ANDHRA PRADESH HIGH COURT

Vetcha Sreeramamurthy

Vs.

Income-tax Officer

Writ Appeal No. 84 of 1954, in W.P. No. 388 of 1954

(Subba Rao, C.J. and Viswanatha Sastri, J.)

21.05.1954. 03.04.1956

JUDGMENT

Subba Rao, C.J.

1. This is an appeal against the order of Ramaswami, J., dismissing the petition filed by the appellant under Article 226 of the Constitution of India for quashing (i) the order of the Income-tax Officer, Vizianagram, declaring the appellant a defaulter and (ii) the sale notice dated 24-03-1954 issued in pursuance thereof by the 2nd respondent, the Special Deputy Tahsildar, Vijayawada, attaching and bringing to sale the properties mentioned in the said sale notice for realizing the tax assessed on the appellant.

2. The appellant carried on business in Niger seeds, groundnut, groundnut kernel and jute on his own account and for commission at Vizianagram. He has also income from other property. He was assessed to income-tax for three years. For the year 1947-48, he was assessed on 14-03-1952 to a tax of Rs. 1,41,039-11-0 payable on or before the 28th of March 1952. On 22-01-1953, the Income-tax Officer forwarded to the Collector a certificate specifying the amount of arrears due from the assessee.
For the assessment year 1951-52, he was assessed on 29-2-1952 to a tax of Rs. 40,230-7-0 payable on or before 25th March 1952. The relevant certificate was issued on 22-6-1953. For the assessment year 1945-46, he was assessed on 7-12-1950 to a tax of Rs. 20,113-13-0 payable on or before 31-1-1951. The relevant certificate was issued on 9-5-1951. The appellant preferred appeals in regard to the first two assessments but no appeal was filed in respect of the third. The total tax payable by him amounted to Rs. 1,70,083-15-0. Out of that amount, a sum of Rs. 1,900/-was realized. In regard to the 1945-46 assessment, another sum of Rs. 8,000/- was levied as penalty under Section 46 (2) on two occasions. Several adjournments were granted to the appellant for the payment of the tax but he did not pay even the admitted amount and, therefore, the certificates were issued. Proceedings were taken under the Revenue Recovery Act and the sale of the property was posted to 24-5-1954, 25-5-1954 and 26-5-1954. The Petitions filed for quashing the aforesaid proceedings and for stay were dismissed by Ramaswami, J. The assessee filed the above appeal on 26-5-1954 and got an interim stay of the sale of the properties fixed for the 15th, 16th and 17th of September 1954.

3. The assessee alleges that he was questioning the validity of the assessment for 1951-52 for the reason that the assessment was made on the basis of a joint family when to the knowledge of the Income-tax Officer there was a division in the family. He attacked the assessment for the year 1947-48 on the ground that the 1st respondent had no right to reject registered deed accepted and acted upon by him in the matter of the assessment of another firm and thereby collected tax twice over from him and the other firm. The Income-tax Officer filed a counter stating that neither during nor after the completion of the assessment for the year 1951-52 did the assessee or any one of the several members of the family file any application under Section 25-A claiming that a partition had taken place among the members of the family and, therefore, they were treated as Hindu undivided family for the purpose of the Act. He also denies that there was a partition in the family. As regards the objection that the income from the business carried on by another firm was included in his income though, as a matter of fact, that firm was separately assessed, the Income-tax Officer pointed out that the said firm was assessed to tax only by way of abundant caution and that the said firm was asked not to pay the tax till the assessee's appeal was disposed of. The Income-tax Officer also alleges that, though several adjournments were granted to the assessee for the payment of tax, he did not care to pay even the admitted tax for the assessment year 1945-46, though four years have elapsed since the completion of the assessment. It may be mentioned that, as all the material papers are not placed before us the above figures are only approximate and they are given only for the purpose of this writ. Ramaswamy J., dismissed the writ petition as, in his view, there were no grounds for issuing the same. Hence the appeal.

