Dwarkanath, Hindu Undivided Family vs Income-Tax Officer, Special Circle, ... on 29 March, 1965

Equivalent citations: 1966 AIR 81, 1965 SCR (3) 536

Bench: J.C. Shah, S.M. Sikri

PETITIONER:
DWARKANATH, HINDU UNDIVIDED FAMILY

Vs.

RESPONDENT:
INCOME-TAX OFFICER, SPECIAL CIRCLE, KANPUR

DATE OF JUDGMENT:
29/03/1965

BENCH:
SUBBARAO, K.
BENCH:
SUBBARAO, K.
SHAH, J.C.
SIKRI, S.M.

CITATION:
1966 AIR 81 1965 SCR (3) 536
CITATOR INFO :
R 1976 SC 578 (11)
RF 1980 SC1579 (25)
R 1985 SC 167 (36,38)
RF 1986 SC1272 (83)
R 1987 SC 537 (18)
F 1989 SC1607 (18)

ACT:
Indian Income-tax Act (11 of 1922), s. 33A(2)-Commissioner's power of revision-If administrative or quasi-judicial--"Deponent's own knowledge", meaning of.

HEADNOTE:
Pursuant to the directions of the Income-tax Appellate Tribunal, the Income-tax Officer, determined the assessee's capital gains under s. 12B of the Income-tax Act, 1922. He did not, however, make any order under s. 23(3) of the Act, nor did he issue a notice of demand under s. 29 of the Act. The assessee filed an application before the Commissioner of

Income-tax, under s. 33A(2) of the Act, for revising the computation made by the Income-tax Officer drawing his attention to a decision of the Bombay High Court in Baijnath's case, (1957) 31 I.T.R 643, as to how the capital gains should be ascertained. That decision was based upon a consideration of the very documents which were the basis of the assessees' claim. The Commissioner dismissed the revision petition as not maintainable, as well as on merits, ignoring the Bombay decision. Meanwhile, the assessee filed an application requesting the Income-tax Officer to issue a notice of demand under s. 29, to enable him to file an appeal, but the Officer declined to do so. The assessee filed a writ application in the High Court for issuing appropriate writs to the Commissioner and the Income-tax Officer, but the High Court dismissed it in limine.

In his appeal to this Court, the assessee contended that (i) the High Court erred in holding that the affidavit filed in support of the writ petition was not in accordance with law, and that even if there were any defects the High Court should have given him an opportunity to rectify them, and (ii) the High Court erred in distinguishing the Bombay decision and in holding that there was no force in the revision filed before the Commissioner, and that, the High Court should have directed the Commissioner to entertain the revision and dispose of it in accordance with law by giving suitable directions to the Income-tax Officer. The respondent raised a preliminary objection that as the order of the Commissioner was an administrative act, Art. 226 of the Constitution could not be invoked.

HELD:(i) As no appeal lay to the Appellate Assistant Commissioner against the calculations made by the Income-tax Officer, the Commissioner had powers under s. 33A(2) to revise the Income-tax Officer's order. The jurisdiction conferred on the Commissioner by the section is a judicial one, The nature of the jurisdiction and the rights decided carry with them necessarily the duty to act judicially in disposing of the revision. Further, the fact that a Division Bench of one of the High Courts in India had taken a view in favour of the assessee, indicated that the question raised was arguable and required serious consideration. Therefore, a writ of certiorari quashing the order of the Commissioner dismissing the assessee's revision petition, should be issued. [544E-G; 548D]

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Sitalpore Colliery Concern Ltd. v. Union of India, (1957) 32 I.T.R. 26, Additional Income-tax Officer, Cuddapah v. Cuddapah Star Transport Co. Ltd. (1960) 40 I.T.R. 200 and Suganchand Saraogi v. Commissioner of Income-tax, (1964) 53 I.T.R, 717, overruled.

