over and above that, if any, will be recovered from the judgment-debtor. No judgment taking the contrary view has been cited by the judgment-debtor. It is held in *Naurang Singh's case* (supra) that if the first appellate court on its inherent jurisdiction under section 151, C.P.C. demanded security for payment of mesne profits from the judgment-debtor when he had applied for stay of his dispossession in execution of the decree and the said security bond was executed by the surety, in pursuance thereof, then the security bond could be executed similarly in the execution proceedings without any recourse to a fresh suit.

(3) In these circumstances, this petition succeeds, the impugned order is set aside and the case is sent back to the executing court for proceeding with the execution application in accordance with law. Of course the decree holder will implead the sureties as party to the execution application in order to claim the amount from them. The parties have been directed to appear in the executing court on 8th November, 1985. Records of the case be sent back forthwith.

*N.K.S.*

*Before S. P. Goyal and G. C. Mital, JJ.*

COMMISSIONER OF INCOME TAX, AMRITSAR,—*Applicant.*

*versus*

MAYA RAM JAI LAL,—*Respondent.*

*Income Tax Reference No.* 33 *of* 1977.

October 18, 1985.

*Income Tax Act (XLIII of 1961)—Section 43(5)—Assessee carrying on business of manufacturing and supplying goods to others—Sums of money paid to different parties as compensation for not fulfilling the contract to supply goods to them—No evidence of any dispute between the parties nor as to why the contract was not performed—Basis of calculation of the amounts also not available—Payments made by the Assessee—Whether come within the purview of 'speculative transaction'—Such amounts—Whether to be disallowed as speculative in nature.*

*Held,* that while determining as to whether a transaction was speculative or not what is to be seen on the facts of a given case is as to whether the dispute itself has been settled between the parties or is it the contract that has been settled. If the dispute is settled between the parties then it is not a speculative transaction but if the contract is settled and under the settlement of the contract, damages are paid, it would be a speculative transaction. If there is no evidence whatsoever as to whether the other party ever raised any dispute or

as to how the assessee was unable to perform his part of the contract or as to the basis on which the damages were calculated, then it is to be held that the settlement arrived at between the parties would be deemed to be a settlement of contract which transaction is to be held speculative. If no delivery of goods was made and it is apparent that the contract between the parties was settled by payment, then such payments cannot be allowed and have to be disallowed being speculative in nature as they clearly come within the ambit of Section 43(5) of the Income Tax Act, 1961.

(Paras 5 and 6).

*Reference under Section* 256(1) *of the Income-tax Act,* 1961 *made by the Income-tax Appellate Tribunal (Amritsar Bench), Amritsar, referring the following questions of law, for seeking the opinion of this Hon'ble Court, arising out of the consolidated order dated* 22*nd July,* 1976 *of the Tribunal in I.T.A. No.* 608 *and C.O. No.* 26 *of* 1975-76 *and R.A. No.* 73 *of* 1976-77 *for the Assessment year* 1969-70:

(*i*) *Whether on the facts and in the circumstances of the case, the Tribonal was right in law in holding that the payment of Rs.* 62,060 *made by the assessee to the various parties during the assessment year* 1969-70 *was based on breach of contracts and was not a speculation loss within the meaning of section* 43(5) *of the I.T. Act,* 1961.

(*ii*) *Whether on the facts and in the circumstances of the case, the Tribunal was right in law in deleting the addition of Rs.* 62,060 *made towards the total income of the assessee during the assessment year* 1969-70.

Ashok Bhan, Sr. Advocate with Ajay Mittal, Advocate, *for the Applicant.*

Vimal Gandhi, Advocate, with S. S. Mahajan, Advocate, *for the Respondent.*

JUDGMENT

*Gokal Chand Mital, J.*

(1) M/s May Ram Jia Lal (hereinafter referred to as the 'assessee') carries on business in the sale of wool-tops and manufacture of yarn. During the course of the assessment proceedings for the assessment year 1969-70, the Income-tax Officer found that the assessee paid a sum of Rs. 62,060 to various parties as compensation for non-fulfilling the contract to supply the goods to them. The Income-tax Officer came to the conclusion that since there was no written agreement between the parties, the compensation paid for non-fulfilment of the conract, was treated as speculative in nature and was disallowed. On appeal, the assessee furnished before the

