

(2009) 07 CAL CK 0060

In the Calcutta High Court

Case No : Writ Petition No. 19251 (W) of 2007

Vishwanath Agarwala

APPELLANT

Vs

Tax Recovery Officer-I

RESPONDENT

Date of Decision : 06-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 59, Order 21 Rule 60, Order 21 Rule 61, Order 21 Rule 63
Evidence Act, 1872 — Section 106, 157
Income Tax Act, 1961 — Section 281
Income Tax Rules, 1962 — Rule 11, 11(4), 11(6), 2

Citation : (2009) 225 CTR 358 : (2010) 320 ITR 636 : (2009) 182 TAXMAN 327

Hon'ble Judges : Biswanath Somadder, J

Bench : Single Bench

Advocate : J.P. Khetan, S. Mukherjee and K.P. Mazumdar, for the Appellant; Amal Baran Chatterjee and Y.N. Gupta, for the Respondent

Judgement

Biswanath Somadder, J.—The instant writ petition is directed against an order dated 6-8-2007 passed by the Tax Recovery Officer-I, Hooghly (hereinafter referred to as "the TRO") under Rule 11(6) of the Second Schedule to the Income Tax Act, 1961.

2. The impugned order dated 6-8-2007 is in respect of sale of an immovable property situated at 13, Kalipukur Road, Sheoraphully, Hooghly, by auction by the TRO to recover the Income Tax dues of Late Dwarka Prasad Agarwala, said to be father of the present writ petitioner, for the assessment years 1959-60 and 1961-62.

3. The writ petitioner claims to be one of the legal heirs of Late Panna Bai. The writ petitioner has stated that Late Panna Bai, during her life-time, became owner of the property-in-question.

4. According to the writ petitioner, his mother, Late Panna Bai, purchased the property from one, Dwip Chand Ghosh, on 13-3-1946 for a sum of Rs. 20,000

out of her Stridhan.

It has been further stated that the name of Late Panna Bai was also registered with the Baidyabati Municipality Assessment List for the year 1951-52 as the owner of the aforesaid premises. From the writ petition it also appears that at that point of time she was the partner of M/s. Hari Prasad Agarwala & Co. and operated her business from the said premises.

5. According to the writ petitioner, the municipal record would demonstrate that Panna Bai was the owner of the property-in-question. In this regard, writ petitioner has referred to the Baidyabati Municipality Assessment List for the years 1951-52 and 1961 -62, which have been annexed to the writ petition.

6. It was also stated that the property-in-question was assessed to wealth tax for the assessment year 1966-67 in the hands of Panna Bai of 24B, Nimtolla Ghat Street, Kolkata, by the Wealth Tax Officer, "B" Ward. The order of assessment also mentioned about previous assessment of the said property. The said assessment included other assets, being movable property as per return and jewellery.

7. It has also been contended that the wealth tax assessment orders for the years 1967-68, 1968-69 and 1969-70 described the assessee as Panna Bai, of the same address and having the same file number, the only difference being that the assessments were made by the Wealth Tax Officer, "I" Ward. The said assessment covered both movable and immovable properties including jewellery, bank balance and investments in the partnership firm of M/s. Kali Prasad Agarwala & Co. The wealth tax assessment for the assessment year 1977-78 described the assessee as "Panna Devi" with her address as 1, Netaji Subhas Road, Calcutta, and as such, the assessment was made by the Wealth Tax Officer, "D" Ward, District I(I), Calcutta. The said assessment covered immovable and movable properties including jewellery.

8. It has been further contended that the Income Tax assessment for the assessment year 1979-80 described the assessee as "Panna Devi Agarwala" of 1, Netaji Subhas Road, Calcutta and an address of New Delhi was also mentioned. The assessment included house property income and was made by the Income Tax Officer at New Delhi on the basis of the return filed at Calcutta. The property-in-question was let out. Rent receipts were issued by the lady described herself as "Smt. Panna Devi".

9. The learned senior advocate for the writ petitioner contended that in March, 1989, the TRO, Chinsurah, served a prohibitory order on Hari Prasad Agarwala, being the tenant as also the uncle of the writ petitioner, restraining him from paying house rent to the father of the writ petitioner in respect of the property-in-question for recovery of the Income Tax dues of Dwarka Prasad Agarwala. Hari Prasad Agarwala objected on the ground that rent was being paid to Panna Devi, who was the owner, and not Dwarka Prasad Agarwala. By a letter dated 3-1-1992, issued by the TRO, Hooghly, Shri Hari Prasad Agarwala was directed to

pay the rent to the TRO, Hooghly, stating therein that the house property of Dwarka Prasad Agarwala was gifted to Panna Devi, which bears the charge liability of the donor. The said letter dated 3-1-1992 was, however, replied to by Shri Hari Prasad Agarwala by his letter dated 22-1-1992, stating that the said property had been purchased by Smt. Panna Bai from her own property directly from Sri Dwip Chand Ghosh in 1946 and not gifted to her by Dwarka Prasad Agarwala.

10. It has been further stated that a certified copy of the municipal assessment of the sale deed was submitted to the TRO, Hooghly on 23-4-1992, which made it clear that the property belonged to deceased Panna Bai and it neither stood in the name of Dwarka Prasad Agarwala nor was it gifted at any point of time.

11. Learned senior advocate, appearing on behalf of the writ petitioner, submitted that the TRO, all on a sudden on 15-4-1996, issued an order of attachment in the name of Panna Devi (Bai) Agarwala, in respect of the said property for recovery of the Income Tax dues of Dwarka Prasad Agarwala, who had by that time already died.

