

# The Indian Law Reports

CIVIL MISCELLANEOUS

*Before Gurdev Singh, J.*

M/S AMAR NATH KHURANA AND SONS,—*Petitioner*

*versus*

THE APPELLATE ASSISTANT COMMISSIONER OF INCOME-TAX,  
AMRITSAR AND ANOTHER,—*Respondent*

**Civil Writ No. 149 of 1967**

January 9, 1968

*Income-tax Act (XI of 1922)—S. 45—Exercise of discretion under—Whether confined to pendency of appeals under section 30—Such discretion—Whether exercisable pending appeals before Income-tax Appellate Tribunal—Discretionary orders—When to be interfered with by High Court.*

*Held*, that it is only where an appeal has been presented under section 30 of the Income-tax Act, 1922 that the Income-tax Officer has the discretion under section 45 not to treat an assessee as being in default and that too for so long as such appeal remains undisposed of. The language of the concluding portion of section 45 is unambiguous. The words "when an assessee has presented an appeal under section 30" clearly refer to an appeal against the order of the Income-tax Officer to the Appellate Assistant Commissioner, Income-tax. This discretion cannot be exercised in cases where the assessee has gone up in further appeal to the Income-tax Tribunal under section 45. It is only the Income-tax Officer who is the authority to treat the assessee as not being in default and that power can be exercised by him only for the period of the pendency of an appeal under section 30 of the Act and not under any other provision of law, as is evident from the use of expression "such appeal". (Para 12)

*Held*, that even in the case of discretionary orders the High Court has ample authority to interfere, yet such interference must be confined to those cases only where the Court comes to the conclusion that there has been either no exercise of discretion or that the discretion has been exercised on extraneous considerations, not on merits but capriciously, arbitrarily or *mala fide*. (Para 14)

*Petition under Article 226 of the Constitution of India, praying that a writ of certiorari, mandamus, prohibition or any other appropriate writ, order or direction be issued quashing the impugned order of respondent No. 1, dated 21st September, 1966, and a further direction be issued to respondent No. 2, restraining him from making the alleged recovery of the demand created on the petitioner's firm to the tune of Rs. 28,000.*

GANGA PARSHAD JAIN, WITH GIAN CHAND GARG, ADVOCATE, for the petitioner

D. N. AWASTHY, ADVOCATE, for the Respondents.

## JUDGMENT

GURDEV SINGH, J.—The petitioner, Messrs Amar Nath Khurana and Sons, which is a partnership concern, was assessed to Income-tax as an unregistered firm on 31st March, 1962, for the assessment year 1957-58 and was required to pay Rs. 88,543 as Income-tax on or before 30th April, 1962. On appeal, the Appellate Assistant Commissioner of Income-tax remanded the case to the Income-tax Officer, who was to submit his remand report on 30th of April, 1962, whereby the liability of the petitioner-firm was reduced by approximately Rs. 9,000 by which the total assessable income of the firm was reduced from Rs. 1,48,145 to Rs. 93,182. In pursuance of this report the Appellate Assistant Commissioner of Income-tax reduced the tax payable by the firm by Rs. 9,000.

(2) It may be mentioned here that during the pendency of the appellate proceedings referred to above, the petitioner-firm had appealed against the order made by the Income-tax Officer under section 26-A of the Income-tax Act, 1922, (hereinafter referred to as the 'Act') whereby he refused to treat the firm as a registered firm and directed its assessment as unregistered firm. Though the Appellate Assistant Commissioner had upheld this order of the Income-tax Officer, the Income-tax Appellate Tribunal, by its order, dated 24th of September, 1963, set it aside and directed registration of the petitioner-firm. Accordingly, on 21st September, 1966, the petitioner-firm was re-assessed as a registered firm and the Income-tax Officer passed a fresh assessment order, under section 23(5)(a) of the Act and found the following amounts due and payable by the various partners of the firm :—

	Rs.
(1) Brij Lal	... 7,303.32
(2) Raghunath Dass	... 7,146.54
(3) Amar Nath	... 2,609.07
(4) Madan Lal	... 2,579.94
(5) Harbans Lal	... 7,758.76

Against the order of the Income-tax Officer making assessment under section 23(5) of the Act, the firm instituted an appeal before the Appellate Assistant Commissioner of Income-tax on the 10th of April, 1962. As noticed earlier, that was partly accepted on the 21st

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of September, 1966,—*vide* order marked Annexure 'C', when the total income of the firm was reduced by Rs. 9,000. Against this appellate order, the petitioner-firm further appealed to the Income-tax Appellate Tribunal. Without waiting for the decision of that appeal, which is still pending, on 28th of January, 1967, the petitioner-firm came to this Court under Articles 226 and 227 of the Constitution for quashing the appellate order of the Appellate Assistant Commissioner of Income-tax, dated 21st September, 1966 (Annexure 'C'), and praying that the same be quashed and direction be issued to the Income-tax Officer (Respondent No. 2) not to recover Rs. 28,000 as Income-tax, to which the petitioner-firm had been assessed as registered partnership.

