CALCUTTA HIGH COURT

Chowringhee Sales Bureau Ltd

Vs.

State of W.B

Civil Revn. No. 110 of 1956

(Sinha, J.)

16.11.1960

ORDER

Sinha, J.

1. The facts in this case are briefly as follows : The petitioner is a company incorporated under the Indian Companies Act and carries on business as an auctioneer. It is stated in the petition that the business of the petitioner is that of auctioning third party's goods and bringing the seller and buyer together for effecting the sale against a certain rate or percentage of remuneration. The petitioner company is registered as a "dealer" under the provisions of the Bengal Finance Sales Tax Act, 1941. (hereinafter referred to as the "Act"). The petitioner submitted returns for the four quarters ending, last day of March 1950 and for the four quarters ending the last day of March, 1951. It was contended by the petitioner that it was not liable to assessment to sales tax in respect of all its business as an auctioneer, because as such it was not a "dealer" within the meaning of the said Act. The Commercial Tax Officer by his orders dated 28-10-1954 and 19-11-1954, rejected the contention of the petitioner that it was not liable to sales tax as an auctioneer and assessed the petitioner to sales tax at Rs. 30892/1/- for the four quarters ending March, 1950 and Rs. 7920/11/- for the four quarters ending last day of March, 1951. Against the said orders of assessment, the petitioner preferred appeals before the Assistant Commissioner of Commercial Tax, South Circle, Calcutta, which are still pending. The Commercial Tax Officer, however, without waiting, for the decision of the said appeals, sent a requisition to the certificate officer, Alipore, under Section 5 of the Public Demands Recovery Act, 1930. Certificates were thereupon issued and served on the petitioner. The petitioner preferred objection, contending inter alia that the petitioner was not a "dealer" within the meaning of the said Act, and that the major portion of the assessment related to a period when the Amending Act XLVIII of 1950 had not come into force, which Act had no retrospective-operation. On 28-6-1955 the Certificate Officer rejected the contention of the petitioner and relied on a decision of this High Court, or Bose, J., *Staynor and Co. v. Commercial Tax Officer*[1]*;* in which the learned Judge held that an auctioneer of goods is a "dealer" within the meaning of Section 2(c)(i) of the said Act. Against the said decision, the petitioner preferred two appeals numbered as 93 and 94 of 1955, before the Additional Collector, 24 Parganas. The Additional Collector by his order dated 24-8-1955 rejected the appeals, also relying on the said decision of Bose, J. In

[1]55 Cal WN 583
the meanwhile, there had been a sales tax reference to the High Court under Section 21(1) of the said Act, being the Sales Tax Reference *Chowringhee Sales Bureau Ltd. v. Member, Board of Revenue*[2], which reference is still pending. It was urged in the appeal that until the reference was heard and decided the matter should be kept pending, but the Additional' Collector did not accept this prayer. The appeals were accordingly dismissed. Against the said decision of the Additional Collector, the petitioner took out two revisional applications before the Commissioner Presidency Division. On 14-12-1954 the said applications were dismissed. On 10-1-1956 this rule was issued by Bose, J. upon the opposite party, to show cause why a writ in the nature of mandamus should not issue commanding them to rescind, recall and/or forbear from giving effect to the certificates of demands as contained in annexure "A" to the petition, and/or why a writ in the nature of certiorari should not issue quashing and/or setting aside the proceedings and/or why such further and other orders should not be made as to this Court may seem fit and proper. The learned Judge passed an order for the issue of an interim injunction restraining the opposite parties from realizing the demands which were the subject matter of the certificate case mentioned above, until the disposal of the rule. The matter came up for hearing before me on 12-1-1959 when it was adjourned for the purpose of enabling the petitioner to make an amendment by adding certain parties as respondents. In the original application, the respondents Nos. 5 to 8 were not parties and the State of West Bengal was made a party, as represented by the Sales Tax Department of 1C and 1B, Hare Street, Calcutta, which of course, was incompetent, as the State of West Bengal could not be so represented. Thereafter, the State of West Bengal was again made a party, being the respondent No. 9. Thereafter, the amendment has been effected and the matter has again come up before me for hearing. Upon the facts there is very little dispute. It is not disputed that the petitioner company carries on business as an auctioneer in the city of Calcutta and holds periodical auctions of specified goods and chattels belonging to third parties, at their place of business, in the usual way. People come and bid at these periodical auctions and it is not disputed that every one is aware that the goods do not belong to the auctioneer, but have been collected together by them for the purpose of receiving bids and selling them on behalf of the owners, upon payment of a commission, as remuneration. The point, for determination is as to whether upon these facts, an auctioneer can be made liable for sales tax upon sales which are the subject matter of these auctions. As has already been mentioned, the authorities below have all relied on a decision of Bose, J. 55 Cal WN 583. That decision is dated 27-2-1951, but the subject matter of the application (Matter No. 80 of 1950) related to a point of time earlier than 6-11-1950 which is the date of the amendment in the said Act, of the definition of the word, "dealer" whereby in explanation 2 the word, "dealer," was expressly stated to include an auctioneer. The position is as follows : The Act, which is an Act of 1941, came into operation on 1-7-1941. In the original Act, the word "dealer" was defined in Section 2(c)(i) and meant any person, firm or Hindu Joint family, engaged in the business of selling or supplying goods in West Bengal, including a co-operative society or a club or association which sells or supplies goods to its members. This definition was amended on or about the 31st March, 1949 with retrospective effect, and inter alia included the Government within the definition. Neither in the original definition nor in this amendment was any mention made of an auctioneer. Thereafter, there was a further amendment which came into operation from 6-11-1950 by Act XLVIII of 1950. This definition is as follows :