12. On 17-4-1996, the TRO proceeded to issue a proclamation of sale and in the schedule of property forming part of the said proclamation, the said property was described as "H.P. of Smt. Panna Devi Agarwala, w/o late Dwarka Pd. Agarwala, 13, Kalipukur Road, Sheoraphully, Hooghly".

13. It has also been contended by the writ petitioner that an objection was filed in respect of the proposed sale, but the TRO proceeded to hold auction in which the respondent No. 4, being the private respondent herein, was the highest bidder offering to pay Rs. 1,35,000. However, before the sale was confirmed, the writ petitioner filed a writ petition, being CO. No. 8094(W) of 1996, before this Hon"ble Court, wherein the private respondent No. 4, was added as a respondent.

14. It has been specifically contended by the writ petitioner that in the first writ proceeding, the then TRO, Arjun Kumar Panja, affirmed an affidavit-in-opposition and in the said affidavit-in-opposition Panna Devi Agarwala was also described as Panna Bai and it was accepted that she was the wife of Dwarka Prasad Agarwala and that the said property stood in her name in the municipal records also. It was, however, disputed that Panna Devi Agarwala alias Panna Bai had purchased the said property out of her stridhan. It was alleged, for the first time, that the said property was owned by Dwarka Prasad Agarwala in the name of his wife Panna Devi Agarwala who was a housewife having no income of her own and was a benamidar of Dwarka Prasad Agarwala.

15. The learned senior advocate for the petitioner submitted that by an order dated 11-9-2003, the writ petition, being CO. No. 8094(W) of 1996, was disposed of with a direction upon the respondents to allow the writ petitioner, being the son of Panna Bai, an opportunity to produce the materials before the TRO showing that in her Income Tax return, Panna Bai, had disclosed the disputed property as her own property or that this very property was assessed

under the Wealth Tax Act. The impugned sale was kept in abeyance till the final decision was taken by the Income Tax Authority holding that the property-in-question was not shown by Panna Bai in her Income Tax return or wealth tax return and it was established that she was a benamidar of her husband as claimed in the affidavit-in-opposition. The petitioner has also contended that the Tax Authority was directed by this Court to pass a reasoned order after giving an opportunity of hearing within two months from the date of communication of the said order.

16. The writ petitioner has submitted that the TRO, after examining Panna Bai's original wealth tax assessment order for the assessment year 1966-67 along with demand notice, found in his order dated 23-1-2004 that the said property was duly considered in the said assessment and consequently held that she was the real owner of the property and as such the sale could not be confirmed in favour of the private respondent No. 4.

17. It has also been contended by the writ petitioner that the private respondent No. 4 herein challenged the TRO's said order dated 23-1-2004, before this Court by filing a writ petition, being W.P. No. 12187(W) of 2006, on the ground that he was not heard before the order dated 23-1-2004 was passed. The learned senior advocate for the petitioner referred to the order dated 9-6-2006, passed by this Court in W.P. No. 12187(W) of 2006, whereby this Court was pleased, inter alia, to set aside the order dated 23-1-2004 and directed the TRO to give a reasoned decision after hearing all affected parties including the writ petitioner and respondent No. 4.

18. On behalf of the writ petitioner it was submitted that the TRO while passing the impugned order dated 6-8-2007 accepted the fact that Panna Bai had shown the property in her wealth tax return while holding that Panna Bai was different from Panna Devi Agarwala. It was further submitted that the TRO seized upon the fact that in the deed dated 13-3-1946 Panna Bai was described as the wife of Dwarka Das Agarwala and not as wife of Dwarka Prasad Agarwala. Referring to the impugned order passed by the TRO, it was submitted that the TRO had relied on reports of his Inspector, correspondence made with the owner of premises No. 24B, Nimtolla Ghat Street, inquiry from a resident of Sheoraphully, field inquiry, deposition of tenants and correspondence with tenants. The learned senior advocate for the petitioner submitted that none of the said materials, which were collected behind the writ petitioner's back, were provided to him and no opportunity was afforded to the writ petitioner to controvert or deal with the same. He submitted that on the basis of such materials, the TRO had held that the address given in the wealth tax return of Panna Bai as 24B, Nimtolla Ghat Street was false as that was the address of Panna Devi Agarwal's father Bholaram Bagla and there was no existence of Panna Bai, wife of Dwarka Prasad Agarwala, who was a fictitious person. He further submitted that the TRO had on that basis held that Dwarka Prasad Agarwala acquired the said property in the name of fictitious benamidar Panna Bai, wife of Dwarka Das Agarwala and

enjoyed the income from the property in his life-time and after his demise his heirs were in enjoyment thereof. The TRO had held that Dwarka Prasad Agarwala was the real owner of the said property, which could be auctioned for recovery his dues.

19. The learned senior advocate submitted that in the facts and circumstances of the instant case, the conduct of the respondent authorities have not been above-board.

20. He submitted that the said property was purchased in the year 1946. Admittedly, the Income Tax demand against Dwarka Prasad Agarwala were for the assessment years 1959-60 and 1961-62, the assessments for which would have been made even later. The said property was acquired more than ten years before the said assessment years. No motive or device could be read into the transaction of purchase. He further submitted that it was not in dispute that Panna Bai was assessed to Income Tax as well as wealth tax and that the said property was shown in her wealth tax returns and also stood mutated in her name in the municipal records.