Even if the Commissioner only made an administrative order in refusing, to give any direction to the Income-tax Officer, the assessee would still be entitled to approach the High Court under Art. 226, and a writ of mandamus

directing the Income-tax Officer to discharge his statutory duty of passing the order and issuing the notice of demand in accordance with law, should be issued. [546C-E]
(ii)The affidavit filed on behalf of the assessee was complete and compiled with the rules made by the High Court. The affidavit spoke only of matters which were within the deponent's own knowledge, because, the phrase "deponent's own knowledge" is wide enough to comprehend the knowledge derived from a perusal of relevant documents. Even if the affidavit was defective in any manner, the High Court instead of dismissing the petition in limine should have given the assessee, a reasonable opportunity to file a better affidavit. [547F-G, H]
(iii)The High Court was also in error in holding that the decision of the Bombay High Court was given on different facts, for the facts in both cases were the same and they arose out of the same transaction. [548B-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 62 of 1964. Appeal by special leave from the judgment and decree dated July 28, 1959 of the Allahabad High Court in Civil Miscellaneous Writ No. 2071 of 1959.

A. V. Viswanatha Sastri, Rameshwar Nath, S. N. Andley and P. L. Vohra, for the appellant.

Gopal Singh and R. N. Sachthey, for the respondents. The Judgment of the Court was delivered by Subba Rao, J. The facts leading up to this appeal may briefly be narrated. Gujarat Cotton Mills Co. Ltd., hereinafter called the Company, is a limited company having its registered office at Ahmedabad. In the year 1938 the Company appointed Messrs. Pira Mal Girdhar Lal & Co., hereinafter called the Agency Firm, as its Managing Agents. On February 28, 1938, a formal agreement was entered into between the Company and the Agency Firm. The said Agency Firm was formed under an instrument of partnership dated February 26, 1938, with 11 partners-3 of them are compendiously described as the "Bombay Group" and the remaining 8 of them as the "Kanpur Group". With certain variations in the constitution of the Agency Firm, the said firm functioned as the Managing Agents of the Company till September 1946. In September 1946 shareholding of the partners of the Agency Firm in the Company was as follows:

Kanpur Group	32,500 shares.
Bombay Group	26,362 shares.

Because of certain differences between the partners, they decided among themselves to sell their shares and to surrender their Managing Agency. On September 7, 1946, the said 11 partakers entered into an agreement with the firm of Messrs. Chhuttu Ram & Sons of Bihar, hereinafter called the Purchaser Firm. Under that agreement it was provided that 65012 shares held by the 11 partners

of the Agency Firm, directly or through their nominees, should be sold to the Purchaser Firm at Rs. 65 per share and that the Agency Firm should before November 15, 1946, resign its 'office of Managing Agency of the Company. It was a condition of the agreement that it should have operation only after the Purchaser Firm or its nominees were appointed as the Managing Agents of the Company. On October 30, 1946, the Company held its General Body Meeting and accepted the resignation of the Agency Firm and by another resolution appointed the Purchaser Firm as the Managing Agents in its stead. In terms of the agreement, the Purchaser Firm paid for the entire shareholding of the partners of the Agency Firm at Rs. 65 per share. The appellant is a Hindu undivided family. Its karta was one Dwarkanath and the present karta is his son Ramji Prasad. The said family was 'one of the II partners of the Agency Firm belonging to 'the Kanpur Group. Out of the total shareholding the appellant held 11,230 shares. It received the price for the said shares at the rate of Rs. 65 per share. It was assessed to income-tax for the year 1948-49 and the Income-tax Officer by his order dated June 5, 1952. assessed the excess amount of Rs. 2,98,909 realized by the assessee under the head "income from business", i.e., the difference in the amount for which it purchased the shares and that for which it sold them. On appeal, the Appellate Assistant Commissioner of Income-tax confirmed the same. On further appeal, the Income-tax Appellate Tribunal, Delhi Bench, held that the said receipt bad to be taxed as "capital gains" under s. 12B. of the Income-tax Act, 1922, and directed the Income- tax Officer to modify the assessment in accordance with its order. The assessee made an application under s. 35 of the Income-tax Act to the Tribunal for further directions and the Tribunal, by its order dated March 26, 1954, amended its previous order dated August 3, 1953, by substituting the word "processed" in place of the word "assessed" in its previous order. The assessee raised various contentions before the Income-tax Officer, inter- alia, that the said income was not liable to be taxed under s. 12B of the Income-tax Act under the head "capital gains" and that in any case in order to determine the amount of capital gains the market value of the shares only should be taken into consideration, as the price of Rs. 65 per share included also the consideration for the relinquishment of the managing agency rights. The Income-tax Officer rejected the said contentions of the assessee. He redetermined the assessable income under the heading "capital gains" but did not issue a notice of demand as prescribed in s. 29 of the Income-tax Act. After making an infructuous attempt to get suitable directions from the Appellate Tribunal, on March 5, 1956, the assessee filed an application before the Income-tax Officer to issue a notice of demand under s. 29 of the Income-tax Act so that it might prefer an appeal against the same to the appropriate authority. But the Income-tax Officer refused to issue any such notice. The assessee preferred an appeal against that order to the Appellate Assistant Commissioner under s. 30 of the Income-tax Act and that was dismissed on March 8, 1957, on the ground that it was not maintainable. Meanwhile on September 27, 1956, the appellant filed an application before the Commissioner of Income-tax under s. 33A(2) of the Income-tax Act for revising the order of the Income-tax Officer dated September 28, 1955. On March 28, 1959, the Commissioner dismissed the revision petition on two grounds, namely, (1) that it was not clear whether the revision petition under s. 33A of the Income-tax Act was maintainable, and (ii) on merits. It may be noticed that long before the revision petition was dismissed, the appeal filed by the assessee against the order of the Income-tax Officer to the Appellate Assistant Commissioner was dismissed on March 8, 1957. On November 18, 1957, the attention of the Commissioner was also drawn to the fact that the Bombay High Court in the case of a reference to that Court at the instance of the Bombay Group held that the market value of the shares should be taken into consideration to ascertain the excess realized on the