Appellate Assistant Commissioner the following details regarding the claim of Rs. 62,060:—

| Name of the party | Date of contract | Quantity contracted | Date and payment of advance received | Date of payment of compensation | Amount paid | Rate at which paid |
|---|---|---|---|---|---|---|
| M/s Jay Udhay Hosiery, Madhopuri, Ludhiana | 15/5/68 | 6000 Kg. | 17/5/68<br>1000 | 10/3/69 | 19500 | 3.25 |
| M/s Mallimal Sant Lal Chaura Bazar, Ludhiana | 1/6/68 | 3500 Lb. | 5/6/68<br>3000 | 10/3/69 | 2835 | 1.00 |
| M/s Surinder Kumar Jain and Brs. Ludhiana | 10/7/68 | 5000 Lb. | 3/8/68<br>2000 | 10/369 | 7500 | 1.50 |
| M/s Knitting Industry Amritsar | 27/8/68 | 9000 Kg. | 4/9/68<br>2000 | 17/3/69 | 22500 | 2·25 |
| Kumar Taxtiie Mills, Amritsar | 22/8/68 | 3600 Kg. | — | 12/3/69 | 9000 | 2·50 |
| Kesho Dass Kahan Chand Taxtile Mills, Amritsar | — | 2000 Lb. | 12/7/68<br>2000 | 16/12/68 | 750 | 1·45 |

It was pointed out that due to unavoidable reasons the assessee could not fulfil the contract for the supply of the goods and hence had to pay the damages for breach of the contract. The assessee's case was that the amount paid was not in the naure of speculative loss, but was in the nature of liquidated damages. The Appellate Assistant Commissioner accepted the assessee's contention and deleted the addition of Rs. 62,060. The Department took the matter in appeal before the Income-tax Appellate Tribunal. The Tribunal came to the conclusion that the loss of Rs. 62,060 was on account of payment as damages for breach of contract and was, therefore, allowable as a trading liability. It rejected the contention of the Department that it was a speculative loss within the meaning of Section 43(5) of the Income-tax Act, 1961 (hereinafter called the Act). In coming to the conclusion, the Tribunal relied on the decision of the Calcutta High Court in *C.I.T. West Bengal* v. *Pioneer Trading Co. Pvt. Ltd.* (1) and *Daulatram Rawatmall* v. *C.I.T. (Central) Calcutta*, (2) and the decision of the Mysore High Court in *Bhandari Rajmal Kushalraj* v. *C.I.T. Mysore*, (3). The conclusion was arrived at after recording the following observations:—

> "We have gone through the details of the various transactions and find that in respect of about all the transactions in dispute, the settlement was made long after the date of delivery as contemplated in the contracts. Thus, the claim made by the assessee was based on breach of contract and does not come within the meaning of a contract settled as used in Secion 43(5) of the Income-tax Act, 1961."

(2) The Department sought reference, and the Tribunal has referred the following two questions for our opinion:

> "(i) Whether on the facts and in the circumstances of the case. the Tribunal was right in law in holding that the payment of Rs. 62,060 made by the assessee to the various parties during the assessment year 1969—79 was based on breach of contracts and was not a speculation loss within the meaning of section 43(5) of tht I.T. Act, 1961.

(1) 70 I.T.R. 347.
(2) 78 I.T.R. 503.
(3) 96 I.T.R. 401.

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in deleting the addition of Rs. 62,060 made towards the total income of the assessee during the assessment year 1969-70."