21. He also submitted that if there was a question about the source of the money used to purchase the property, that question should have arisen at least half a century ago and it was the usual procedure of the revenue authorities to look into the source of the money whenever an assessee disclosed acquisition of property in the return to find out whether such acquisition had been made out of disclosed and taxed income or not. He further submitted that in the instant case, curiously enough, the question of benami was raised in the year 1996 and that too before the High Court, fifty years after purchase of the property-in-question and more importantly, after both Dwarka Prasad Agarwala and Panna Devi Agarwala had died.

22. He also submitted that both Dwarka Prasad Agarwala and Panna Bai/Panna Devi Agarwala were tax assesseees, the source of the money used for purchase of the said property could not be an open question fifty years after the purchase, particularly when the said property was admittedly assessed to tax. He submitted that the plea of benami was an afterthought and is quite evident from the fact that even in the year 1992 the case of the respondent authorities was that the said property was gifted by Dwarka Prasad Agarwala to Panna Devi Agarwala.

23. The learned senior advocate for the writ petitioner while referring to the first writ proceeding, being CO. No. 8094(W) of 1996, submitted that the issue of benami was raised by the Income Tax Department for the first time therein and in view of the order of Bhaskar Bhattacharjee, J. dated 11-9-2003, the TRO should not have re-agitated such point. He submitted that the stand that Panna Bai was different from Panna Devi Agrawal had been taken in the impugned order sixty one years after the purchase of the said property and seventeen years after the demise of Dwarka Prasad Agarwala and Panna Devi Agarwala. He also submitted that no such stand was taken by the respondent authorities and

no distinction was made between Panna Bai and Panna Devi, wife of Dwarka Prasad Agarwala in the first writ proceeding and this High Court was invited to dispose of the matter on such basis. The dispute sought to be raised as regards identity is clearly an afterthought, at this stage.

24. He further submitted that it was not in dispute that the property-in-question was assessed to wealth tax. The wealth tax assessment orders themselves described the lady sometimes as Panna Bai and sometimes as Panna Devi. The wealth tax assessment orders, apart from the said property, also show other assests including investment in the partnership firm of M/s. Kali Prasad Agarwala & Co., bank balance and jewellery. Even in the Municipal Assessment List, the lady was initially described as Panna Bai and subsequently as Panna Devi. The attachment order dated 15 th April, 1996 described the lady as "Panna Devi (Bai) Agarwala wife of late Dwarka Pd. Agrawal In the schedule of property in the proclamation of sale the said property was described as "H.P. of Smt. Panna Devi Agarwala wife of late Dwarka Pd. Agrawal

25. He further submitted that even in the affidavit-in-opposition, filed by the respondent to the first writ petition, it was accepted that the said property stood in the name of Panna Bai/Panna Devi Agarwala, wife of Dwarka Prasad Agarwala. He submitted that it does not lie in the mouth of the respondent authorities to now contend that Panna Bai is nonexistent and fictitious and that Panna Devi Agarwala is not the Panna Bai/Panna Devi who filed the wealth tax returns disclosing amongst her other assets the said property as part of her wealth. According to him the respondent authorities cannot now so contend about Panna Bai being a non-existent and fictitious person, seventeen years after the demise of both Panna Devi Agarwala and Dwarka Prasad Agarwala and sixty one years after the purchase of the property, and that too on the basis of materials collected behind the petitioner's back and without disclosing the same to him in course of the proceedings or affording him any opportunity to controvert or deal with such materials.

26. Relying on the deed dated 13th March, 1946, he also submitted that there was no doubt that Panna Bai was described as the wife of Dwarka Das Agarwala. Panna Bai was not a signatory to the said deed which was executed by the vendor alone. The deed was written in the Bengali vernacular and the slip with regard to the middle name went unnoticed. He also submitted that the deed correctly gave the address as Sheoraphully, Hooghly. Considering that Panna Devi Agarwala, wife of Dwarka Prasad Agarwala, had all along shown and dealt with the said property as her own and no other person had ever laid any claim to the property, according to the learned senior advocate nothing turns on the small slip in the deed. The attempt of the respondent authorities to make capital out of it, sixty one years after the purchase and seventeen years after the demise of Panna Devi Agarv/ala and Dwarka Prasad Agarwala was entirely unreasonable and should not be permitted by this Court. He also submitted that the attempt of the respondent authorities had been to create a dispute on facts so that the

jurisdiction of the writ Court was ousted and to drive the writ petitioner to a suit. He submitted that the TRO had wrongly assumed jurisdiction to decide the question of title and was now contending that the question of title cannot be decided by the writ Court.

27. He also submitted that this Court may take into consideration that not only were the respondent authorities acting without jurisdiction and had sought to create a dispute on facts, findings in that respect had been admittedly arrived at in the impugned order, in gross violation of the principles of natural justice. Considering the inconsistent stands adopted by the respondent authorities from time to time, he submitted that no credence could be lent to the new controversy now sought to be raised as regards identity.

28. Relying on the judgment of the Supreme Court rendered in the case of *The Tax Recovery Officer II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade (Dead) Through Mrs. Shobha Ravindra Nemiwant*, , he submitted that the provisions of Rule 11 of the Second Schedule to the Income Tax Act, 1961 are analogous to those of Order XXI, Rules 58 to 61 and 63 of the CPC as it stood prior to the amendment in 1976. He submitted that the jurisdiction of the TRO relates to examining possession, and only incidentally, any question of right to possession as claimed by the objector and the TRO cannot go into intricate questions of law as to title of the property.