4. Learned counsel for the appellant relies upon the provisions of Section 45 of the Income-tax and contends that, under that section, a duty is cast upon the Income-tax Officer to treat an assessee not as a defaulter under certain circumstances and that, in the present case, he did not discharge his duty, though there were compelling reasons for doing so. Alternatively, he would say that the Income-tax Officer in not staying his hands before his rights have been finally decided by the Appellate Tribunal has acted capriciously and, therefore, has not exercised the discretion vested in him in law. The argument of the Counsel for the Commissioner of Income-tax may be put thus. If an assessee does not pay the tax within the time prescribed, he shall be deemed to be in default under Section 45 of the Act. The discretion vested in the Income-tax Officer is within narrow confines to be exercised only against the State and he cannot be compelled to exercise it in favor of the assessee as, by a statutory fiction, he is declared to be a defaulter. That apart, the words "may in his discretion" give to the Income-tax Officer an absolute and uncontrolled discretion to treat the assessee as not being in default and that it cannot be questioned in a court of law. The question falls tobe decided on a construction of Section 45 of the Income tax Act. Section 45 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 the 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."

Under this section, if the amount specified as payable in the notice of demand is not paid within the prescribed time the assessee would be deemed to be in default. But, the same section provides that, pending an appeal filed by the assessee, the Income-tax Officer may, in his discretion, treat the assessee as not being in default.

5. Before I consider the case law on the subject, it will be convenient at this state to dispose of the argument of the learned Counsel for the Commissioner of Income-tax in regard to the scope of the discretion. His argument that the discretion of the officer under this section is a very limited one and he can only exercise it against the State and he cannot be compelled to use it in favor of the assessee may be subtle but does not appeal to me. It is true the section in terms declares the assessee under the circumstances mentioned in the section, as a person in default and the discretion conferred on the Income-tax Officer is to treat him as being in default. By exercising his discretion in not treating him as a defaulter, he would be holding against the State and also in favor of the assessee. The discretionary power conferred upon the Income-tax Officer is in effect and substance one to give or not to give stay and it works both ways depending upon the manner in which it is exercised. If he treats him as not being in default, the assessee will not be proceeded against till the appeal is disposed of and the State will not be able to collect the amount till the result of the appeal is known. If he refuses to exercise his discretion, the assessee will be subjected to coercive process and the State will be in a position to recover the tax immediately. The power, therefore, if exercised helps one and prejudices the other. In this view, I must hold that the discretionary power conferred upon the Income-tax Officer is not limited as contended by the Counsel for the Commissioner of Income-tax but is a power exercisable both against and in favor of the assessee or the State as the case may be.

6. The scope of a discretionary power Conferred on a public authority is the subject-matter of treatises and decisions. In Maxwell on the Interpretation of Statutes, 10th edition, the following passage appears at page 239 :

> "Statutes which authorize persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they "may" or "shall", if they think "fit" or "shall have power", or that "it shall be lawful" for them to do such acts, a statute appears to use the language of mere permission but it has been so often decided as to have become an axiom that in such cases such expressions may have to say the least .... a compulsory force and so would seem to be modified by judicial exposition."

At page 248, the author deals with cases where the power is qualified by express references to the discretion of the authorized person. The author gives illustrations of powers qualified by words "if they should so think fit", 'if deemed advisable' and similar words and comes to the conclusion that the power is limited by the duty. A summary of the mode of exercise of discretion is given at page 123 :

> "According to his discretion' means, it has been said, according to the rules of reason and justice, not private opinion; according to law and not humour; it is to be, not arbitrary,

> vague and fanciful, but legal and regular; to be exercised, not capriciously, but on judicial grounds and for substantial reasons. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself, that is within the limits and for the objects intended by the legislature.

These dicta may be summed up in the statement of Lord Esher that the discretion must be exercised without taking into account any reason which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion." The result of the aforesaid passages may be stated thus : The discretionary statutory power conferred upon an authority for the public good is coupled with a duty to perform it under relevent 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.

7. There is also an essential distinction between a refusal to exercise the discretion and the manner of its exercise. If the authority fails to discharge his duty by refusing to exercise his discretion when facts calling for its exercise exist or, if he exercises discretion under the circumstances mentioned above, which is not an exercise of discretion in law, the court will compel him to do so. If the authority concerned exercises his discretion honestly and in the spirit of the statute, no mandamus will be issued directing him to exercise his discretion in a particular way. See The *Lord Krishna Sugar Mills Ltd., Saharanpur v. Income-tax Officer, Ambala*[1] *Julius v. Bishop of Oxford*[2] All*croft v. Lord Bishop of London*[3]

8. The application of the aforesaid principles to cases under Section 45 of the Income-tax Act is illustrated in some of the cases cited at the Bar. In *Ladhuram Tapria v. B. K. Bagchi*[4] Bose, J. of the Calcutta High Court considered the question in some detail. There, the petitioners carried on business in copartnership under the name and style of Ladhuram Taparia from the 28th of February 1941. The firm was registered under the Indian Partnership Act. For the assessment years 1943-44 and 1944-45, the firm was registered under Section 26-A of the Indian Income-tax Act, but for the assessment