[2] Case No. 218 of 1951

> " "Dealer" means any person who carries on the business of selling goods in West Bengal and includes the Government. Explanation 1. A cooperative society or a club or any

> association which sells goods to its members is a "dealer". Explanation 2. A factor, a broker, a commission agent, a del credere agent, an auctioneer or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling is and who has, in the customary course of business authority to sell goods belonging to principals is a "dealer". Explanation 3. The manager or an agent in West Bengal of a dealer who resides outside West Bengal and carries on the business of selling goods in West Bengal shall, in respect of such business, be deemed to be a dealer".

2. It appears that by a further amendment dated 24-7-1934 the third explanation has been dropped, but it is not relevant for our purpose. It is now possible to understand one of the points made by the petitioner, namely, that the term, "dealer" as used in the original Act did not include an auctioneer, and that it was only introduced into the definition, as and from 6-11-1950 by Act XLVIII of 1950, which Act is not retrospective in operation. It is argued that a major part of the assessment related to a period prior to coming into force of the Amending Act, and therefore, the Commercial Tax Officer was wrong in reading the word, "auctioneer" into the definition of "dealer", prior to the amendment of the definition itself. Ordinarily, there would seem to be no answer to this argument. It is, however, pointed out on behalf of the respondents that the decision of Bose, J., was given at a point of time when the Amending Act had already come into operation and the learned Judge did not deal with this question, but independently of the amendment came to the conclusion that an auctioneer was a "dealer" as originally defined. As against this, it is pointed out that although the learned Judge did not deal with the amendment, he did so advisedly, because although the application was heard and judgment delivered after the amendment had come into operation, the period to be considered and the application itself, was before the amendment. In any event, it is true that in the reported judgment there is no mention of the amendment of the term "dealer" by the Amending Act XLVIII of 1950. It must, therefore, be presumed that in the opinion of the learned Judge the original definition of the word "dealer" included an auctioneer. Before Bose, J. it was contended that an auctioneer was not a "dealer" within the meaning of Section 2(c) of the said Act, and it was argued by a specific reference to the Act and the rules made thereunder, that unless a person selling goods is the owner of the goods he cannot be considered to be a 'dealer' within the meaning of the said Act. The learned Judge very briefly dealt with this question as follows :

> "It is submitted that this idea pervades the entire scheme of the Act. An auctioneer is not the owner but he simply auctions other people's goods. I cannot accept this contention. An auctioneer has dominion and possession of the goods. It is the stroke of his hammer that completes the sale and transfers property or ownership in the goods to the bidder who purchases the goods. He is the person who is actually engaged in the business of selling the goods. The sales tax is on the transaction of sale and not on the goods. It is because of the sale that the tax is imposed. It is therefore immaterial whether the auctioneer is the owner of the goods or not. I have no hesitation in coming to the conclusion that the petitioners are dealers within the meaning of Section 2(c)(i) of the Act".

3. Mr. Das, appearing on behalf of the petitioner has argued that the learned Judge was wrong in each of the conclusions arrived at by him. He has argued that an auctioneer does not sell goods

and is not even a party to the sale. He points out that an auctioneer has no dominion over the goods and that the sale can be withdrawn, at any moment at the option of the owner of the goods. Whether the strike of his hammer would conclude a sale depends upon the conditions of sale, and the owner might lay down different conditions.