29. He also relied on a judgment of the Supreme Court rendered in the case of *Sawai Singhai Nirmal Chand Vs. Union of India*, and submitted that the scope of enquiry under Rule 11, which is akin to Order XXI Rule 58 of the CPC (as it stood prior to 1976 amendment) was very limited in nature and was confined only to a summary investigation as regards possession and the TRO cannot decide intricate questions of law as the title of the property. He further submitted that the question of benami can only be adjudicated in a suit upon appreciation of evidence and cannot form subject-matter of a summary investigation.

30. He also submitted that if the claimant adduces evidence to show that he was possessed of the property under some kind of a title, the property would have to be released from attachment. He submitted that in the order dated 11-9-2003, passed in the earlier writ petition, being CO. No. 8094 (W) of 1996, the Court never conferred such jurisdiction upon the TRO which he did not have under the statute of which he was a creature. He further submitted that in the instant case, the petitioner has shown that his mother was possessed of the said property under the deed as owner thereof. The petitioner had also shown that the property was subjected to wealth tax in his mother's hand and was also mutated in her name in the municipal records. The petitioner had further shown that she was receiving rent in respect of the said property and paying Income Tax. In such circumstances, he submitted that in terms of Sub-rule (4) of Rule 11, the TRO should have released the said property from attachment since it was not in the possession of the defaulter or any person in trust for him or in the occupancy of a tenant or other person paying rent to him. He further submitted that it was

not open to the Assessing Officer to dispute the title of the petitioner's mother on the ground of benami or to arrive at any finding in that regard, in a proceeding under Rule 11. In conclusion, he submitted that the impugned order dated 6-8-2007 was passed wholly without jurisdiction and this Court should be pleased to set aside the same. In the alternative, he submitted that the order is not sustainable on account of admitted violation of the principles of natural justice.

31. On the other hand, learned senior advocate appearing on behalf of the respondent, Income Tax Authorities, submitted that the TRO had passed the order dated 6-8-2007 well within his jurisdiction exercising his powers under Rule 11 of the Second Schedule of the Income Tax Act, 1961. He also submitted that the TRO proceeded to adjudicate upon the matter in terms of the directions given by the High Court on 9-6-2006, in W.P. No. 12187 (W) of 2006, whereby the High Court had been pleased to set aside the earlier order of the TRO, passed in purported compliance of the direction given by the High Court on 11-9-2003 in CO. No. 8094 (W) of 1996. He submitted that the TRO, in pursuance to the order of the High Court dated 9-6-2006, sent notices to all parties and had duly considered the issues raised and came to the conclusion, inter alia, that the facts were indicative that the purchase money for the property-in-question had come from the real owner of the property, Dwarka Prasad Agarwala and the ostensible owner, "Panna Bai", wife of "Dwarka Das Agrawal", was a fictitious person and she could not provide the consideration of the property at the time of purchase. In such circumstances the TRO had come to a categorical finding that it had been undoubtedly proved that the property-in-question at Sheoraphully, Hooghly, was purchased in the name of a fictitious person "Panna Bai, wife of Dwarka Das Agarwala" and the beneficiary of the property was Dwarka Prasad Agarwala in his life time. The learned senior advocate also submitted that the TRO had determined the issue with regard to benami transaction on the basis of the clear direction of the High Court contained in the order dated 11-9-2003, passed in CO. No. 8094 (W) of 1996 and upon duly complying with the directions given by the High Court in the subsequent order dated 9-6-2006, passed in W.P. No. 12187 (W) of 2006 and hence there was no scope for any doubt in respect of the observation of the TRO that the transaction was benami. He further submitted that the TRO had correctly come to the final conclusion that the property could be auctioned for the recovery of the outstanding demand of Dwarka Prasad Agarwala as per provision of Rule 11 of the Second Schedule to the Income Tax Act, 1961 and had therefore rightly rejected the claim of the writ petitioner-Vishwanath Agarwala.

32. The learned advocate appearing on behalf of the private respondent No. 4, Kanhaiya Lai Bhagat, essentially supported the stand taken by the learned advocate appearing on behalf of the Income Tax Authorities. He also submitted that his client, Kanhaiya Lai Bhagat, on 22-5-1996, participated in the public auction held by the Income Tax Authorities in respect of property-in-question. On being a failure in the auction purchase, Hari Prasad Agarwala, as a constituted

attorney of the writ petitioner-Vishwanath Agarwala, had filed the earlier writ petition before this Court, challenging the said auction. He also submitted that the writ petitioner is a son of Sri Dwarka Prasad Agarwala and lives in New Delhi and other sons of Dwarka Prasad Agarwala live in London and his daughters are all married and living elsewhere. He submitted that his client has been living in the property-in-question for a long time as also Hari Prasad Agarwala, being the attorney-holder of the writ petitioner and had successfully participated in the public auction held by the Income Tax Authorities.

33. He further submitted that Hari Prasad Agarwala, as the constituted attorney of Vishwanath Agarwala, had challenged the said auction sale before the respondent authorities as well as before this Court by filing the earlier writ petition being CO. No. 8094 (W) of 1996. The directions given by the High Court in that writ petition were clear. The TRO had, however, proceeded to adjudicate upon the matter without giving any opportunity of hearing to Kanhaiya Lai Bhagat, and had passed cryptic and/or unreasoned order dated 23-1-2004, for which Bhagat, who had actually purchased the property, had to file the subsequent writ petition, being W.P. No. 12187(W) of 2006, which was disposed of by the Court on 9-6-2006, laying the foundation of the order dated 6-8-2007, being the impugned order passed by the TRO. He further submitted that the mala fide intention of the writ petitioner in filing the present writ petition, at the instance of the loser in the auction sale, Hari Prasad Agarwala, claiming to be the attorney-holder of the writ petitioner who happens to be one of the sons of the deceased assessee, is very clear since the other sons and daughters of the assessee are neither interested nor have they got any grievance in respect of the auction sale of several properties, including the present one, for realization of dues of the deceased assessee.