(3) It appears that after the impugned order of assessment, the petitioner-firm had approached the Income-tax Officer, Amritsar (Respondent No. 2), for not treating it as defaulter and staying the recovery of the Income-tax from it and its partners under section 45 of the Act. The respondent Income-tax Officer, however, on 24th May, 1962, allowed payment of the tax assessed in five monthly instalments. The petitioner-firm, however, did not avail of this concession and on 1st June, 1962, moved the Commissioner of Income-tax. In exercise of his revisional jurisdiction, the Commissioner of Income-tax directed the stay of the recovery of the tax assessed on the condition that the petitioner-firm furnished adequate security for its payment. The security offered by the petitioner in pursuance of this order was found not to be satisfactory and on 11th of October, 1962, the Income-tax Officer called upon the petitioner to pay Rs. 4,542.62 Paise on or before 15th October, 1962 and the balance by monthly instalments of Rs. 3,000 each payable on 15th of every succeeding month. The petitioner-firm again moved the Commissioner of Income-tax on 22nd October, 1962 and the Inspecting Assistant Commissioner on 15th November, 1962, whereupon after due consideration of the matter the petitioner was allowed payment of the tax assessed by monthly instalments of Rs. 3,000 each, commencing on 15th of January, 1963. The petitioner even then committed default but all the same the authorities did not proceed with the recovery and the proceedings remained stayed during the pendency of the appeal, which the petitioner-firm had preferred before the Appellate Assistant Commissioner and which was decided on 21st September, 1966.

(4) After the decision of this appeal by the Appellate Assistant Commissioner, the petitioner-firm again wanted the stay of the recovery proceedings and for that purpose approached the respondent Income-tax Officer, with its application (marked 'D'), dated 21st December, 1966, invoking his jurisdiction under section 220(6) of the new Income-tax Act, 1961. This application was, however, turned down and the Income-tax Officer, by his order, dated 29th December, 1966 (Annexure 'E'), directed the firm to make the payment of the tax due "after deducting share in the refund due to the firm" for the assessment year in dispute. The petitioner-firm was further informed that total refund of Rs. 9,284.60 Paise had become due to them. Aggrieved by this refusal of the Income-tax Officer to stay the recovery proceedings, the petitioner-firm amended their writ petition and prayed that this order of the Income-tax Officer be also quashed and he be prohibited from recovering the tax due till their appeal, which was pending before the Income-tax Appellate Tribunal, was disposed of.

(5) At the outset of the hearing today, Mr. Ganga Parshad has stated that since his appeal against the assessment order is pending before the Appellate Tribunal of Income-tax, he does not wish to have the validity of the appellate order of the Appellate Assistant Commissioner, dated 21st September, 1966, adjudicated upon by this Court and he merely wants that the order of the Income-tax Officer, dated 29th December, 1966, refusing to stay the recovery of the tax due from him in exercise of his jurisdiction under section 45 of the Act, be quashed, with the direction that no recovery of the tax be made from the petitioners till their appeal is disposed of by the Income-tax Appellate Tribunal. In attacking the order of the Income-tax Officer refusing to afford relief to the petitioner under section 45 of the Act, Mr. Ganga Parshad has urged that material questions relating to the liability of the petitioner to the tax demanded had been raised before the Income-tax Appellate Tribunal and await its decision and in these circumstances it is not only expedient but just and proper that the recovery of the tax should be stayed and the petitioner-firm be not treated as defaulter. He argues that the Income-tax Officer, who is vested with discretion not to treat the petitioner as defaulter under section 45 of the Act, is duty bound to exercise his discretion in favour of the petitioner as has been well-settled by a catena of judicial decisions of various High Courts of this country. In this connection, he has cited *Ladhuram Taparia v. B. K.*

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*Bagchi* (1), *Vetcha Sreeramamurthy v. The Income-tax Officer, Vizianagaram and another* (2), *Aluminium Corporation of India Ltd. v. C. Balakrishnan and others* (3), *Yusuf Jan Sahib v. Additional Income-tax Officer, Quilon* (4), and *Messrs Behari Lal Baldeo Prasad v. Commissioner, Jhansi Division, Jhansi and others* (5).