4. The question is as to whether it is possible for me to go behind this decision, because there is no doubt that the learned Judge has come to the definite conclusion that an auctioneer is a "dealer" within the meaning of the said Act, even apart from the amendment. My attention has been drawn to an appellate decision of this Court, *Suresh Chandra v. Bank of Calcutta Ltd*[3]*.,* in which Harries, C.J. held that, where there was a decision of a single Judge upon a question of law, it is not right for any other single Judge of that Court to depart from it whatever his own views may be. The Judge may express his own views about the matter, but his decision must be in accordance with the previous decision. This decision is binding on me, but I think that on the facts of the present case, a distinction may be made. The principles which govern the interpretation of the term, "dealer" in the said Act, have been the subject matter of subsequent decisions of the Supreme Court, which decisions were not before the learned Judge when he delivered judgment in Staynor's case, 55 Cal WN 583 (supra). The enunciation of these principles by the Supreme Court, has, in my opinion, given a different orientation to the problem, and I have no doubt that if these decisions were available to the learned Judge, he might have come to a different conclusion. After all, in the interpretation of the term, "dealer" I must be guided by the law as declared by the Supreme Court, and to that extent I cannot follow the judgment of Bose, J. Further, the point seems to have been dealt with rather summarily by the learned Judge and none of the cases which have been cited before me by Mr. Das appear to have been cited or considered by the learned Judge, For these reasons, although the decision of Bose, J. is entitled to great respect, I feel compelled to deal with the question. Further, it must be remembered that notwithstanding his own decision, Bose, J. himself issued this rule and granted an interim injunction. Secondly, it is pointed out that a reference upon the very question is pending and, therefore, I should hold my hands until the reference is concluded. I must confess that I was strongly tempted to do so, but have desisted, because such references take a long time to be heard, and it may be years before this particular reference comes up for hearing. The point is of public importance and any delay in deciding the point would be undesirable.

5. The constitutional sanction for the promulgation of the Bengal Finance Sales Tax Act, 1941 is Entry 48, List II in the 7th Schedule of the Government of India Act, 1935, namely - "taxes on the sale of goods and on advertisements". Therefore, in 1935 the Government of India Act enabled the Provincial Legislature to promulgate a law imposing taxes on the "sale of goods". At the time when this constitutional statute was passed, the term, "sale of goods" had a definite meaning in law. There was in existence the Indian Sale of Goods Act (Act No. III of 1930). It must therefore, be presumed that the term "sale of goods" was used with reference to the meaning of the term as contained in the Sale of Goods Act, or any other relevant law for the time being in operation. It follows that the validity of the impugned Act has to be examined against the background of such law. A power is given to tax the sale of goods, which means the sale of goods as

[3]54 Cal WN 832

defined in the Sale of Goods Act. If, therefore, there is any attempt to tax something which is not a sale of goods according to the Sale of Goods Act, then the legislation would be void as being ultra vires Entry 48 List II of the 7th Schedule to the Government of India Act, 1935. Upon this

point we have to refer to two Supreme Court decisions. The first is - Sales Tax Officer, *Pilibhit v. Messrs. Budh Prakash Jai Prakash*[4], The facts of that case were as follows : The respondent was a firm doing business in forward contracts, in respect of which it was made liable for the payment of sales tax, under the Uttar Pradesh Sales Tax Act (Act XV of 1948). The respondent thereupon challenged the validity of the proceedings on the ground that the Act, in so far as it imposed a tax on forward contracts was ultra vires the powers of the Provincial Legislature. The High Court upheld this contention, and thereupon an appeal was preferred to the Supreme Court. Before the Supreme Court, it was argued that under the Government of India Act, 1935, the Provincial Legislature derived its power to impose a tax on the sale of goods under Entry No. 48 in List II of the 7th Schedule to the Government of India Act, 1935 and the Uttar Pradesh Sales Tax Act (Act XV of 1948) was enacted in exercise of this power, Section 2(h) of the said Act defines sale as including forward contracts. It was pointed out that under the statute law of India, which is based on the English law on the subject, a sale of goods and an agreement for the sale of goods are treated as two distinct and separate matters and, therefore, the sale of goods, according to the existing law, could not include an agreement for sale, and that a forward contract was nothing but an agreement to sell. Ayyar, J. said as follows :

> "Thus, there having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell, it would be proper to interpret the expression "sale of goods" in entry 48 in the sense in which it was used in 'legislation both in England and India and to bold that it authorizes the imposition of a tax only where there is a completed sale involving transfer of title".

6. The learned Judge then proceeds to discuss the Indian and the English law relating to sale of goods, and concludes as follows :

> "The position therefore is that a liability to be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agreement to sell, which can only result in a claim for damages. It would be contrary to all principles to hold that damages for breach of contract are liable to be assessed to sales tax on the ground that they are in the same position as sale price. The power conferred under entry 48 to impose a tax on the sale of goods can therefore be exercised only when there is a sale under which there is a transfer of property in the goods, and not when there is a mere agreement to sell. The State Legislature cannot by enlarging the definition of "sale" as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of "sale" in Section 2(h) of Act XV of 1948 must, to that extent, be declared ultra vires. For the same reason, Explanation III to Section 2(h) which provides that forward contracts "shall be deemed to have been completed on the date originally agreed upon for delivery" and Section 3-B ..... must also be held to be ultra vires".