34. He submitted that the auction sale, vis-a-vis the purchase of the property by the respondent No. 4-Kanhaiya Lai Bhagat, was in accordance with law. The writ petitioner had been filing writ petitions one after another against the order and/or adjudication of the authority, being the TRO No. 1, Hooghly, only in order to frustrate the auction sale.

35. He submitted that the instant writ petition ought to be dismissed, being not maintainable in law, as the alternative remedy by way of filing appeal has not been availed of. Regarding jurisdiction and/or the authority of the TRO concerned, he submitted that the said authority had acted in accordance with law and disputed question of fact has been raised by the writ petitioner, which cannot be considered and/or gone into by this Court, in exercise of its power sitting in high prerogative constitutional writ jurisdiction. He also submitted that the writ petitioner had not availed the remedy provided in law by filing a civil suit against the auction as provided under Rule 11(6) of the Second Schedule to the Income Tax Act. He submitted that although several properties in the district of Hooghly were put to auction for realization of dues of the assessee, but it was only in respect of the property-in-question, that the writ petitioner has chosen to raise a

dispute, having no concern in respect of the other properties.

36. He submitted that the TRO had duly adjudicated the matter pursuant to the specific directions given by the Court and all issues and/or points formulated by the Court had been gone into by the said authority. The impugned order made it clear that notices to sons and heirs of the assessee were issued, but none were present before the authority to prove that the property-in-question was not the benami property of the assessee. Only Hari Prasad Agarwala, as the attorney-holder of the writ petitioner-Vishwanath Agarwala was present before the TRO at the time of hearing. Therefore, admittedly the order of TRO, which is impugned in the writ petition, was quite justified and in accordance with law, more so being passed pursuant to the order and/or direction of the Court dated 9-6-2006 in W.P. No. 12187 (W) of 2006. He also submitted that the TRO had discharged his onus fully, as provided u/s 106 of the Evidence Act. The fact of benami of the property was investigated in detail and the authority issued notices to the heirs of the assessee for attendance at the hearing, in order to prove that the property was not benami, as per directions given by Jayanta Kumar Biswas, J., in the order dated 9-6-2006, but the writ petitioner had hopelessly failed to discharge the same. He submitted that upon perusing the impugned order it would be apparent that the authority had duly discharged its duty and /or the burden of proving that the property-in-question was a benami. He further submitted that u/s 157 of the Evidence Act as well under Rule 11 of the Second Schedule to the Income Tax Act, 1961, the TRO was duly competent to adjudicate the issue. He submitted that the investigation undertaken by the TRO was only for the purpose of coming to a correct finding that the property was a benami of Dwarka Prasad Agarwala, being the assessee-in-default. Referring further to the impugned order he submitted that pursuant to the direction given by the writ court on 9-6-2006, TRO had determined that the property-in-question was a benami of the assessee namely, Dwarka Prasad Agarwala and the so-called owner, Panna Bai, was a benamidar. He further submitted that the TRO had duly followed the ratio laid down by the Supreme Court in the case of Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, . He submitted that entire aspect of the matter was gone into and was duly investigated by the TRO who came to the conclusion that the concerned property was benami and the same was purchased in the name of a fictitious person. He, therefore, submitted that the property was liable to be dealt with like all other properties of the defaulter assessee. Finally, he concluded that in fiscal laws, the interpretation postulates strict construction and there was no scope for any imagination, thinking and/or purposive approach to a problem and in the present case the TRO had dealt with the problem meticulously, literally and following the precincts of tax laws. In this regard, he also relied on the case of Geo Miller and Co. Pvt. Ltd. and Others Vs. State of M.P. and Others, (paragraphs 30 and 31). He, thus, submitted that the order and the decision of the TRO, is quite justified and valid in law.

37. After considering the submissions made on behalf of the learned advocates appearing on behalf of the respective parties, this Court is of the view that in

order to decide the issues raised in the instant writ petition it is necessary first to advert to the impugned order dated 6-8-2007 passed by the TRO-I, Hooghly. The order of the TRO was passed under Rule 11(6) of the Second Schedule to the Income Tax Act, 1961. While dealing with the matter, the TRO took into consideration the earlier orders passed by this Court in CO. No. 8094 (W) of 1996 and W.P. No. 12187 (W) of 2006. While proceeding to deal with the principal issue as to whether the property-in-question could be auctioned for the recovery of the outstanding demand of Dwarka Prasad Agarwala, the TRO issued notices to all concerned in terms of the order passed by the High Court on 9-6-2006 and heard the matter at length. The TRO in his order dated 6-8-2007 came to several findings based on evidence, which are, inter alia, as follows:

With regard to the question as to whether Panna Bai had shown the property-in-question in the wealth tax return or not, the TRO concluded that Panna Bai residing at 24B, Nimtoala Ghat Street, Calcutta-6, had shown the property in the wealth tax return for the assessment year 1966-67 furnished on 30-6-1966. He, however, observed that the order could not be verified for non-availability of the records in the department.