(6) Referring to *Ladhuram Taparia's case*, which according to Mr. Ganga Parshad, is the basic authority, reliance is placed upon the following observations of Bose, J. :—

“In the circumstances it appears to me that there is a duty on the respondent to refrain from enforcing payment of the tax under the notice of demand and to grant extension of time and stay their hands till the appeal is disposed of by the appellate authority.

It was contended by the learned Advocate-General that the words in section 45 are not merely “may” but “may in his discretion” and, therefore, such a discretionary power cannot be under any circumstances converted into a duty. I do not think that there is any force in this contention. No authority in support of this contention has been cited by the Advocate-General. On the other hand, words such as “may, if they think fit” have been held to have a compulsory force.”

(7) This Single Bench decision of Bose J., came up for consideration in several cases before various High Courts. In the Calcutta High Court itself, a Division Bench consisting of Das Gupta and Guha, JJ., held in *Kashiram Agarwalla v. Collector of 24 Parganas and others* (6), that they did not find it possible to agree with the observations of Bose, J. After introducing observations of Bose, J., which have been quoted by me above from 20 ITR 51, their Lordships referred to the fact that an appeal against that decision of Bose, J.,

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- (1) 20 I.T.R. 51.
  - (2) 30 I.T.R. 252.
  - (3) 37 I.T.R. 267.
  - (4) 42 I.T.R. 637.
  - (5) A.I.R. 1966 All. 176.
  - (6) 33 I.T.R. 800.

was taken to a larger Bench, wherein Harries, C.J., delivering the judgment of the appeal observed as under :—

“Once an appeal was filed, however, it would be for the Income-tax Officer then to consider whether in the particular circumstances it would be just and proper to treat them as defaulters. If, for example, the questions involved in the appeal were difficult and the prospects of success in the appeal were bright, it would be a very bold Income-tax Officer who could hold that the assesseees were still defaulters. The matter is in his discretion having regard to the circumstances of the case.”

(8) Referring to these observations, Dass Gupta, J., who delivered the judgment of the Division Bench in *Kashiram Agarwalla v. Collector of 24-Parganas and others* (6) (*supra*) said :

“with great respect I am unable to agree with the view taken by Mr. Justice Bose, and respectfully agree with the observations of Harries, C.J., that whether or not an assessee would be considered to be in default after an appeal is filed against the assessment is a matter entirely in the discretion of the Income-tax Officer, who has, however, to exercise his discretion after due regard to the circumstances of the case. If in a particular case, the question of exercise of discretion has not been considered properly by the Income-tax Officer that might be a good ground for issuing a writ directing him to treat the assessee to be not in default. But that question cannot be considered by us in the present rule. The position is that the Income-tax Officer has not in exercise of his discretion treated the assessee to be not in default. He is not, however, bound to do so and so the assessee must be held for the purpose of the present case to be in default.”

(9) The decision of Bose, J., in 20 ITR 51, also came up for consideration before a Division Bench of this Court in *The Lord Krishna Sugar Mills, Ltd. v. Income-tax Officer, Ambala, and others* (7), and was not approved. J. L. Kapur, J. (as he then was), who wrote the leading judgment in that case, after referring to the provisions of

(7) 22 I.T.R. 410.

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section 45 of the Act and noticing the observations of Bose, J., in *Ladhuram Taparia's case* (1), and holding that it was not possible to agree with Bose, J., observed as follows :—

“Under section 45 whatever discretion there is of the Income-tax Officer and he having exercised it in a particular manner which in my opinion is neither *mala fide*, nor capricious, nor done for collateral purposes, nor has he taken matters into consideration which are extraneous to the issue, it is not open to this Court to interfere in its supervisory jurisdiction.....With very great respect I am unable to agree with the rule laid down by the learned Judge because when exercising his discretion under section 45 of the Income-tax Act, the Income-tax Officer has not to look to the correctness of his own order of assessment. There are other considerations which have to be seen at the time of declaring an assessee to be a defaulter or otherwise.”

Soni, J., the other learned member of the Bench while agreeing with Kapur, J., said :—

“It is a grave thing to interfere in the orderly administration of justice by the ordinary or special Tribunals constituted by the Legislature. If these Tribunals or the functionaries appointed under the Special Acts do not perform their duties they may be compelled by an appropriate writ to do so. Where, however, they are acting within the limits of the powers assigned to them by the Legislature and have exercised their discretion, this Court will not sit in judgment over them and will not ordinarily interfere unless the discretion has been exercised so capriciously or in such an outrageous manner as to attract the extraordinary jurisdiction of this Court.”