[4](1955) 1 SCR 243

7. The next decision of the Supreme Court to be considered is *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd*[5]., In that case, the respondent company doing business, inter alia, in the construction of buildings, roads, etc. was assessed to sales tax by the sales tax

authorities who sought to include the value of the materials used in the execution of building contracts, within the taxable turnover of the respondent. The validity of the assessment was challenged by the respondent, who contended that the power of the Madras Legislature to impose a tax on sales of goods under Entry 48 in List II in Schedule 7 of the Government of India Act, 1935 did not extend to imposing 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 Tax (Amendment) Act, 1947, authorising the imposition of such tax were ultra vires. The High Court of Madras took the view that the expression "sale of goods" had the same meaning in Entry 48 which it has in the Indian Sale of Goods Act, 1930 and that the supply of materials under construction contracts of the respondent did not constitute such a sale and, therefore, was not taxable by the State Government. This view was upheld by the Supreme Court, which held that 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 of goods, and in the legislative practice relating to that topic, and must be interpreted in Entry 48 in List II in Schedule VII of the Act as having the same meaning as in the Sale of Goods Act, 1930, and that the Provincial Legislature had no right to impose a tax on the supply of materials used, under a building contract, treating it as a sale. Aiyar, J., referred to a number of English and American decisions and said as follows :

> "On the basis of the above authorities, the respondents contend that the true interpretation to be put on the expression "sale of goods" in Entry 48 is what it means in the Indian Sale of Goods Act, 1930, and what it has always meant in the general law relating to sale of goods. It is contended by the appellant and quite rightly that in interpreting the words of a Constitution the Legislative practice relative thereto is not conclusive. But it is certainly valuable and might prove determinative unless there are good reasons for disregarding it, and in 1955-1 SCR 243 (supra), it was relied on for ascertaining the meaning and true scope of the very words which are now under consideration. There, in deciding that an agreement to sell is not a sale within Entry 48, this Court referred to the provisions of the English Sale of Goods Act, 1893, the Indian Contract Act, 1872, and the Indian Sale of Goods Act, 1930, for construing the word "sale" in that Entry ..... This decision, though not decisive of the present controversy, goes far to support, the contention of the respondents that the words "Sale of Goods" in Entry 48 must be interpreted in the sense which they bear in the Indian Sale of Goods Act, 1930 .... Sales tax was not a subject which came into vogue after the Government of India Act, 1935. It was known to the framers of that statute and they made express provision for it under Entry 48. Then it becomes merely a question of interpreting the words, and on the principle, already stated, that words having known legal import should be construed in the sense which they had at the time of the enactment, the expression "Sale of Goods" must be construed in the sense which it has in the Indian Sale of Goods Act".

[5](1959) SCR 379

8. As I have stated above, the Supreme Court upheld the view of the Madras High Court, where Rao, J. had stated as follows in *Gannon Dunkerley and Co. v. State of Madras*[6], at p. 1142 :

> "It therefore, follows that the building contracts, which the assessees entered into during

the assessment year, on which the turnover was calculated, do not involve any element of sale of the materials and are not in any sense contracts for the sale of goods as understood in law. Having regard to the terms of particular contracts, there may be an intention to pass the ownership in the materials for a price agreed upon between the parties, in which case such contracts might contain an element of sale of goods, but that is not the case, here. If the amendments introduced in 1947 by the Provincial Legislature are intended to catch in the net of tax contracts of the nature with which we are concerned, we should hold that to that extent the amendments introduced are ultra vires of the Provincial Legislature as they had no power to tax transactions which are not sales of goods. We, therefore think that the levy of tax on the assessees on the sum of Rs. 29,31,528-7-4 was not justified in law".

9. Relying on the decisions above mentioned, Mr. Das has formulated his case thus : The constitutional sanction for the said Act is Entry 48 in List II of the 7th schedule to the Government of India Act, 1935. It conferred power upon the Provincial Government to promulgate a law for imposing tax on the sale of goods. The term "sale of goods" must be interpreted in the sense in which it was used in existing legislation. In this particular case, it indicates the Indian Sale of Goods Act, 1930 which again is based on the English Sale of Goods Act. An auctioneer carrying on business, in course of which he offers for sale, specific goods or chattels belonging to third parties is neither in the position of a seller nor the buyer. In the Sale of Goods Act, there are two parties to a sale, namely, the seller and the purchaser. Entry 48 authorises the imposition of tax either on a seller or a purchaser or both. If, however, the Legislature purports to levy a tax upon a person, who is neither a seller nor a purchaser, the legislation must be declared ultra vires, because it treats an operation as a sale of goods which, according to the Sale of Goods Act, does not amount to such a sale. In the case of Budh Prakash 1955-1 SCR 243 (supra) the Uttar Pradesh Legislature sought to tax the persons who did not sell, but entered into an agreement for sale. This was declared as ultra vires. In Gannon Dunkerkley's case ILR (1955) Mad 832 : AIR 1954 Madras 1130 (supra) the Madras Legislature sought to tax the persons who had entered into a building contract and had supplied materials, and this was held not to be a sale of goods and the legislation imposing a tax thereon was declared ultra vires. He has argued that in the present case, an auctioneer neither sells nor purchases goods and, therefore, any attempt to treat him as a "dealer" is ultra vires. That the expression "dealer" is used instead of the seller or the purchaser is, of course, immaterial. The taxation is upon the footing that an auction sale is a sale of goods and the auctioneer is a seller. The expressions "sale of goods" and "seller" have acquired a legal import, and it is legitimate to presume that Entry 48 was used in the sense, in which it was used in England and India and particularly in the Indian Sate of Goods Act, which is based on the English law. Neither under the English law nor under Indian law is the auctioneer a seller. According to the authorities, he is not even a party to the sale. It is necessary, therefore, to consider the law on the subject as to the legal position of an