With regard to the question as to whether Panna Bai was the benamidar of Dwarka Prasad Agarwala or not, the TRO, held that without doubt the transaction was benami and the real owner of the property at 13, Kalipukur Lane (Road), Sheoraphully, Hooghly, was Dwarka Prasad Agarwala and Panna Bai, wife of Dwarka Das Agarwala, was the ostensible fictitious owner. The TRO further held, inter alia, that Dwarka Prasad Agarwala had acquired the property in the name of fictitious benamidar Panna Bai, wife of Dwarka Das Agarwala. The TRO also held that a registered deed was prepared and executed after considerable deliberation and the name of the Panna Bai, wife of Dwarka Das Agarwala, was expressly shown as the purchaser or the transferee in the deed. But, the address which was written in the wealth tax return was forged, as proved by the field enquiry conducted by the Inspector. Therefore, the TRO came to the conclusion that Panna Bai, wife of Dwarka Das Agarwala, had no existence. The beneficiary of the property was also Dwarka Prasad Agarwala as per deposition of the tenants. Upon the death of Dwarka Prasad Agarwala, his heirs were enjoying their interest in the property and the filing of application before the High Court against the attachment and auction of the property, standing in the name of a fictitious benamidar, proves the interest of the heirs, i.e., interest of Dwarka Prasad Agarwala in the property.

If Panna Bai and Panna Devi was the same person, the name of the husband must be Dwarka Das Agarwala as per purchase deed of the disputed property, whereas the name of husband of Panna Devi Agarwala is Dwarka Prasad Agarwala. Therefore, the TRO held that Panna Bai, Panna Devi and Panna Devi Agarwala could not be the same and identical person and proceeded to reject the claim of the writ petitioner, as raised in his letter dated 9-7-2007. The TRO also specifically observed that the explanation as to why Panna Bai, wife of Dwarka

Das Agarwala, should not be treated as the benamidar of Dwarka Das Agarwala on the basis of evidence as submitted was sought for vide letter dated 28-5-2007, but was not adduced by the evidences and reply of Vishwanath Agarwala. The TRO proceeded to observe that practically Vishwanath Agarwala did not answer this vital issue.

38. The TRO finally proceeded to reject the claim of the petitioner Vishwanath Agarwala, son of Panna Devi Agarwala, observing that the same was not tenable in law and passed his order under Rule 11(6) of the Second Schedule to the Income Tax Act, 1961, rejecting his plea while concluding that the property could be auctioned for recovery of the outstanding demand of Dwarka Prasad Agarwala. The confirmation of sale to the highest bidder, Kanahaiya Lai Bhagat, was to be issued after one month from the date of service of the order upon Vishwanath Agarwala.

39. One of the contentions of the petitioner in the instant application is that the order of the TRO was passed without jurisdiction since the TRO acting under Rule 11 of the Second Schedule to the Income Tax Act, 1961 did not have any authority to go into or adjudicate the question of benami. In my opinion, this contention raised by the writ petitioner is wholly without basis since the writ petitioner himself had earlier moved the writ petition, being CO. No. 8094 (W) of 1996, which was disposed of by the Court on 11-9-2003. It is clear from the order dated 11-9-2003 passed by the writ court in CO. No. 8094 (W) of 1996 that the writ petitioner (Vishwanath Agrawal) was given an opportunity to produce materials before the TRO showing that in her Income Tax return, Panna Bai, had disclosed the disputed property as her own property or that this very property was assessed under wealth tax. The writ court had further directed that the impugned sale was to be kept in abeyance till final decision was taken by the Income Tax Authority holding that 13, Kalikapukur Lane was not shown by Panna Bai in the Income Tax return or wealth tax return and it was further established that she was a benamidar of her husband, as claimed in the affidavit-in-opposition.

40. In my view, the above direction was explicit in nature. No appeal was preferred by the writ petitioner (Vishwanath Agrawal) against the order dated 11-9-2003. In fact, he submitted to the jurisdiction of the TRO and an order was passed by the TRO on 23-1-2004 which was subsequently set aside by the order dated 9-6-2006 passed by the writ court in W.P. No. 12187 (W) of 2006 at the instance of Kanhaiya Lai Bhagat, being the respondent No. 4 herein. It is noticed that while disposing of W.P. No. 12187 (W) of 2006 the court observed, inter alia, as follows:

In the order of this Court dated 11-9-2003 it was specifically mentioned that the authority should give the decision regarding confirmation of sale of the property after considering the materials placed by the parties. There is no dispute that in the auction held by the authorities the petitioner purchased the property in question on 22-5-1996. There is no dispute either that in the writ petition in

which the order dated 11-9-2003 was made the petitioner was a respondent. In para 6 of the writ petition it has been specifically alleged that before making the impugned order dated 23-1-2004 the Tax Recovery Officer had not given any notice to the petitioner offering him the opportunity of producing materials and hearing. It is also apparent on the face of the impugned order that notice of hearing was given only to the person who took out the writ petition in which the order dated 11-9-2003 was made. It is, therefore, apparent that the order was made against the petitioner without giving him any opportunity to present his case. It is also apparent that the Tax Recovery Officer made the order contrary to the directions given by this Court. The impugned order is liable to be set aside on this ground alone.

It is to be noted that affidavit of service has been filed stating that notice was given to all the respondents. However, only the fourth respondent (the original owner of the property) has entered appearance. I am also of the view that the impugned order is liable to be set aside on the ground that it is not a reasoned order. From the last paragraph of the order it is apparent that without dealing with the materials produced before him and without giving the reasons for reaching the conclusion, the Tax Recovery Officer abruptly reached the conclusion that the auction sale in favour of the petitioner was not fit for confirmation. The order is grossly vitiated for these reasons. The authority was under the obligation to record reasons in support of his order.