[1]1952-22 ITR 410 : AIR 1953 Pun 113 [3]1891 AC 666
[2]1880-5 AC 214 [4]1951-20 ITR 51 (Cal)

year 1945-46, the Income-tax Officer refused to renew the registration of the said firm and assessed the said firm as an unregistered firm. The assessment was made on 29-03-1950 and the notice of demand was dated 30-03-1950 and the petitioners were required to pay a sum of Rs. 8,67,239-10-0 on or before the 20th April 1950. In the assessment the Income-tax Officer added to the total income of the firm the total income assessed by him of five other firms. He also made several assessments in respect of the five other firms. The petitioners filed an appeal before the Appellate Assistant Commissioner both against the assessment and against the order refusing to

renew registration. On the 20th of April 1950, the petitioner's firm applied to the Income-tax Officer for granting them sufficient time to consider the matter and for payment of the legitimate tax but the Income-tax Officer did not accede to that request. Thereafter, the petitioner filed an application under Section 45 of the Specific Relief Act and the Constitution of India for cancelling the notice of demand and calling upon the Income-tax Officer to forbear from taking further steps. The facts found in that case were : There was a serious question of law involved in the appeal. The Income-tax Officer himself treated these firms earlier as separate entities and made assessment on that basis. He had also made alternative protective assessments.
The time given for payment of the tax going into lakhs was very short and had the effect of ruining the business of the petitioners and that of the five other firms. On those facts, Bose, J. held that it was a fit case for issuing mandmus. The learned Judge quoted with approval the following passage of Cairns L. C. in (1880) 5 AC 214 at pp. 222, 223 .

> "they confer a faculty or power and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the conditions under which it is to be done something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so". Relying upon this authority and the others, which followed it Bose, J. observed :

In this case also a discretion was conferred on the Revenue authority but it was pointed out that if in a proper case he did not exercise that power he could be compelled to do so by an order under Section 45 of the Specific Relief Act". When it was contended before him that the Court has no power to interfere with the exercise of discretion by public officers in pursurance of a discretionary power vested in them, the learned Judge, relying upon the decision of *Queen v. Bishop of London*[5] pointed out that an arbitrary or capricious exercise of discretion would be no exercise at all. This decision is, therefore, authority for the position that the discretionary power conferred upon an income-tax Officer is coupled with a duty and, if he did not exercise it when the occasion called for it or if he exercised it in such a manner that it is no exercise of discretion at all, he can be compelled to discharge his duties.

9. A similar question arose in 1952-22 ITR 410 : AIR 1953 Punjab 113. There, the petitioners were assessed to Income-tax and a tax of Rs. 3,33,533-13-0 was imposed on them. Notice of demand was sent to them on 06-10-1951. The petitioners made an

[5]1889-24 QBD 213 at p. 243

application to the Income-tax Officer under Section 27 of the Income-tax Act for cancellation of the assessment. On 17-11-1951, that was dismissed and an appeal was taken to the Appellate Assistant Commissioner. In May 1952, an appeal was filed before the Income-tax Appellate Tribunal which was pending. As against the Original order of assessment an appeal was taken to the Appellate Assistant Commissioner in October 1951 and that was also pending. They applied to the Income-tax Officer under Section 45 of the Income-tax Act praying that the tax might be kept in abeyance till after the appeal was decided. On 26-10-1951, the Income-tax Officer ordered the tax to be paid in monthly installments but, as nothing was paid, the income-tax Officer imposed a penalty of Rs. 20,000/-. Thereafter, the higher authorities gave them time to pay till the 10th March 1952 and then extended the time till the 20th of March. The petitioners

applied to the Central Board of Revenue and obtained interim stay on 22-03-1952 but that was vacated on 19-06-52. The Income-tax Officer finally wrote to the petitioners to pay up the income-tax by 8th July 1952 and on 9th July 1952 they filed the writ. On 8th July 1952 they again approached the Income-tax Officer and the Commissioner for stay of recovery of income-tax. The Commissioner again fixed installments the last of which was to be paid on 31-03-1953.

10. It is apparent from the aforesaid facts that, though the assessment was made on the 30th of September 1951, every opportunity was given to the assessee to pay the said amount, in installments up to 31st March 1953. On those facts, Kapur and Soni, JJ. held that there was no case for issuing a writ. At page 417 (of ITR) , Kapur, J. observed :

> "Under Section 45 whatever discretion there is 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 into consideration which are extraneous to the issue, it is not open to this court to interfere in its supervisory jurisdiction."