sale of the shares of the assessee for the purpose of capital gains tax. The Commissioner ignored that decision in dismissing the revision. Thereafter, on July 28, 1959, the assessee filed Writ Application No. 2071 of 1959 in the High Court of Judicature at Allahabad, inter alia, for a writ of certiorari or any other direction or order of like nature to quash the order of the Income.tax Commissioner, Lucknow, dated March 28, 1959, and the Order of the Income-tax Officer dated September 28, 1955, and for a writ of mandamus or any other order or direction of the like nature directing the Commissioner to pass a fresh order in accordance with the decision of the Bombay High Court and direct the Income-tax Officer to pass a fresh order in accordance with law and to issue a notice of demand as required by s. 29 of the Income-tax Act. The High Court dismissed the said application in limine mainly on the following three grounds: (1) the affidavit filed in support of the writ petition was highly unsatisfactory and on the basis of such an affidavit it was not possible to entertain the petition; (2) the facts given in the affidavit were incomplete and confused; and (3) even on merits, there was no force in the revision petition Hence the appeal.

Mr. A.V. Viswanatha Sastri, learned counsel for the appellant, contended that the affidavit filed in support of the petition was in accordance with law, and that, even if there were any defects, the Court should have given an opportunity to the appellant to rectify them; and that the High Court should have held that the revision against the order of the Income-tax Officer to the Commissioner was maintainable under s. 33A of the Act, as the appeal against that order to the Appellate Assistant Commissioner was not maintainable and that it should have directed the Commissioner to entertain the revision and dispose of it in accordance with law directing the Income-tax Officer to issue a notice of demand under s. 29 of the Income-tax Act. He further contended that the High Court went wrong in holding that the facts in the Bombay decision were different from those in the present case, for the facts in both the cases were the same and in fact they arose out of the same transaction, namely, the sale of the shares by the Agency Firm to the Purchaser Firm. Mr. Gopal Singh, learned counsel for the Revenue, while supporting the order of the High Court raised a preliminary objection, namely, that the order of the Commissioner under s. 33A of the Income-tax Act was administrative act and, therefore, no writ of certiorari would lie to the High Court to quash that order under Art. 226 of the Constitution.

We shall first take the preliminary objection, for if we maintain it, no other question will arise for consideration. Article 226 of the Constitution reads:

> " ..... every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

This article is couched in comprehensive phraseology and it exfacie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood

in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart. High Courts can also issue directions. orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this county. Any attempt to equate the scope of the power of the High Court under Art. 226 of the constitution with that of the English Courts to issue prerogative writs is to introduce the Unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government into. a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this not to say that the High Courts can function arbitrarily under this article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels. This interpretation has been accepted by the Court in Basappa v. Nagappa(1) and P.J. Irani v. State of Madras(2). But we are satisfied that this case falls directly within the confines of the certiorari jurisdiction as understood in England. It is well settled that a writ of certiorari can be issued only to quash a judicial or a quasi-judicial act and not an administrative act. It is, therefore, necessary to notice the distinction between the said two categories of acts. The relevant criteria have been laid down with clarity by Atkin, L.J., in King v. Electricity commissioners(3), elaborated by Lord Justice Scrutton in Rex v. London County Council(4) and authoritatively restated in Province of Bombay v. Kusaldas S. Advani(5). The said decisions laid down the following conditions to be complied with: (1) The body of persons must have legal authority; (2) the authority should be given to determine questions affecting the rights of subjects; and (3) they should have a duty to act judicially. So far there is no dispute. But in decided cases, particularly in India, there is some mixing up of two different concepts, viz., administrative tribunal and administrative act. The question whether an act is a judicial act or an administrative one arises ordinarily in the context of the proceedings of an administrative tribunal or authority. Therefore, the fact that an order was issued or an act emanated from an administrative tribunal would not make it anytheless a quasi-judicial act if the aforesaid tests were satisfied. The concept of a quasi-judicial act has been conceived and developed by English Judges with a view to keep the administrative tribunals and authorities within bounds. Parker, J., in R.V. Manchester Legal Aid Committee(1) brought out the distinction between judicial and administrative acts very vividly in the following passage:

> "The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to define exhaustively ..... When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if in order to arrive at the decision, the

(1) [1955] 1 S.C.R. 250.

(2) [1962] 2 S.C.R. 169.

(3) [1924] 1 K.B. 171.

(4) [1931] 2 K.B. 215.

(5) [1950] S.C.R. 621.

(6) [1952] 2 Q.B. 413, 428.

body concerned had to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry ..... Further, an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law ..... If on the other hand, an administrative body in arriving at its decision at no stage has before it any form of his and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially".

The relevant principles have been succinctly stated in Halsbury's Laws of England, 3rd Edn., Vol. 11, at pp. 55 and 56 thus:--

> It is not necessary that it should be a court:
>
> an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of, and are not in accordance with the practice of, a court of law. It is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition. A body may be under a duty, however, to act judicially (and subject to control by means of these orders) although there is no form of lis inter partes before it: it is enough that it should have to determine a question solely on the facts of the particular case, solely on the evidence before it, apart from questions of policy or any other extraneous considerations".
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> "Moreover an administrative body, whose decision is actuated in whole or in part by questions of policy, may be under a duty to act judicially in the course of arriving at that decision ..... If, on the other hand, an administrative body in arriving at its decision has before it at no stage any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any time to act judicially". These are innumerable decisions of this Court where it issued a writ of certiorari to quash a quasi-judicial act of an administrative tribunal or authority. This Court set aside the order of the Andhra Pradesh State Government approving the order of nationalisation of road transport made by the Andhra Pradesh Road Transport Undertaking in Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation(1), the order of the Examination (1) [1959] Supp. 1 S.C.R. 319.

Committee cancelling the examination results on the ground that it did not give opportunity to the examinees to be heard before the order was made in Board of High School and Intermediate Education, U.P., Allahabad v. Ghanshyam Das Gupta(1), and the order of the Revenue Board made in a revision petition against the order of the Deputy Commissioner impounding the document

without hearing the aggrieved party in The Board of Revenue, U.P. v. Sardarni Vidyawati(2). In all these cases the Government, the Examination Committee and the Board of Revenue were administrative bodies, but the acts impugned were quasi- judicial ones, for they had a duty to act judicially in regard thereto. The law on the subject may be briefly stated thus: The provisions of a statute may enjoin on an administrative authority to act administratively or judicially. If the statute expressly imposes a duty on the administrative body to act judicially, it is a clear case of a judicial act. But the duty to act judicially may not be expressly conferred but may be inferred from the provisions of the statute. It may be gathered from the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the nature of the power conferred or the duty imposed on the authority and other indicia afforded by the statute. In short, a duty to act judicially may arise in widely different circumstances and it is not possible or advisable to lay down a hard and fast rule or an inflexible rule of guidance.

With this background let us look at the relevant provisions of the Income-tax Act. Section 33A(2). The Commissioner may, on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner, made within one year from the date of the order (or within such further period as the Commissioner may think fit to allow on being satisfied that the assessee was prevented by sufficient cause from making the application within that period), call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

Provided that the Commissioner shall not revise any order under this sub-section if---

> (a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, [1962] Supp. 3 S.C.R. 36. (2) [1962] Supl. 3 S.C.R. 50' or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or
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> (b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or
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> (c) the order has been made the subject of an appeal to the Appellate Tribunal.