For these reasons I set aside the impugned order dated 23-1-2004 and allow this writ petition to this extent. I order that the Tax Recovery Officer shall hear the matter once again. Before giving the reasoned decision, the authority shall give notice to the petitioner and the fourth respondent and also to other persons who may be affected by the order. The noticed persons shall be given reasonable opportunity to produce materials in support of their respective cases. They will be entitled to submit their representations narrating their respective cases. After considering the materials produced and after giving the petitioner and the fourth respondent and other noticed parties opportunity of hearing, the Tax Recovery Officer shall make the fresh order in the matter. The fresh order shall be made within eight weeks from the date of receipt of a copy of this order by the Tax Recovery Officer.

41. Consequent thereto, the TRO passed the order impugned, being the order dated 6-8-2007. Since the TRO was bound by the specific directions given by the court in W.P. No. 12187 (W) of 2006 and the earlier order passed by the court at the instance of the writ petitioner herein in CO. No. 8094 (W) of 1996 on 11-9-2003, the order of the TRO, by no stretch of imagination, can be said to be an order without jurisdiction or that the question of benami could not be gone into by the TRO. In fact, in the order dated 11-9-2003, the writ court had specifically directed the Income Tax authorities to take a final decision in respect of the property-in-question, which included the benamidar aspect, as well. The directions given by the High Court in the two orders made it clear that it was

incumbent and obligatory upon the TRO to decide the matter in terms of such directions given by the court. The contention of the writ petitioner, while relying on the judgment of the Supreme Court in the case of Gangadhar Vishwanath Ranade (supra), that the TRO could not go into the question of benami since he had limited jurisdiction under Rule 11 cannot stand to any reason in view of the two earlier orders of the High Court, the first of which was passed at the instance of Vishwanath Agarwala, being the writ petitioner herein. No appeals were preferred therefrom by any of the parties herein. In the facts of the present case, it is clear that the TRO merely proceeded to pass a comprehensive reasoned order under Rule 11(6) based on the two earlier orders passed by the High Court in CO. No. 8094 (W) of 1996 and W.P. No. 12187 (W) of 2006. That apart, the judgment of the Supreme Court in Gangadhar Vishwanath Ranade's case (supra) was rendered in a completely different fact situation. In that case, the TRO had levied attachment under Rule 11 of the Second Schedule to the Income Tax Act, 1961, on an immovable property originally belonging to the deceased assessee which was claimed by his wife and daughter as of their ownership and in their possession in the objections which they were filed against the attachment proceedings under Rule 11. The Bombay High Court had set aside the order of the attachment of the TRO, against which an appeal was preferred by way of special leave before the Supreme Court. In the facts of that case it may be briefly noticed that initially on 23-10-1972 an immovable property, being a residential house of the assessee, was attached by the TRO. Assessee objected by stating that he had executed a mortgage of the property on 2-12-1967 in favour of the Bank of Maharashtra and further had executed a trust deed in respect of the property on 21-2-1969 in favour of his wife and daughter. Objection was filed on behalf of the wife and daughter of the assessee claiming that the title to the said property vested in them as full owners and they were in possession of the said property. Objection was also filed by Bank of Maharashtra. It was contended by the assessee as well as his wife and daughter that on the day when notice was issued under Rule 2 of the Second Schedule to the Income Tax Act and also on the date when the said property was attached by the TRO, the property was of the ownership of the wife and daughter of the assessee who were also in possession of the property. Hence, the property was not liable to be attached for the dues of the assessee. A subsequent show-cause notice dated 21-1-1974 was issued u/s 281 of the Income Tax Act, as then in force, on the assessee. The Income Tax Officer held an inquiry, recorded evidence and passed an order dated 9-5 -1974, declaring, inter alia, that the transfer in favour of the wife of the assessee and his daughter of the said immovable property was void as against the department u/s 281 of the Income Tax Act. This decision was the subject-matter of challenge in an earlier proceeding before the Bombay High Court. The Bombay High Court in the earlier writ proceedings by its judgment and order dated 9-1-1981 held that the proceedings taken pursuant to the declaration or expression of an opinion by the Income Tax Officer or authority u/s 281 of the Act were a mere prelude to the procedure for recovery of tax and the order of the Income Tax Officer dated 9-5-1974 did not, in any way, affect the

rights of the parties pertaining to the said property which could be considered in proceedings under Rule 11. Consequent thereto, the TRO passed an order dated 17-9-1981 and overruled the objections and declared that the mortgage, trust deed and conveyance were illegal and void and the said property was liable to attachment and sale. It was this order of the TRO that was assailed by the assessee and others by filing a writ petition before the Bombay High Court, which led to the order of the High Court setting aside the order of the TRO.