Soni, J. expressed the same idea in the following terms :

> "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".

This decision also lays down the same principle. The learned Judges refused to issue the writ as the Income-tax authorities exercised their discretion reasonably and without caprice or arbitrariness.

11. The Allahabad High Court in *Govardhan v. Commissioner of Income-tax*[6], refused to issue a writ when the income-tax officer did not treat an assessee as not being in

[6] AIR 1956 All 130

default. In that case, the assessee was assessed by the Income-tax Officer to tax amounting to Rs. 75,477/-for the assessment years 1945 to 1951. Appeals were filed against the aforesaid orders before the Appellate Assistant Commissioner. Notice of demand was sent to the applicant and, on his failure to deposit the whole amount of tax, he was directed by order dated 27-05-1955 to deposit the whole amount of tax within three days. The assessee filed a writ in the Allahabad High Court for quashing the order of demand. Though the application filed by him before the Income-tax Authorities was dismissed, the petitioners' counsel was informed orally that he could pay the amount by installments if he liked but he did not agree to the proposal. On those facts, the learned Judge observed at page 131 :

> "The filing of an appeal does not under Section 45 amount to an automatic stay of the realization of the amount of the tax. By merely filing an appeal it cannot be said that the

> failure to pay the amount within the time specified in the notice of demand under Section 29 will not make an assessee a defaulter. It is discretionary with the income-tax Officer not to consider him a defaulter in case appeals have been filed against the orders of the Income-tax Officer.
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> "The power not to regard an assessee a defaulter even though he did not pay the amount of tax within a specified time, has been given to the Income-tax Officer and the exercise of such a power depends upon the discretion of the income-tax Officer. The contention of the applicant is that the power given under Section 45 is coupled with a duty and it is incumbent upon the Income-tax officer not to regard the petitioner who has gone up in appeal as a defaulter.

In my judgment it is not a correct reading of Section 45. If such a duty has to be interred from the provisions of Section 45, the words 'in the discretion of the Income-tax Officer would become redundant. It will be an absolute right in all cases, where an appeal has been filed, of the assessee not to pay the amount of the tax till the appeal has been disposed of.

12. After citing the decision in 1951-20 ITR 51 (Cal) (D) the learned judge observes :

> "No doubt the observations made in that case give support to the contention of the applicant but the circumstances of that case were different from the present case and if that case lays down that in all cases where an appeal has been filed, there is a duty cast upon the Income-tax Officer not to regard the assessee as a defaulter I have no hesitation in differing from that opinion".

With great respect to the learned Judge, Bose, J. in the Calcutta case did not say that the mere filing of an appeal would cast duty on the Income-tax Officer to stay enforcement of demand. Bose, J. only held that, under certain compelling circumstances, a duty is cast upon an Income-tax Officer to exercise his discretion in staying the enforcement of demand. The existence of such duty would depend not upon the filing of an appeal but upon other facts. It is not necessary to express our view whether the discretion exercised by the Commissioner on the facts found in that case was capricious or arbitrary. The aforesaid authorities support the view already expressed by me earlier.

13. Learned Counsel then relied upon the words "in his discretion" and argued that the said words confer an absolute discretion, authorizing the Income-tax Officer to show indulgence or not depending upon administrative convenience. He also referred to the analogous provisions in other statutes such as Section 9 (4) (a), Section 15 (2) and Section 51 (1) of the Estate Abolition Act, Section 12-A of the General Sales Tax Act and Section 22 (1) of the Income-tax Act. I have already cited passages from Maxwell, which indicate that similar words do not confer an arbitrary power on the authority concerned. Full meaning can be given to those words if it be held that the authority concerned has the discretion to stay or not to stay but he must exercise the discretion taking into consideration only the relevant facts and without caprice or arbitrariness.

14. 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, 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 refused to stay on the ground that 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 any 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.