(10) No other reported or unreported decision of this Court has been brought to my notice and Mr. Ganga Parshad has not even suggested that a view contrary to that expressed by a Division Bench of this Court in *The Lord Krishna Sugar Mills, Ltd. v. Income-tax Officer, Ambala* (7), has ever been taken by this Court. Whatever the view of the other High Courts may be, sitting in Single Bench I am bound to follow the rule laid down by the Division Bench of

this Court. In fact, if I may say so with respect, the view taken by this Court is fully borne out by the language of the relevant provision, Section 45 of the Act, and is in consonance with the policy of the Legislature enacting the Income-tax Act.

(11) The first part of section 45 of the Act on which relief was sought by the petitioner from the Income-tax Officer for staying the recovery of the tax assessed runs thus :—

“Any amount specified as payable in a notice of demand under sub-section (3) of section 23-A or under section 29 or an order under section 31 or section 33, shall be paid within time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that when an assessee has presented an appeal under section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as *such appeal* is undisposed of.....”

(12) Quite obviously, it is only where an appeal has been presented under section 30 of the Act that the Income-tax Officer has the discretion under section 45 not to treat an assessee as being in default and that too for so long as such appeal remains undisposed of. The language of the concluding portion of the relevant section 45, which has been reproduced above is unambiguous. The words “when an assessee has presented an appeal under section 30” clearly refer to an appeal against the order of the Income-tax Officer to the Appellate Assistant Commissioner, Income-tax. The Petitioner’s counsel, Mr. Ganga Parshad, has, however, urged that there is no reason to limit the power of the Income-tax Officer to stay the recovery only up till the time the appeal before the Appellate Assistant Commissioner remains pending under section 30 of the Act, and such power can be exercised by him, and in fact in some cases it may be necessary to exercise it, even in those cases where the assessee has gone up in further appeal to the Income-tax Tribunal, so as to avoid hardship and injustice to him. However, desirable it may be to confer such power to stay recovery of the disputed tax upon the Income-tax Officer or some other authority, the fact remains that under section 45, it is only the Income-tax Officer who is the authority to treat the assessee as not being in



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default and that power can be exercised by him only for the period of the pendency of an appeal under section 30 of the Act and not under any other provision of law, as is evident from the use of expression "such appeal". It is a well-settled rule of interpretation that where the language is clear, the Courts have no option but to give effect to it and irrespective of the considerations of hardship, justice or equity, they have to enforce the relevant provisions. The scope of section 45 cannot be extended, the language being unambiguous, leaving no room for doubt with regard to the intention of the Legislature.

(13) On this short ground the impugned order of the Income-tax Officer refusing to afford relief to the petitioner under section 45 during the pendency of the petitioner's appeal before the Appellate Tribunal must be upheld. Apart from this, as has been observed earlier and held by this Court in *The Lord Krishna Sugar Mills Ltd. case* (7) (*supra*), the question whether the assessee should or should not be treated in default is one within the discretion of the Income-tax Officer. It is true that when a statutory discretion vests in an authority to make a certain order and a prayer is made invoking this discretionary power, the authority or the officer concerned has to apply his mind to the facts of the case and to see how far the case merits the exercise of such discretionary power. In that sense it can well be said that the Officer or the authority concerned is under a duty to act in accordance with that provision which confers discretion on him, but, in my opinion, it is a fallacy to say that the authority is under a duty to exercise its discretion in a particular way, especially in matters of taxation, where the assessee complains of undue hardship. As has been observed in *The Lord Krishna Sugar Mills' case*, the discretion has to be exercised considering all the circumstances of the case, in which the authority is called upon to exercise its jurisdiction under section 45 of the Act. Those circumstances can never be enumerated, nor is it expedient to enumerate the same, but the nature of the circumstances, in my opinion, if I may say so with respect, has been correctly indicated by the Division Bench of the Madras High Court in *Vetcha Sreeramamurthy v. The Income-tax Officer, Vizianagaram and another* (2). Subba Rao, C.J., after referring to various Indian authorities bearing on the point said :

"To illustrate, if an assessee pays the admitted amounts and files an appeal raising substantial questions and gives

security for the disputed amount, it would be a capricious exercise of discretion if the Income-tax Officer refuses to treat him as not a defaulter. If so, as in the Calcutta case, appeals were filed raising a substantial and serious question and if protective assessments were made against the other firms and if large amounts were asked to be paid in a ridiculously brief period with the certain result of ruining the business, it may also be an arbitrary exercise of power. If an assessee pays the admitted amounts and files an appeal raising substantial questions and gives reasonable security for the payment of the balance, but the Income-tax Officer refuses to stay, on the ground the financial condition of the State requires recovery of arrears, it would be an order taking into consideration extraneous and irrelevant circumstances. The aforesaid cases are only illustrative and there may be many other cases where the Income-tax Officer would not be exercising his discretion honestly and fairly. It is not possible to exhaust the circumstances under which the Income-tax Officer should or should not give stay. It is in his discretion to give stay, but, if he exercises his discretion honestly and fairly without caprice or arbitrariness, a Court would not and should not interfere with his discretion."