[6] AIR 1954 Mad 1130

auctioneer and of the operation involved in a sale of goods by auction. The position in law in England has been summarized in Halsbury's Laws of England 3rd Edn. Vol. 2 pages 69 to 90. An auction is a manner of selling or letting property by Bids, and usually to the highest bidder by public competition. An auctioneer is one who sells goods or other property by auction (Art. 136). An auctioneer may sell property of his own as principal in which case he is the seller. When

selling goods belonging to a third party he is the agent of the vendor only (Art. 139). The implied authority of the auctioneer is a general authority to sell, in the way usual and customary amongst auctioneers, but it is subject to express instructions of the owner enlarging or limiting it. He has no implied authority to sell by private contract. Where a reserve has been fixed by the vendor, there is no implied authority to sell without reserve. He has no authority unless expressly instructed by the vendor to give a warranty at the auction. As soon as the property has been knocked down, the auctioneer's authority is at an end. He cannot rescind the contract nor introduce into it any stipulations as to title (Articles 141-142-144-145). Up to the time of the conclusion of the sale, and until the property is finally knocked down, the auctioneer's authority is revocable by the vendor, that is to say the owner. This authority can be withdrawn, even though the auctioneer has advertised the property for sale and incurred expenses. If the authority has in fact been revoked, the auctioneer can give the highest bidder no right to the property even though the bidder is unaware of the revocation (Art. 146). Where an auctioneer sells for an undisclosed principal, he is personally liable on the contract. Where an auctioneer discloses the fact that he is selling as an agent, but does not name his principal, he is personally liable on the contract, unless a contrary intention appears, the presumption being that the purchaser is only willing to contract with the unknown man if the auctioneer makes himself personally liable; this presumption does not arise, however, in the case of the sale of specific chattels which the purchaser knows is not the property of the auctioneer. An auctioneer selling on behalf of a disclosed principal is in general not liable on the contract unless by its term he contracts personally (Art. 177). Although an auctioneer is not the seller of goods, still by virtue of the special incident attached to an auction sale, he may, by reason of his lien on the goods for his remuneration, maintain an action in his own name for the price or goods sold and delivered by him, and this is so even where he sells and delivers as agent for a disclosed principal. This right to sue continues as long as the auctioneer's lien exists and cannot be affected by any settlement between the vendor and the purchaser (Art. 181). By virtue of his lien, an auctioneer can maintain an action of trespass or trover against persons wrongfully interfering with his possession (Art. 184). The above principles have also been summarized in Bowstead on Agency, 3rd Edn. page 238. According to the learned author, where an auctioneer sells property by auction, the nature and extent of his contract with the purchaser depend upon the conditions of sale, the nature of the subject matter, and the other surrounding circumstances. Where an auctioneer sells a specific chattel by auction, he is not liable upon the contract of sale, nor does he impliedly warrant the title of his principal, although the name of the principal has not been disclosed to the buyer. In such a case, he impliedly warrants that he has authority to sell and that he knows of no defect in the title of his principal; and he undertakes to deliver the chattel in exchange for the price (for which he may sue); but his contract with the buyer is independent of the contract of sale, which he makes on behalf of the seller and to which he is not a party. In the present case, as I have already mentioned, the sale is of specific chattel, and it was known to the purchaser that the goods did not belong to the auctioneer. In such a case, all the text-book writers agree that the auctioneer is not even a party to the sale and has no personal liability whatsoever. The leading case on the subject is *Benton v. Campbell. Parker and Co. Ltd.*[7] The facts of that case were as follows : The defendants appellants were auctioneers at Birmingham and carried on a business in the sale of motor cars by public auction. A Ford Car was delivered to the defendants by the Sexton Rubber Co. with instruction to sell it by public auction. Pursuant to the instruction, the car was put up for auction with a condition contained in the catalogue printed for the occasion, that the auctioneers would not hold themselves responsible for any action that may arise and that they were acting solely as agents between buyer and seller. The car was sold at the auction to the

plaintiff who took delivery from the defendants and paid the price to them. It appeared later on that the car was the property of one Bellingham who had let it out to the Sexton Rubber Co. on hire-purchase and upon a condition that until all the installments were paid it would remain the property of the owner. At the time of auction, all installments had not been paid. Bellingham discovered the car and recovered it from Trean's possession, to whom the plaintiff purchaser had sold the car. The plaintiff then brought an action against the auctioneers claiming damages and recovered judgment, against which the defendants appealed. Salter, J., said as follows :

> "An attempt was made to show that the defendants were dealers and that they were selling their own property. The learned county court Judge clearly found that they were in fact agents, selling the property of another.
>
> ....