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee.

Under this sub-section an assessee may apply to the Commissioner for revision of an order under the Act by an authority subordinate to him. Such application shall be filed within one year from the date of the order or within such further period as the Commissioner may think fit to allow. On receipt of such an application the Commissioner may call for the record of the proceeding in which such order was made and make such enquiry or cause such enquiry to be made. After such enquiry

he can make an order not to the prejudice of the assessee but to his benefit. Such revision is not maintainable if the time prescribed for an appeal against such an order to the appropriate authorities has not expired or if an appeal against such an order is pending before the appropriate authorities. The scope of the revision is, therefore, similar to that prescribed under different statutes. Prima facie the jurisdiction conferred under s. 33A(2) of the Act is a judicial one. The order that is brought before the Commissioner affects the right of the assessee. It is implicit in revisional jurisdiction that the revising authority shall give an opportunity to the parties affected to put forward their case in the manner prescribed. The nature of the jurisdiction and the rights decided carry with them necessarily the duty to act judicially in disposing of the revision. The fact that the Commissioner cannot make an order to the prejudice of an assessee does not possibly change the character of the proceeding. Though the Commissioner may not change the order of the inferior authority to the prejudice of the assessee, he may not give the full relief asked for by the assessee.

But it is said that the Commissioner exercising jurisdiction under s. 33A of the Act is only functioning as an administrative authority and all his orders made thereunder partake that character. Reliance is placed on the decision of the Judicial Committee in Commissioner of Income-tax, Punjab, N.W.F. & Delhi Provinces, Lahore v. Tribune Trust, Lahore(1). There, the Judicial Committee held that the assessments, which were duly made by the Income-tax (1947) L.R. 74 I.A. 306. 317, 318.

545. Officer in the proper exercise of his duty, were not a nullity, but were validly made and were effective until they were set aside; and that a reference to the High Court did not lie from an order under s. 33 of the Act unless that order was prejudicial to the assessee in the sense that he was in a worse position than before the order was made. But the Board incidentally made the following observations:

> "On the contrary, s. 33 follows a number of sections which determine the rights of the assessee and is itself, as its language clearly indicates, intended to provide administrative machinery by which a higher executive officer may review the acts of his subordinates and take the necessary action on such review. It appears that, as a matter of convenience, a practice has grown up under which the commissioner has been invited to act "of his own motion", under the section, and where this occurs a certain degree of formality has been adopted. But the language of the section does not support the contention, which lies at the root of the third question and is vital to the respondent's case, that it affords a claim to relief".

Continuing the same idea that Board observed:

> "The Commissioner may act under s. 33 with or without invitation of the assessee: if he does so without invitation, it is clear that, if he does nothing to worsen the position of the assessee, the latter can acquire no right: the review may be a purely departmental matter of which the assessee knows nothing. If, on the other hand, the commissioner acts at the invitation of the assessee and again does nothing to worsen his position, there is no justification for giving him a new right of appeal".

These observations were made in the context of a question whether a reference would lie to the High Court against an order of the Commissioner. But the question whether the order of the Commissioner under s. 33 of the Act was a judicial or a quasi-judicial act subject to the prerogative writ of certiorari was neither raised nor decided in that case: that question was not germane to the enquiry before the Board, for the appeal did not arise out of any order made in a writ of certiorari. Section 33, which was considered by the Privy Council was repealed by the Amending Act of 1939; but by Act XXIII of 1941 the revisional powers of the Commissioner were restored. Section 33-A took the place of s. 33 with certain modifications. Sub-section (1) of s. 33A provided for the Commissioner acting suo motu; and sub-s. (2)thereof, on the application of the assessee. Under this section the Commissioner can exercise the revisional jurisdiction subject to the conditions mentioned therein. While s. 33 only provided for the suo motu exercise of the jurisdiction, s. 33A enables an assessee to apply to the Commissioner to revise the order of his subordinate officer.

Some of the High Courts, under the impression that the Privy Council held that the act of the Commissioner was an administrative one, ruled that a writ of certiorari. would not lie to quash the order of the Commissioner under s. 33A of the Act: see Sitalpore Colliery Concern Ltd. v. Union of India(1); Additional Income-tax Officer, Cuddapah v. Cuddapah Star Transport Co. Ltd.(2); and Suganchand Saraogi v. Commissioner of Income-tax, Calcutta(3). They did not consider the scope of the revision before the Commissioner and whether the orders made thereunder satisfied the well settled tests of "judicial act" laid down by this Court. In our view, for the reasons mentioned by us earlier, the said judgments were decided wrongly.