15. Learned Counsel for the Commissioner of Income-tax then contended that a writ would not lie to give interim relief pending an appeal and, in support of this contention reliance is placed upon a judgment of the Supreme Court in State of *Orissa v. Madan Gopal*[7]*,*

16. There the Government of Orissa, having passed an order cancelling the temporary permits and having directed the respondents to remove their assets appertaining to the mines within a fortnight, the respondents filed an application for a writ of mandamus. The High Court declined to investigate and pronounce on the rights of the parties and left the rights of the parties to be decided in a suit. But, as the respondents could not file a suit till after the expiry of sixty days required for the purpose under Section 80 C. P. C. the High Court passed an order that till three months from the date of the order or one week after the institution of their contemplated suit, whichever was earlier, the Government of the State of Orissa should refrain from disturbing the petitioners' possession over the mining areas in question. The Supreme Court held that Article 226 could not be used for the purpose of giving interim relief as the only and final relief on the application. At page 14 their Lordships observed :

[7] AIR 1952 SC 12 : 1952 SCR 28

> "An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceedings." That decision has no bearing on the present case. This Court is not asked to give any interim relief pending some contemplated proceedings by the appellant but is approached to direct the Income-tax Officer to discharge his duty which, according to the appellant, he has failed to do. If the contention of the appellant is correct, he would certainly be entitled to the relief.

Nor can we accept the argument of the learned Counsel that a writ should not be issued because under Section 33-A, the Commissioner may, on his own motion, call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of the Act, may pass such order thereon, not being an order prejudicial to the assessee as he thinks fit. The Commissioner's jurisdiction depends upon the order passed by the authority subordinate to him. In the present case, no order has been made by the Income-tax Officer. The complaint is that he did not make an order giving him stay but issued a certificate to the revenue authorities

for collecting the amount by coercive process and that the revenue authorities are bringing his properties to sale. The grievance, therefore, is that the Income-tax Officer did not exercise his duty and that he should be compelled to do so. In such circumstances, the provisions of Section 33-A may not avail the assessee. Even if it does, the mere existence of revisional jurisdiction is not necessarily fatal to the maintainability of the application. If we hold that the Income-tax Officer did not discharge his duty of exercising his discretion, we should certainly issue the writ.

17. Now, coming to the merits, we are not satisfied that this is a fit case for issuing a writ. From the aforesaid facts, it is obvious that large amounts were due from the assessee and he paid only a comparatively small amount of Rs. 1,900/-. Though there is no specific order directing him to pay in instalments, he had years for paying the tax. The learned Counsel, except stating that he had preferred an appeal, has not satisfied us that his appeal raises substantial questions of law. The earliest assessment is of the year 1945-46 and nothing has been paid though six years have elapsed since the assessment was made. In the case of the other two assessments, four years have elapsed since the dates of assessments and no substantial amounts have been paid. Nor did the assessee offer security for the amount due from him. In the circumstances, we cannot say that the Income-tax Officer did not discharge his duty or exercise his discretion arbitrarily in not treating him as a person who had not made a default.

18. The appeal is, therefore dismissed with costs. Advocate's fee Rs. 200/-.

Viswanatha Sastri, J.

19. The facts of the case have been stated in the Judgment of my Lord and it is unnecessary for me to recapitulate them. The meaning of the words "shall" and "may" found in legislative enactments has been the subject of the constant and conflicting interpretation by the courts. Section 45 of the Income-tax Act in which both these words are found, has been brought into the arena of this controversy and its interpretation has been the subject of a difference of opinion among the High Courts. Under Section 45 an assessee failing to pay the tax specified as payable in a notice of demand issued by the Income-tax Officer under Section 29 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."

There is a second proviso to the section that the income-tax officer "shall not" treat the assessee as in default in respect of tax on foreign income, the remittance of which to India is prohibited or restricted and "shall continue to treat the assessee as not in default" till the prohibition or restriction, is removed. The contract between the word "may" occuring in the first proviso and the word "shall" occuring in the second proviso would indicate that the word "may" in the first proviso was used by the Legislature in its natural and ordinary, and therefore in an enabling or permissive, and not in an obligatory or compulsory sense. The words "in his discretion" occuring in the first proviso merely bring out what is implicit in the word "may" and were evidently intended to emphasize the fact that the exercise of power under the first proviso was not obligatory but discretionary. Even so, the question is whether the discretion vested in the Income-

tax Officer under the first proviso is absolute or unqualified and whether he has a free opinion to exercise or not to exercise the power vested in him, in which case the court can not interfere or whether the power is coupled with a duty to exercise it, in which case an application for a mandamus would lie to compel him to exercise the power in a proper case. In case like the present, we have to consider something more than the mere words used in Section 45. This section was passed, after a long chain of authority, both Indian and English, had established that though a discretionary power is given to a public authority, there may be circumstances which coupled with the power a duty to exercise it. Though the word "may" in its ordinary or primary sense is susceptible of a permissive meaning, decisions of the Highest Courts have recognized that a duty might exist, outside and apart from the particular provisions of a statute, whereby those on whom a power is conferred by the Statute are under an obligation to exercise it. The word "may", though primarily permissive, has been, in certain circumstances, treated as obligatory and the question is whether the first proviso to Section 45 could be so interpreted.