Where an agent purports to make a contract for a principal, disclosing the fact that he is acting as an agent, but not naming his principal, the rule is that, unless a contrary intention appears, he makes himself personally liable on the authorised contract. It is presumed that the other party is unwilling to contract solely with an unknown man. He is willing to contract with an unknown man, and does so, but only if the agent will make himself personally liable, if called on, to perform the contract which he arranges for his principal. The first question here is whether this general rule applies in this case, or the circumstances are such as to rebut the presumption. Where the agency is to buy goods, whether ascertained or not, so that the liability imposed on the principal by the contract is a liability to accept and pay, there is nothing in the circumstances inconsistent with a presumption that the seller requires that the agent shall make himself personally liable to take and pay for the goods in accordance with the contract of sale, if called on, or with a presumption that the agent agrees to do so. So, again, if the agency is to sell unascertained goods, there is nothing inconsistent with a presumption that the buyer stipulates, and the agent agrees, that the agent will himself deliver goods in accordance with the contract of sale, if called on. If he has not the necessary goods he can procure them and make delivery. But where the agency, as in this case, is an agency for the sale of a specific chattel, which the buyer knows is not the property of the agent, it seems to me impossible to presume that the buyer, who contracts to buy that Chattel from the principal would stipulate that the agent, if called on, shall himself sell the chattel to the buyer and shall himself warrant his own title to a thing which the buyer knows is not his. It is impossible to presume that the agent would agree to undertake such a liability. The only way in which he could discharge it would be by acquiring the chattel from his principal, a thing he has no right to demand and a thing inconsistent with the contract he has been

[7](1925) 2 KB 410

instructed to make, by which the principal sells that chattel to the buyer. For this reason I think that the presumption above mentioned is rebutted in the case of a sale of a specific chattel by an unknown agent for an undisclosed principal. This applies to an auctioneer as to any other selling agent. The auctioneer has a special property in the chattel delivered to him for sale, he has a lien on it and on the price of it, he has rights against the buyer, and liabilities to him, which do not accrue to other selling agents. These rights and liabilities do out arise from the contract of sale, which binds only the buyer and the principal. They arise from the contract which the auctioneer makes on his own account with the buyer ... But whatever its terms may be, the contract is

entirely independent of the contract of sale. To that contract the auctioneer who sells a specific chattel as an agent is, in my opinion, no party. He has no right to enforce it and is not bound by it".

10. The learned Judge notes a fact that the auctioneer may sue for the price. With regard to this, he says as follows :

> "The auctioneer sues for the price by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer, that the price shall be paid into his hand, and not by virtue of the contract of sale. He is not the seller, nor had he undertaken to discharge the liabilities of a seller except so far as those liabilities may be included in his own contract with the buyer ..... It would certainly be going too far to say that an auctioneer selling without disclosing the name of his principal, makes himself a contracting party in the same way and to the same extent that another agent acting for an undisclosed principal does, The auctioneer sells, not as an owner having a right to sell by virtue of his own right of property, but as an auctioneer empowered and entrusted by his employer to sell".

11. I have quoted the judgment in this case in extenso inasmuch as it contains all the principles which are applicable to this case, and which are also in conformity with the Indian Sale of Goods Act, and it is apparent from the text books that the case of 1925-2 KB 410 (supra) is still good law. Mr. Das has argued that one of the basic reasons upon which Bose, J. relied in Staynor's case, 55 Cal WN 583 (supra) is that until the sale has been effected, the auctioneer had dominion over the property. Mr. Das has pointed out that the auctioneer has certainly certain rights, but he cannot be said to have dominion over the property. It is the vendor, that is to say the owner, who has dominion, because he can introduce any condition he likes and can at any time before the strike of the hammer withdraw the goods from the sale. This position seems to be well established. (See *Menser v. Back, (1848) 67 ER 1239 at p. 1241 and Taplin v. Florence*[8] at p. 301). The rights of an auctioneer are severely limited, for example, if the owner has fixed a reserve price, he can not sell it at a lesser price. (See *McMannus v. Fortescue*[9]*,*). I now come to the Indian Sale of Goods Act, 1930. Under Section 2 a "seller" has been defined to mean a person who sells or agrees to sell goods, and a "buyer" means a person who buys or agrees to buy goods. The essence of a sale is the transfer of the property in a thing from one person to another for a price. A sale therefore, necessarily involves the existence of two persons, a seller and a buyer. This is indicated in Section 4(1) which lays down that the 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. The expression