That apart, on the assumption that the order of the Commissioner under s. 33-A of the Act was an administrative one, the respondent would not be in a better position. What the appellant complains is that the Income-tax Officer in terms of s. 29 of the Act is under an obligation to issue a demand notice. If the said contention was correct, he did not discharge the duty imposed on him by the statute. If the Commissioner only made an administrative order in refusing to give any direction to the Income-tax Officer, it would not exonerate the said officer from discharging his statutory duty. In that event the assessee would certainly be entitled to approach the High Court under Art. 226 of the Constitution for the issue of a writ of mandamus or other appropriate direction to the Income-tax Officer to discharge his statutory duty. We, therefore, reject the preliminary objection of the respondents.

The High Court mainly dismissed the writ petition on the ground that the affidavit flied in support of the writ petition was highly unsatisfactory and that on the basis of such an affidavit it was not possible to entertain the petition. In exercise of the powers conferred by Art. 225 of the Constitution and of other powers enabling it in that behalf the High Court of Allahabad framed the Rules of Court. Chapter XXII thereof deals with the procedure to be followed in respect of a proceeding under Art. 226 of the Constitution other than a writ in the nature of habeas corpus. The relevant rule is sub-r. (2) of r. 1 of Ch. XXII, which reads:

> "The application shall set out concisely in numbered paragraphs the facts upon which the applicant relies and the grounds upon which the Court is asked to issue a direction, order or writ, and shall conclude with a prayer stating clearly, so far as

> circumstances permit, the exact nature of the relief sought. The application shall be accompanied by an affidavit or affidavits in proof of the facts referred to in the application. Such affidavit or affidavits shall be restricted to matters which are within the deponent's own knowledge".

(1) [1957] 32 I.T.R,. 26.

(2) [1960] 40 I.T.R. 200.

(3) [1964] 53 I.T.R. 717.

The application filed in the High Court certainly complied with the provisions of sub-r. (2) of r. 1 of Ch. XXII of the Rules of Court of the Allahabad High Court. It set out concisely in numbered paragraphs the facts upon which the applicant relied, the grounds on which the Court was asked to issue the direction and the exact nature of the relief sought. But it is said that the affidavit filed in support of the application did not speak to matters which were within the deponent's own knowledge. Dhruva Das, the deponent of the affidavit, is a relative of the petitioner and he also looked after the case on his behalf as his pairokar and was fully conversant with the facts. He solemnly affirmed and swore as follows:

> "I Dhruva Das, aforesaid deponent do hereby solemnly affirm and swear that the contents of paras 1, 2, 3 and 50 partly are true to my personal knowledge, that the contents of paras. 4, 5, 6, 7, 8, 9, 10. 11,
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> 12. 13, 14, 15, 16, 20, 21, 25, 27, 29 partly, 31, 32, 34, 37, 38.41, 42, 44 are based on 46 and 50 partly and paras 17, 18, 19, 22, 23, 24, 26, 28, 29, partly 30, 33', 35, 36, 39, 40, 43, 48 partly are based on perusal of the record, those of paras 47, 48 partly 49 and 50 partly are based on legal advice, which I believe to be true, that no part of this affidavit is false and nothing material has been concealed in it".

In paragraphs which are based on a perusal of the record the deponent referred to the relevant orders of the Income- tax authorities and also to the relevant agreements and the copies of the said orders and agreement were also annexed to the affidavit as schedules. It is not clear from the schedules whether certified copies or the original of the orders received by the appellant were filed. The said agreements and the orders afford sufficient basis to appreciate the case of the appellant and for disposing of the same. "Deponent's own knowledge" in r. 1(2) of Ch. XXII of the Rules is wide enough to comprehend the knowledge of the appellant derived from a perusal of the relevant documents; and the affidavit in express terms disclosed and specified the documents, the source of the appellant's knowledge. He swore in the affidavit that the documents annexed to the affidavit were true copies of public documents. If they are certified copies of public documents, they prove themselves; if they are original of the orders sent to the appellant, the deponent, as his agent, speaks to their receipt. It is, therefore, not correct to say that the facts stated in the affidavit are not based on the deponent's knowledge. The other facts alleged in the affidavit are only introductory in nature and if they are excluded the result will not be affected. That apart, if the affidavit was defective in

any manner the High Court, instead of dismissing the petition in limine, should have given the appellant a reasonable opportunity to file a better affidavit complying with the provisions of r. 1 of Ch. XXII of the Rules. We cannot, therefore, agree with the High Court that the petition was liable to be dismissed in limine in view of the alleged defects in the affidavit.