In this authority, Viswanatha Sastri, J., the other learned member of the Bench dealing with the scope of section 45, observed at page 268 of the report as follows :—

"Section 45 of the Income-tax Act does not give an absolute right to an assessee who has preferred an appeal to get an order from the Income-tax Officer treating him as not in default pending the appeal, independently of the judgment or discretion of the Officer. At the same time, cases might easily be conceived and do occur, where the assessee would suffer financial ruin and irreparable injury if an order for stay of collection of the demand is not made..... If the circumstances exist under which it was contemplated that the power of granting a stay should be exercised, the Income-tax Officer cannot decline to exercise that power on the ground that it was left to his discretion. In such a case, the Legislature is presumed to have intended

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not to grant an absolute, uncontrolled or arbitrary discretion to the Officer but to impose upon him the duty of considering the facts and circumstances of the particular case and then coming to an honest judgment as to whether the case calls for the exercise of that power. The public officer is, of course, not a Judge exercising judicial functions and duties but he is to bear a judicial mind—that is a mind to determine what is fair and just in respect of the matter under consideration—when he is required to exercise his powers by those for whose protection the power is conferred upon him. He must act in a judicial spirit and not capriciously or arbitrarily.”

(14) From the history of the case in hand, which has been set out above in the earlier part of this judgment, it is amply clear that far from insisting upon the enforcement of the order and payment of tax by the petitioner-firm, the Income-tax Officer and the authorities had from time to time given concessions to the petitioner-firm for payment of the tax, to which it had been assessed. Each time, the petitioner-firm availed of the concession, withheld the payment of the amount and refused to pay the instalments. Even if the contention of the petitioner's counsel that the Income-tax Officer had the jurisdiction to make an order in his favour under section 45 is accepted for the sake of argument, I do not find that in the circumstances of the present case in refusing to make that order in the petitioner's favour, the Income-tax Officer (Respondent No. 2) has exercised his discretion *mala fide*, capriciously, arbitrarily or contrary to judicial principles.

It is no doubt true, as is now well-settled, that even in the case of discretionary orders this Court has ample authority to interfere, yet such interference must be confined to those cases only where the Court comes to the conclusion that there has been either no exercise of discretion or that the discretion has been exercised on extraneous considerations, not on merits but capriciously, arbitrarily or *mala fide*.

Reference in this connection may be made to the Division Bench decision of the Madras High Court in *Vetcha Sreeramamurthy's case* (2) *supra*. Subba Rao, C.J., while dealing with this matter of interference by High Court with the discretionary orders observed as follows at page 257 of the report :—

“The discretionary statutory power conferred upon an authority for the public good is coupled with a duty to

perform it under relevant circumstances. The fact that the exercise of the power is left to the discretion of the authorized person does not exonerate him from discharging his duty. If the discretionary power so conferred is exercised arbitrarily, capriciously or unreasonably or by taking into consideration extraneous and irrelevant considerations, in the eye of law the authority concerned must be deemed not to have exercised the discretion at all, that is, he has not discharged his duty. If the Court on the facts placed before it comes to a definite conclusion that a particular authority has not exercised his duty for one or other of the aforesaid reasons, it will compel the authority to discharge his duty, or, to put it differently, to exercise his discretion honestly and objectively."

(15) Viewing the circumstances of the case in hand, in the light of these observations, I am of the opinion that even if the Income-tax Officer had the jurisdiction to make an order in the petitioner's favour under section 45, the discretion that he has exercised in not making that order in petitioner's favour does not call for interference by this Court. The petition is accordingly dismissed with costs.

K. S.

CIVIL MISCELLANEOUS

*Before Prem Chand Pandit, J.*

DAULAT RAM,—*Petitioner*

*versus*

THAKAR SINGH AND OTHERS,—*Respondents*

**Civil Writ No. 1771 of 1967**

March 12, 1968

*Punjab Co-operative Societies Act, 1954 (XIV of 1955)—S. 16—Punjab Co-operative Societies Rules (1956)—Rules 34 and 43—Punjab Co-operative Societies Rules (1963)—Rule 26(6)—Registrar, Co-operative Societies, Punjab—Whether has the power to frame election rules—Model by law not adopted by the society—Framing of election rules under—Whether valid.*