20. The cases on the topic are so many and the language used by the learned Judge is so varied that it would be a profitless task to refer to or reconcile all that has been said. Suffice it to refer to a few leading cases. In 1877 the Judicial Committee, construing Section 21 of Act XIV of 1859, observed :

> "There is no doubt that in some cases the word "must", or the word "shall", may be substituted for the word "may"; but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word "may"' must be taken to be used in its natural, and therefore in a permissive, and not in an obligatory sense, *Delhi and London Bank Ltd. v. Orchard*[8], (H). The principle was expressed in a

[8]4 Ind App 127 at p. 135 (PC)

> some what different form in the well known and off-cited case of 1880-5 AC 214 at pp. 222, 241 and 245, which arose on the construction of the words "it shall be lawful" in Section 3 of the Church Discipline Act 1840. Lord Cairns stated the law in these terms.
> "The words 'it will be lawful' are not equivocal. They are Plain and unambiguous. They confer a faculty or power, and they do not of themselves do more than convey a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus. And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me who contend that an obligation exists to excercise the power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation." Lord Blackburn was of the opinion that the cases where it had been held that power of this kind

must be used, were based on the principle that although prima facie the donee of the power may either exercise it or leave it unused, yet "if the object for which a power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Where there is such a duty it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it."

21. *In re, Baker; Nichols v. Baker*[9], Cotton, L. J., observed :

> "I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning, but it gives a power, and then it may be a question in what cases, where a judge has power given to him by the word "may", it becomes his duty to exercise it." In a similar train of thought, Talbot J., in *Sheffield Corporation v. Luxford*[10], at p. 183, said :
> "May" does not mean 'must'; 'may' always means 'may'. 'May is a permissive or enabling expression; but there are cases in which for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it."

22. The same principle has been applied by the Judicial Committee in *Allcock, Ashdown and Co., Ltd. v. Chief Revenue Authority, Bombay*[11], where, interpreting the word "may" in Section 51 of the Indian Income-tax Act, 1918, empowering the Commissioner to State a case to the High Court, Lord Phillimore observed :

[9]1890-44 Ch D 262 at p. 270 [11]50 Ind App 227 at p. 236 : (AIR 1923 PC 138 at p. 144)
[10]1929-2 KB 180

> "And as the learned counsel for the respondent rightly urged, "may" does not mean "shall". Neither are the words "it shall be lawful" those of compulsion. Only the capacity or Power is given to the authority. But when a capacity of power is given to a public authority, there maybe circumstances which couple with the power a duty to exercise it."

The learned Lord followed the exposition of the law by Lord Cairns in 1880-5 AC 214 at pp. 222, 241 and 245 already cited :

23. In the *Province of Bombay v. Khushaldas Advani*[12] Das, J. summed up the result of the authorities thus :-

> "The authorities show that in construing a power the Court will read the word "may" as "must" when the exercise of the power will be in furtherance of the interest of a third person for securing which the power was given. Enabling words are always potential and never in themselves significant of any obligation. They are read as compulsory where they are words to effectuate a legal right."

24. *In Reg. v. Tithe Commissioners*[13], where a power was given to the Tithe Commissioners in dealing with certain land owners, to confirm agreements for commutation of title under certain circumstances, Coleridge, J. observed :

> "The words undoubtdly are only empowering; but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissory or enabling may have a compulsive force where the thing to be done is for the public benefit or in advancement of public justice."

Repelling the contention of the Advocate-General that an order under Section 491, Cri. Procedure Code, was discretionary and that a suitor could not be said to have a vested right in it, the learned Chief Justice of Madras observed in *Narayanaswami Naidu v. Inspector of Police, Mayavaram*[14]

> "His contention was largely based on the use of the words "may, whenever it thinks fit". I do not agree that the use of these words affects the legal position in any way. It has been so often decided as to have become an axiom that in such cases of statutes enacted for the public good and the advancement of justice, expressions which appear to belong to the language of mere permission like 'may' have a compulsory force."