Nor can we agree with the High Court that the facts given in the affidavit are incomplete and confused. On the other hand, a careful perusal of the affidavit, along with the documents annexed thereto, discloses clearly the appellant's case: it gives the necessary facts and the reliefs sought for. We do not find any missing link in the narrative of facts or any confusion in the nature of the reliefs asked for.

We cannot also agree with the High Court that the decision of the Bombay High Court in Baijnath Chaturbhuj v. Commissioner of Income-tax, Bombay City 11(1) was given on different facts and that it was impossible to contend that any part of the money paid by Messrs. Chaturam & Sons was really compensation for the managing agency rights. The Bombay decision was given in the context of the dispute between the Bombay Group and the Income-tax authorities and was based upon the consideration of the very documents which are the basis of the appellant's claim. We do not propose to express any opinion on the correctness or otherwise of that decision. But, the fact that a Division Bench of one of the High Courts in India had taken the view in favour of the appellant indicates that the question raised is, in our view, an arguable one and it requires serious consideration. We are satisfied that this is not a case where the High Court should have dismissed the writ petition in limine. We find in the decree issued by the High Court that Sri Gopal Behari appeared on behalf of the opposite parties; presumably he appeared as the appellant must have issued notice in terms of r. 1(4) of Ch. XXII of the Rules. Be that as it may, the High Court did not finally decide two important questions that really arose 'for consideration before it, namely: (i) whether a revision lay to the Commissioner under s. 33-A(2) of the Act against the order of the Income-tax Officer; and (ii) whether the Income-tax Officer should have issued a demand under s. 29 of the Act. If a revision lay to the Commissioner, the Commissioner should have considered the second question before dismissing it. Therefore, the question is whether a revision lay to the Commissioner under s. 33-A(2) of the Act. A revision does not lie to the Commissioner against an order where an appeal against that order lies to the Appellate Assistant Commissioner but has not been made and the time within which such an appeal may be made has not expired or where an appeal against the order has been made, it is pending before him. It follows that if no appeal lies against the order an officer to the Appellate Assistant Commissioner, the Commissioner can revise that order under s. 33-A of the Act. In the present case, pursuant to the directions of the, Tribunal, Delhi Bench, the Income-tax Officer determined the assessee's capital gains under s. 12-B of the Act; but the Income-tax Officer did not make any order under s. 23(3) of the Act, nor (1957) 31/.T.R. 643.

did he issue a regular notice of demand as prescribed under s. 29 of the Act. The result was, no appeal lay against the computation made by the Income-tax Officer to the Appellate Assistant Commissioner. Indeed, on March 8, 1957, the Appellate Assistant Commissioner rejected the appeal filed by the appellant as being not maintainable. As no appeal lay to the Appellate Assistant Commissioner against the calculations made by the Income-tax Officer, the Commissioner had certainly power to revise the said order. On March 5, 1956, the appellant flied an application

requesting the Income-tax Officer to issue a notice of demand as required by s. 29 of the Act. But the said Officer declined to issue the notice of demand. The question is whether he was bound to issue a notice of demand under s. 29 of the Act. Section 29 of the Act reads:

> "When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable".

Under this section, if a tax is due in consequence of an order from an assessee, the Income-tax Officer is under a duty to serve on him a notice of demand. Pursuant to the directions given by. the Tribunal the Income-tax Officer made fresh calculations under the head 'capital gains' and ascertained the amount due from the assessee. In the circumstances, pursuant to the said calculation, he should have passed an order and issued a notice of demand to the assessee. In not doing so, it must be held that the Income-tax Officer did not discharge his duty which he was bound to do under the Act; with the result he had become amenable to a writ of mandamus directing him to do what he should have done under the ,Act.

In the result, the order of the High Court is set aside and we issue a writ of certiorari quashing the order of the Commissioner and a writ of mandarnus directing the Income- tax Officer to pass an order and issue a notice in accordance with law. The appellant will have his costs throughout.

Appeal allowed.