(3) Since the questions referred have to be answered on the facts and circumstances of the case, the admitted facts as are disclosed from the statement of the case and the order of the Tribunal only show that these contracts were entered into by the assessee with different concerns from May to August, 1968, of which deliveries were to be made from December, 1968 to March, 1969, according to the details tabulated above. There was no written contract. There is no evidence if the persons with whom the assessee had contracted to sell certain items gave any notice to the assessee alleging the breach of contract on the part of the assessee or ever took the matter to any Court of law. All that we find from the record is that after the date of the delivery of the goods lapsed, the assessee settled the contracts by paying compensation. Beyond that there is no record. However, in addition to this, we have the finding of the Tribunal to the effect that from the details of the transactions furnished to them, they were of the opinion that all the transactions and the dispute were settled long after the date of the delivery as contemplated in the contracts. Therefore, the only material which was before the Tribunal for not applying Section 43(5) of the Act was that the transactions in dispute were settled long after the date of the delivery. On these facts, we will have to decide whether the case in hand is covered by Section 43(5) of the Act or not.

(4) Now, adverting to the legal position, it will have to be borne in mind as to what is "Speculative transaction" within Section 43(5) of the Act. In this behalf, reference may be made to the observations made by R. S. Pathak, J. in *Commissioner of Income-tax, Bombay City III* v. *Shantilal P. Ltd.* (4). Both sides have placed reliance on this judgment, counsel for the assessee because the matter was decided against the Department and by the counsel for the Department because if the law laid down in the aforesaid decision is applied to the facts of this case, the matter is be decided in favour of the Department. There the assessee failed to perform its part of the contract because the price of the contracted goods which were to be supplied within three months of the

(4) 144 I.T.R. 57.

contract went up from Rs. 440 per Kilogram to Rs. 2,000 per Kilogram, and for that reason, the assessee did not perform the contract. The opposite party who had contracted to purchase the good, filed a suit and the dispute was referred to an Arbitrator and as a result of the arbitration the assessee had to pay compensation. On those facts, it was held that the dispute was settled between the parties by way of arbitration and the payment of compensation as a result of the arbitration did not come within the purview of "speculative transaction". The following opinion of law was furnished while deciding that case:

> "Is a contract for the purchase or sale of any comodity settled when no actual delivery or transfer of the commodity is effected, and instead, compensation is awarded under an arbitration award as damages for a breach of the contract? A contract can be said to be settled if instead of effecting the delivery or transfer of the commodity envisaged by the contract the promises, in terms of section 63 of the Contract Act, accepts, instead of it, any satisfaction which he thinks fit. It is quite another matter where instead of such acceptance the parties raise a dispute and no agreement can be reached for a discharge of the contract. There is a breach of the contract and by virtue of section 73 of the Contract Act the party suffering by such breach becomes entitled to receive from the party who broke the contract compensation for any loss or damage caused to him thereby. There is no reason why the sense conveyed by the law relating to contracts should not be imported into the definition of "speculative transaction." The award of damages for the breach of a contract is not the same thing as a party to the contract accepting satisfaction of the contract otherwise than in accordance with the original terms thereof. It may be that in a general sense the layman would understand that the contract must be regarded as settled when damages are paid by way of compensation for its breach. *What is really settled by the award of such damages and their acceptance by the aggrieved party is the dispute between the parties. The law, however, speaks of a settlement of the contract, and a contract is settled when it is either performed or the promisee dispenses with or remits, wholly or in part, the performance of the promise made*

*to him or accepts instead of it any satisfaction which he thinks fit.* We are concerned with the sense of law, and it is that sense which must prevail in sub-section (5) of section 43. (Emphasis supplied)."

(5) The underlined portion of the aforesaid quotation clearly goes to show as to what is to be seen on the facts of a case while concluding whether the transaction was speculative or not. If the dispute is settled between the parties then it is not a specultive transacion, but if the contract is settled and under the settlement of the contract, damages are paid, it would be speculative transaction. In the present case, we have to see whether the dispute was settled or the contract was settled. As already noticed, there is no evidence whatsoever if the other party ever raised any dispute. There is no evidence as to why the assessee was not able to perform his part of the contract. There is no evidence as to how the damages were calculated. In order to prove the damages, it was for the assessee to show that when the contract was entered into, the agreed rate was such and such and when the time for performance of the contract matured, the rate of those goods was such and such, and on the difference between the two rates, the compensation was paid not to settle the contract but to settle the dispute. All these facts are missing in this case. It has not been shown as to what was agreed rate and what was prevailing rate on the date of delivery. If material had been placed on record, the Department could rebut it. We are at a loss as to on what material the Tribunal allowed deletion of Rs. 62,060. Merely because the contract had not been performed by the agreed date, it cannot be said that it was due to the default of the assessee. If the default of the assessee is not established in this case, the question of its liability would not arise and consequently, the question of payment of damages would not arise.