It should not be understood from the above statements either that enabling words are always compulsory where the public are Concerned or are never compulsory except where the public is concerned. Lord Blackburn in 1880-5 AC 214 at p 244 (B) clarified the position in these words :

> "The enabling words are construed as compulsory whenever the object of the

[12] AIR 1950 SC 222 [14] AIR 1949 Mad 307 (SB)
[13](1849) 14 QBD 459

> power is to effectuate a legal right. It is more easy to show that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only and yet it lias been held that the power must be exercised), it has been on the application of those whose private rights require the exercise of the pawer."

25. Where a court is invested with a discretionary power, as for instance, to award . costs, grant time, condone or excuse delay, stay execution of a decree or order, amend pleadings and so on, it is open to a suitor to call upon the court to do so and in a fit case, the court would make an order for that purpose ex debito justitiae. Discretion, when applied to a court of justice, means sound discretion guided by law and in accordance with precedents. 'It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular. *Per Lord Mansfield in R. v. Wilkes*[15] at p 2539 where a discretionary power is given not to a court but "deposited" with a public officer for the purpose of being used for the benefits of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature, of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised. See Lord Cairns in 1880-5 AC 214 at p 225 (B). This is not to say that a mandamus will issue in every such case irrespective of other considerations.

26. 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. Sometimes assessments for three years and more, are completed at the same time and the assessee is called upon to pay a heavy demand within a few days. Registration of a firm or the recognition of a partition might be refused and a heavy assessment made on the firm or the family. Accounts might be rejected for insufficient reasons, and a huge estimate made of the taxable income. It might happen that in the year of account a trader might have been prosperous but his condition at the time when the assessment is actually made, is verging on insolvency. An assessee who does not pay the tax demanded within the due date Incurs a very heavy penalty at the discretion of the Income-tax Officer under Section 46. In cases like these if an assessee applies for a stay of collection of the tax pending the decision of his appeal against the order of assessment, his application must be considered by the Income-tax Officer on its merits in a judicial spirit. The right of the state to realise the tax assessed should also be kept in view, for, the mere filing of an appeal does not entitle the assessee to a stay of collection of the tax. It is true that Income-tax Officers are but men, and being human, may not exercise their discretion against the State which employs them. The legislature has, however, chosen to entrust the discretion to them. Being to some extent in the position of judges in their own cause and invested with a wide discretion under Section 45 of the Act, their responsibility for taking an impartial and objective view is all the greater. If the circumstances exist under which it was contemplated that the power of granting a

[15](1770) 4 Bur 2527

stay should be exercised, the Income-tax Officer cannot decine 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 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. His discretion must be exercised according to common sense and according to justice. As there is no indication in Section 45 of the Income-tax Act, of the grounds upon which the discretion has to be exercised, it is not desirable to lay out any rules indicating the particular grooves in which the discretion should run. It is not proper to limit the operation of a rule expressed in such general terms by stating the circumstances or all the circumstances under which the Income-tax Officer should exercise his discretion to treat the assessee as not being in default.

27. Though it is not within the province of the Court to give general directions or lay down general rules for the exercise of the power conferred by Section 45 and though this Court is not authorized to sit as a Court of appeal for review of orders passed by Income-tax Officer under that section, still there may be occasion for this Court's interference by a writ of mandamus.

28. If an Income tax Officer declines to hear and consider the application of an assessee under Section 45 for an order of stay of collection of the tax pending an appeal from the order of assessment, he fails to perfom a duty cast on him by the section and which is enforceable by

mandamus. In such a case the officer refuses to exercise a jurisdiction given to him. It is true that a mandamus will not be issued by the Court where there is no obligation or duty imposed by statute on a public officer and the performance or non-performance of an act is left to his absolute discretion.

For the reasons already, given, the Income-tax Officer has no free option or absolute and uncontrolled discretion in this matter but is bound to receive, consider and give his decision on an application by assessee invoking his jurisdiction under Section 45. These being duties or obligations cast upon him by law, could be enforced by mandamus. But the writ in such a case will only be a command to the Officer to hear and decide the assessee's application. Where, however, the Income-tax Officer received and considers the application of the assessee but in the exercise of his discretion rejects his request for a stay of collection of the tax, it is a delicate question as to how far the Courts are entitled to interfere. f the officer has given no reasons at all for rejecting the application of the assessee for a stay, he may be required to take up the consideration of the application and dispose of it giving the assessee an opportunity to be heard and giving reasons for his decision. It is obvious that no writ will issue dictating to the officer in what manner he is to decide an application under Section 45 or exercise his discretion, so long as he exercises his power honestly and in the spirit of the statute, 1891 AC 666. Nor will a writ issue for the purpose of reviewing his decision honestly given on the merits of the application, even though such decision is erroneous, if the proceedings have been conducted with fairness and impartiality and the assessee has been given an opportunity of being heard. To hold otherwise would be to give an appeal under colour of mandamus when no appeal is given under the Act, Where, however, the income-tax Officer has not given a reasonable opportunity to the assessee to be heard in support of his application, he has not exercised his discretion in a judicial manner and he can be compelled by mandamus to do so. Where the Income-tax Officer in refusing the assessee's application has allowed himself to be influenced by irrelevant and extraneous matters or considerations, in point of fact he would have exercised no discretion or he would have exceeded his jurisdiction, and whichever way it is put, this Court will interfere by a *Writ R. v. Bowman*[16], and *R. v. London Country Council*[17],