[8](1851) 138 ER 294

[9]1907-2 KB 1

> "seller" has been given an extended meaning for purposes of chapter V of the Sale of Goods Act and Sub-Section (2) of Section 45 states that the term "seller" in the said chapter includes any person who is in the position of a seller. The particular section however which deals with auction sales is Section 64, which is contained in Chapter VII. This section lays down the procedure by which auction sales are to be conducted and the legal incidences thereof. For example, it lays down that a sale is completed when the

auctioneer announces its completion by the strike of his hammer or any other customary manner. There are various rights conferred and liabilities imposed upon the parties to the sale. For example, it has been laid down that the "seller" may only bid at the sale where such a right is expressly reserved but not otherwise. It will be observed that the expression used is the "seller", which means the owner, and where the auctioneer sells goods not belonging to himself, he is naturally not a seller. The following note appears in Pollock and Mulla's book on the Indian Sale of Goods Act, 2nd Edn. page 284 :

"There is therefore a contract between the auctioneer and the buyer, but probably it is not a contract of sale in the full sense of the term, but a contract made with the auctioneer on his own account with the buyer. Under it the auctioneer incurs certain liabilities but not the full liabilities of a seller; though the precise extent of the liabilities must depend on the facts of the case".

12. Although the learned authors have not been very specific in this behalf, at least they have expressed doubts about the auctioneer being a party to the contract of sale. In my opinion, there is no doubt whatever in the case of a sale by auction of specific chattels or goods for an unknown principal. Such a situation is completely covered by the principle enunciated in 1925-2 KB 410 (supra) which has been cited as good law by the learned authors themselves (page 284). Looking at the relevant position in the Indian Sale of Goods Act, 1930 it is quite clear that the position of an auctioneer is practically the same under the Indian law as that obtaining in England. In a case such as we are dealing with, the auctioneer is not the seller and is himself not a party to the sale. The owner is the seller and the procedure of sale is the transfer of his rights in the goods to the buyer for a price, effected through the machinery of an auction. As has been indicated above, a sale by auction is a peculiar kind of sale, having special incidences. The operation by which the property is transferred from the owner to the purchaser certainly constitutes a sale of goods and has been dealt with in the Indian Sale of Goods Act, under Section 64. But the point to be considered is as to whether in the facts and circumstances of this case, an auctioneer can be said to be the 'seller', and as to whether he is a party to the contract of sale between the owner and the purchaser. As we have seen above, the present case is a case of a sale of specific chattels belonging to an unknown principal by an auctioneer whose position in the matter is known to the buyer. In such a case, the law is that the auctioneer is not the seller and he is not even a party to the contract of sale between the owner and the purchaser. He may have his own contract with the buyer, and he has his own rights and liabilities as an auctioneer. Strange as it may seem, he can, in enforcement of his lien, even file a suit for the price of goods sold at an auction. But even so, this is only in the enforcement of his own lien on the goods as an auctioneer, for his remuneration, and not as a seller. Thus, in such an operation, the auctioneer is not the seller of the goods and cannot be made liable for sales tax and to that extent the amendment in the said Act including the word "auctioneer" within the meaning of the definition of the word "dealer" is ultra vires.

13. The learned Advocate General appearing for the respondents commenced his argument by saying that I am bound by the judgment of Bose, J. in Staynor's case, 55 Cal WN 583 (supra). I have already dealt with this point and it is unnecessary to repeat the same. The next point that has been argued by him is that even assuming that the auctioneer is an agent for the principal seller, namely the owner, he is nevertheless to be considered in the position of a seller and has personal liability to the buyer. A number of decisions have been cited to show that a commission agent is

personally liable to a buyer and he has argued that the position of a commission agent and that of the auctioneer is the same. The first case cited is a Full Bench decision of the Madras High Court, *Radhakrishna Rao v. Province of Madras*[10], This was a case under the Madras General Sales Tax Act (IX of 1939). In that case reference has been made to a judgment of Vivian Bose, J. (as he then was) in *Kalyanji Kumarji v. Tirkaram Sheolal*[11], In the latter case, Bose, J., described the position of a commission agent in the following manner :