(6) Counsel for the Department also placed reliance on two decisions of the Supreme Court rendered by R. S. Pathak, J. in *Nirmal Trading Co.* v. *Commissioner of Income-tax (Central) Calcutta,* (5) and *Jute Investment Co. Ltd.* v. *C.I.T. West Bengal,* (6) for the proposition that if the delivery of the goods is not made and it is not shown that there was any dispute between the contracting parties, then it is to be held that the settlement arrived at between the

(5) 121 I.T.R. 54.
(6) 121 I.T.R. 56.

parties would be deemed to be a settlement of contract which transaction has to be held speculative. In the present case, no delivery was made and it is apparent that the contracts between the parties were settled by payment and, therefore, such payment cannot be allowed and have to be disallowed being of speculative nature as they clearly come within the ambit of Section 43(5) of the Act.

(7) On behalf of the assessee, reliance was placed on *Commissioner of Income-tax, Delhi-III* v. *Bhagwan Dass Rameshwar Dayal,* (7) a decision of the Division Bench of the Delhi High Court. It was held in that case that even if there is no supply of the contracted goods, yet the transaction cannot be speculative. There is no quarrel with this proposition. That is why, the learned Judges of the Delhi High Court observed that even without actual delivery, all settlements cannot be termed as speculative and it will depend on the facts of each case. In that case, the learned Judges found that part of the oil was supplied under the first three contracts and under the fourth contract, no supply was made. The non-supply was for the following reasons:

(i) failure in the market causing a break down in oil supplies due to fluctuation in oil prices;

(ii) the assessee had represented its inability to shoulder any further burden due to blockage of money; A huge amount was due to the assessee from the customers.

For these reosons, the learned Judges came to the conclusion that the supplies were not made due to which disputes arose, which were settled between the parties. Therefore, in that case, it was held that it was not a case of settlement of contract but a settlement of dispute. Hence this case does not help the assessee.

(8) Adverting to C.I.T. *West Bengal's cose* (supra) which decision was approved by the Supreme Court in *Commissioner of Income-tax, Bombay City's case* (supra) we find that there was a real dispute between the contracting parties which was settled and, therefore, it was held that it was not a speculative transaction. On the facts of the present case, the aforesaid case does not help

(7) 149 I.T.R. 387.

the assessee, and the Tribunal erred in applying it to decide the matter in favour of the assessee. Similar is the position of other two cases referred to by the Tribunal. The facts of those cases are entirely different and it was shown that there was a real dispute between the parties which was settled.

(9) For the reasons recorded above, we hold that on the facts and circumstances of the case, the Tribunal was not right in holding that the payment of Rs. 62,060 made by the assessee to the various parties during the assessment year 1969-70 was not a speculative transaction within the meaning of Section 43(5) of the Act and it further erred in deleting the said amount.

(10) In view of what we have said above, both the questions are answered in the negative that is, in favour of the Department and against the assessee. The Department will have its costs. Counsel fee being Rs. 300.

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*N.K.S.*

*Before : J. V. Gupta, J.*

STATE OF PUNJAB,—*Appellant.*

*versus*

MUKHTIAR SINGH,—*Respondent.*

*Regular Second Appeal No.* 456 *of* 1985.

November 14, 1985.

*Constitution of India,* 1950—*Article* 311—*Punjab Civil Service Rules (Vol. I), Part I—Rules* 2.14 *and* 2.26—*Peon working in a non-gazetted establishment—Government declaring Sub-Divisional Officers as head of office in respect of such establishment—Deputy-Commissioner being the appointing authority initiating disciplinary proceedings against the peon and terminating his services—Order of termination—Whether valid—Disciplinary proceedings—Whether could be initiated by the authority higher than the Sub-Divisional Officer.*

*Held,* that under Article 311 of the Constitution of India, 1950, it has been provided that no person, who is a member of the civil