I would go a step further. If the exercise of discretion by the Income-tax Officer is so arbitrary and capricious that no reasonable man would have acted likewise, in other words, if there has been no exercise of discretion at all, in such a case too this Court might interfere. (1889) 24 QBD 213.

29. Three decisions of the Calcutta, Punjab and Allahabad High Courts in which the scope and effect of Section 45 of the Income-tax Act were considered have been cited to us. In 1951-20 ITR 51 (Cal), Bose J., issued a mandamus directing the Income-tax Officer to forbear from taking any steps for enforcing a notice of demand issued under Section 29 of the Income-tax Act until the disposal of an appeal preferred by the assessee against the order of assessment. The learned Judge adverted to the facts relating to the assessment, the contentions of the assessee, the merits of the appeal filed by him, the hardship caused by the imposition of a heavy tax payable in a short time and the inaction of the income- tax officer when requested to extend time for payment of the tax and concluded by himself exercising the discretion conferred by Section 45 on the Income-tax Officer. The facts of that case have been analysed by my Lord and were of an exceptional character. the only observation that I wish to make is that, in the circumstances stated by Bose J., the proper course might have been to issue a mandamus to the income-tax officer to consider the assessee's application for stay of collection of tax afresh in a proper and judicial

manner. In so far as the Punjab High Court in AIR 1953 Punjab 113, relying on the passage from the speech of Lord Cairns in (1880) 5 AC 214 at p. 228, sought to equate the position of the Bishop to that of an Income-tax Officer exercising his power under Section 45 of the Income-tax Act, I am unable, with great respect, to agree with the reasoning.
All the learned Lords in (1880) 5 A C 214, were at pains to point out that the complainant in that case had no particular or personal right in relation to church discipline and the Bishop owed no particular duty to him and refused a mandamus on those grounds. That is not the position of the assessee vis-a-vis the Income-tax Officer. The assessee has a personal and individual right for the protection and vindication of which the Income-tax Officer owes a duty to him to exercise his power. With the actual decision of the learned Judges of the Punjab High Court, I am in respectful agreement. The decision of a single Judge of the Allahabad High Court in AIR 1956 Allahabad 130, follows the Punjab decision. Though the argument was advanced in 1951-20 I T R 51 (Cal), that an appeal under Section 30 of the Income-tax Act re-opens the assessment and that therefore the assessed tax need not be paid
[16]1898-1 QB 663
[17]1915-2 KB 466 at pp. 475, 487, 489 ; (1889) 24 QBD 213 at p. 243

from the moment the appeal is filed till it is disposed of, it does not appear to have been accepted by Bose, J. Such a contention would indeed be opposed to the plain provision of Section 45 of the Income-tax Act that the tax should be paid within the time mentioned in the notice of demand.

30. Lastly, it has to be observed that Section 45 of the Income-tax Act is somewhat cryptic in its terms and merely gives the Income-tax Officer power to declare a person to be not in default pending the appeal. There is no provision for stay similar to O. 41, Rules 5 and 6, Civil Procedure Code. There is no conferment of an express power of granting a stay of realization of the tax though the effect of an order in favor of the assessee under Section 45 of Act is a stay. Nor is there a provision for allowing the tax to be paid in installments or for taking security for deferred payment. Neither the appellate Assistant Commissioner nor the Appellate Tribunal is given the power to stay the collection of tax. Whether the law should not be made now liberal so as to enable an assessee who has preferred an appeal, to obtain from the appellate forum, a stay of collection of the tax, either in whole or in part, on furnishing suitable security, is a matter for legislature to consider.

31. I agree with my Lord in the view he has taken of the merits of the case and in the order proposed by him
Appeal dismissed.