> "We also know that commission agents in general deal with a large number of what I may call principals scattered throughout India and sometimes abroad. It can hardly be supposed that the customers who come to their shops, for purchasing a given quantity of cotton seed or grain look beyond them to these other persons resident elsewhere or deal with them otherwise than as principals in their own behalf. A customer in such circumstances can scarcely be expected to ask or know or even care who is the owner of each handful of grain he purchases; in fact, it may well be that the commission agents themselves do not know once they have brought the grain from their godowns and mixed it with it with other stock which is being retailed in their shops; nor would the principals care who these purchasers are. Their contracts are with the commission agents and ordinarily no privity is established between the principals and the ultimate purchasers. In general there is nothing to prevent these commission agents from purchasing the commodities themselves at the price named by their principals and then selling thereafter at a profit to themselves. This profit they would be entitled to retain. A mere agent could not do that. Looking then to the general dealing between the parties in this case, looking to the fact that these conditions are the usual conditions upon which commission agents operate and to the fact that the defendants were themselves grain and seed merchants actually running a shop, I am clear that the understanding between the parties was that the defendants were to sell the grain and cotton seed in their own right and be responsible to the plaintiffs as debtors for the sale proceeds less their agency charges".

14. It was held by the Full Bench that the position of a commission agent is different from that of an ordinary broker and a commission agent doing the kind of business mentioned above, is a 'dealer' as defined in Section 2(b) of the Madras Sales Tax Act. The same view has been expressed by the Andhra High Court in *P. Samba Murthi v. State of Andhra*[13],

15. In my opinion, it is not at all a good argument to say that the position of an auctioneer is the same as that of a commission agent and therefore, the position of the two should be equated. Mr. Das has pointed out the following points of difference. A commission agent

[10] AIR 1952 Mad 718 [12](1956) 7 STC 652

[11] AIR 1938 Nag 254

is generally authorized to sell in his own name. Indeed, as pointed out by Vivian Bose, J. (supra), the purchaser dealing with a commission agent as the seller does not care who the principals are. That however, is not the position in the case of an auctioneer who does not sell in his own name, but it is well understood that he is selling as an auctioneer, for an unknown principal. Then again, a commission agent is not a fiduciary agent of the owner. He receives money on his own account and mixes it with his own money, while the auctioneer cannot do so. A commission agent is

entitled to buy the goods himself and to re-sell the same making a profit. This the auctioneer cannot do. There is, therefore, a number of distinctions between a commission agent and an auctioneer and the legal incidences cannot be equated. This appears clear from a Supreme Court decision, *Mahadayal Premachandra v. Commercial Tax Officer Calcutta*[13], In that case, the appellants were commission agents in West Bengal for certain mills in Kanpur. Orders were placed with the mills, either through the appellants or directly by the customers. The goods were supplied to the customers directly, and payments were received by the mills through Bank. The appellants, except for canvassing business for the mills, did not take any part in the said transactions. The mills however, maintained a personal account of the appellants in which their commissions were credited. The appellants were assessed to sales tax under the provisions of the Bengal Finance Sales Tax Act, 1941. It was held that even though the appellants were the commission agents of the mills, they had no authority to sell goods belonging to principals and as such Explanation II to Section 2(c) of the Act did not apply. This observation is of great importance, because it would be remembered that under the 1950 Amendment, the definition of a "dealer" was extended and a 'commission agent' was expressly included in the meaning of the term 'dealer' in the same manner as that of an auctioneer. Even so, the Supreme Court decided that on the facts of the case, the appellants who were the commission agents, could not be brought within the meaning of the expression "dealer" under Section 2(c) of the Act.

16. The result is that it must be held that where an auctioneer is selling specific chattel and/or goods for an unknown or a disclosed principal and where the buyer knows that the auctioneer is not the owner, the auctioneer cannot be considered as the seller and there is no contract of sale between him and the buyer. In such, a case, the auctioneer is not even a party to the sale. Therefore, in such transactions the auctioneer cannot be made liable to payment of sales tax and the extension of the definition of the word "dealer" in Explanation 2 of Section 2(c) of the Indian (Bengal ?) Finance Sales Tax Act, so as to include an auctioneer is ultra vires and must be declared as void. In this view of the matter, it is not necessary to deal with the other points raised.

17. This rule is accordingly made absolute and there will be issued a writ in the nature of certiorari quashing the assessment orders mentioned in paragraph 4 of the petition dated 20-10-1954 and 19-11-1954 as also the certificate mentioned in paragraph 6 of the petition and all proceedings had by reason thereof, including the order of the Certificate Officer dated 28-6-1955 and the orders of the Additional Collector in Appeals Nos. 93 and 94 of 1955 mentioned in paragraph 9 of the petition, and the orders in revision of the Commissioner, Presidency Division, mentioned in paragraph 10 of the petition are quashed and/or set aside. The respondents are restrained by a writ in the nature of mandamus from giving effect to the same. There will be no order as to costs.

[13](1959) SCR 551

18. I make it clear however that this order will not prevent the respondents from making a proper assessment of sales tax for the relevant period, should it transpire that any goods sold by auction belonged to the auctioneers themselves. Writ in nature of certiorari issued.