the person whose rights will be affected. We have heard both sides on the question as to whether a pawnbroker becomes a dealer under the Act and on hearing both sides we have held that a pawnbroker becomes a dealer under the Act. The circular issued by the Commissioner is also to the same effect. Therefore, in the instant case it becomes unnecessary for us to go into the question as to whether section 3A of the Act is violative of article 14 of the Constitution. This contention can be considered in an appropriate case and not in a case like this wherein we have considered the question as to whether a pawnbroker is a dealer. Hence, we are of the view that points 2 and 3 need not be considered in these appeals. The circular dated October 30, 1991, being a conformity with the decision we have rendered is valid in law.

For the reasons stated above, the writ appeals fail and the same are dismissed.

In the facts and circumstances of the case, there will be no order as to costs.

13. Writ appeals dismissed.