42. From the above narration of facts, it is absolutely clear that the fact situation in Gangadhar Vishwanath Remade's case (supra) is distinct from that of the instant case. The TRO in the instant case has not proceeded to declare the transfer of the property-in-question as void u/s 281 of the Income Tax Act, 1961. That was not what he was directed to do by the High Court in CO. No. 8094 (W) of 1996 and W.P. No. 12187 (W) of 2006. He was not supposed to nor did he go into any intricate questions of law regarding title, which is impermissible, in case of summary investigation as envisaged under Rule 11. He merely came to a finding that the real owner of the property was Dwarka Prasad Agarwala and the ostensible owner of the property was a fictitious person named Panna Bai and that the said Dwarka Prasad Agarwala was enjoying the income from the said property standing in the fictitious name of Panna Bai, wife of Dwarka Das Agarwala, who was actually the creation and benamidar of Dwarka Prasad Agarwala. The TRO, thereafter, concluded that the property could be auctioned for recovery of the outstanding demand of Dwarka Prasad Agarwala and proceeded to reject the claim of the writ petitioner, Vishwanath Agarwala, by passing the order under Rule 11(6) of the Second Schedule to the Income Tax Act, 1961. The judgment of the Supreme Court rendered in Gangadhar Vishwanath Ranade's case (supra), therefore, has no manner of application at all in the facts and circumstances of the instant case.

43. The judgment of Supreme Court in Sawai Singhal Nirmal Chand's case (supra) was on the point of law as to whether a suit filed in pursuance of Order 21 Rule 63 of the Code of Civil Procedure, 1908, attracted the provisions of Section 80 of the Code. The Supreme Court, while proceeding answer the point took into consideration the limited scope of enquiry under Order 21 Rule 58 of the Code of Civil Procedure, confining to question of possession as therein indicated, as distinct from a suit brought under Order 21 Rule 63, where not only the question of possession but also the question of title could be gone into. It may, however, be noticed that the judgment was rendered by the Supreme Court prior to the amendment of the Code of Civil Procedure, 1908, which was brought about by Act 104 of 1976. In my opinion, the limited scope of enquiry of the TRO while proceeding to exercise his jurisdiction under Rule 11 may be akin to the scope of enquiry under Order 21 Rule 58 of the Code of Civil Procedure, 1908 (as it stood prior to 1976 amendment), but that does not take away his power or authority to investigate under Rule 11 to come to a finding with regard to a property being in the nature of a benami transaction, for the purpose of sale by auction of that benami property for recovering the outstanding demand of the

assessee. The judgment of the Supreme Court in *Sawai Singhal Nirmal Chand's* case (*supra*) therefore, is not of much assistance to the writ petitioner, in the facts of the instant case.

44. The contention of the writ petitioner that the order of the TRO dated 6-8-2007 cannot even stand the test of scrutiny because it was passed in violation of the principles of natural justice, in my opinion, does not have legs to stand on. A plain reading of the impugned order makes it clear that the TRO gave adequate opportunity of hearing to all concerned, including the writ petitioner as well as the private respondent No. 4 herein, in terms of the direction given by the High Court in the order dated 9-6-2006, passed in W.P. No. 12187 (W) of 2006. That apart, it is noticed that the writ petitioner was duly represented before the TRO, which is borne out from the impugned order itself. Moreover, it is also noticed that the specific query raised by the TRO regarding whether Panna Bai and Panna Devi Agarwala was the same person or not was sought to be answered by the writ petitioner-Vishwanath Agarwala by means of a letter received on 9-3-2006, whereupon the TRO observed, "It is interesting to note that he did not use a single word regarding the query "whether Panna Devi Agarwala and Panna Bai was the same person or not"." It is also noticed from the impugned order that the finding arrived at by the TRO with regard to whether Panna Bai was the benamidar of Dwarka Prasad Agarwala or not, was duly intimated to the writ petitioner-Vishwanath Agarwala by letter dated 28-5-2007 and he was requested to explain within 1-6-2007 why Panna Bai should not be treated as the benamidar of Dwarka Prasad Agarwala on the basis of the evidence gathered by the TRO. The authorised representative of Vishwanath Agarwala requested the TRO to grant time to give reply and finally on 9-7-2007, Vishwanath Agarwala submitted his reply. Upon considering his reply, the TRO observed, *inter alia*, "Practically he (Vishwanath Agrawal) did not answer to this vital issue". It is, therefore, not open to the writ petitioner to contend that the materials based on which the TRO formed his opinion were not made available to him or that he was not afforded an opportunity to controvert or deal with the same. All these clearly goes to show that the impugned order was passed by the TRO adhering to all known principles of natural justice.

45. I am in agreement with the submission made by the learned advocate for the respondent No. 4, that in case of fiscal laws, such as the Income Tax Act, interpretation postulates strict construction. In my view, if one merely glances through the provisions of the various Sub-rules under Rule 11, it becomes apparent that the TRO is duly empowered to investigate any claim or objection in connection to attachment or sale of a property in the manner set-out therein. In the instant case it is seen that the TRO has not made the slightest deviation from the strict letters of law which govern his power and jurisdiction under Rule 11.

46. However, in my opinion, the writ petitioner is not without any remedy.

47. Rule 11(6) of the Second Schedule of the Income Tax Act, 1961 reads as follows:

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.

48. The above Rule gives ample scope and provides adequate statutory protection to the writ petitioner to establish the right which he claims to the property-in-question by instituting a civil suit. The writ petitioner is therefore at liberty to approach the competent civil court and seek appropriate reliefs there.

49. For the interest of justice, however, in view of the above observation, the TRO may not finalize the sale in favour of the respondent No. 4, only for a period of 45 days from date, to enable the writ petitioner to approach the competent civil court by instituting a suit in the meanwhile. Upon institution of the suit, the competent civil court shall consider the merits of the suit and any interlocutory application that may be filed in connection thereto, independently, without being influenced in any manner by any observation made herein, including the direction upon the TRO as indicated hereinabove.

50. The writ petition stands disposed of in terms of the directions given above. There shall be, however, no order as to costs.