(1997) 01 BOM CK 0076

Bombay High Court

Case No: Writ Petition No. 857 of 1983

Sunderlal Daga (Decd.) and another (Through Lrs)		APPELLANT
	Vs	
Tax Recovery Officer and others		RESPONDENT

Date of Decision: Jan. 17, 1997

Acts Referred:

- Income Tax Act, 1961 - Section 222, 230A, 281

Citation: (1997) 225 ITR 10 : (1997) 93 TAXMAN 97

Hon'ble Judges: L. Manoharan, J; G.D. Patil, J

Bench: Division Bench

Advocate: V.C. Daga, L.S. Dewani and Ms. J.D. Uttamani, for the Appellant; P.N. Chandurkar and S.A. Bobde, for the Respondent

Judgement

L. Manoharan, J.

The challenge in this writ petition is against the order annexure-E rendered by the first respondent. For the Income Tax dues from Adam Ali and Hatimbhai, 1/4 share each of the said defaulters in 7.73 acres of land comprised in Kh. No. 20 situated at Mouza Kachimeth, Tq. and Dist. Nagpur, was attached by the first respondent. The said attachment orders dated May 4, 1974, are at annexures "A" and "B". Against the said attachment, the petitioners had preferred annexure "C" objection by way of claim contending, the said survey field belonged to the firm - K.S.M. Hassonjee and Sons and that the senior partner Mulla Akbar Ali sold the property to the petitioners pursuant to an agreement to sell in their favour, on February 1, 1972. They contended that they were put in possession pursuant to the said agreement to sell, and later sale deeds were also executed. Thus, according to them, they were in possession of the entire property, which included the said 1/2 share which was attached. It is their case that they are in possession as absolute owners and, therefore, the said property was not liable for the claim against the defaulters. The first respondent, the Tax Recovery Officer, by annexure "B" order, dismissed their

objection.

2. In this writ petition, the contention of the first respondent is that the property did not belong to the aforesaid firm, but it originally belonged to Mulla Akbarali and his brother, Mulla Fidali. Mulla Fidali had two sons - Hatimali and Adamali, the defaulters. Akbarali was having 1/2 share and Fidali was having the balance 1/2 share in the whole property. After the death of Mulla Fidali, his sons, Hatimali and Adamali, inherited 1/4 share each in the said property. Thus, according to the first respondent, the defaulters, Hatimali and Adamali, were having 1/2 share in the property and that the said 1/2 share was attached for satisfying the claim of arrears of Income Tax due from the aforesaid two defaulters. As already indicated, it is their case that the alleged firm - K.S.M. Hassonjee and Sons, never had any interest in the property and that Akbar Ali was not competent to deal with the whole property as if the same belonged to the aforesaid firm.

3. Later, Hatimali expired. His legal representatives along with Adamali sought intervention in this writ petition. The intervention was allowed and they were impleaded as additional respondents Nos. 2 to 8. They also maintained that 1/2 share in the entire property belonged to them, and they denied that the property belonged to the aforesaid firm. They also challenged the competency of Akbarali to deal with their share in the property. In short, they supported the claim of the Revenue.

4. As indicated, by the impugned order, the first respondent rejected the claim on the ground that the alleged sale deeds in favour of the writ petitioners are violative of section 230A of the Income Tax Act, 1961 (for short "the I.T. Act"). Apart from finding that the aforesaid sale deeds are violative of section 230A of the Income Tax Act, the first respondent also found that the property did not belong to the aforesaid firm; and that section 281 of the Income Tax Act has no application as the sale deeds in favour of the petitioners were not executed by the defaulters.

5. It was urged by learned counsel Shri V.C. Daga for the petitioners that annexure-E order rendered by the first respondent is without jurisdiction, inasmuch as he held that the sale deeds in favour of the writ petitioners are void. It is his case that the Tax Recovery Officer has no jurisdiction to hold the sale deeds void. Apart from that, it is pointed out, that the said sale deeds in favour of the writ petitioners do not violate section 230A of the Income Tax Act. It was also urged by learned counsel that the finding by the Tax Recovery Officer that the property did not belong to the firm also is without jurisdiction as under rule 11 of the Second Schedule (for short "the Rules"), the Tax Recovery Officer does not have jurisdiction to declare a document void and, therefore, the order is bad for excessive exercise of jurisdiction. The order is also vitiated as, according to learned counsel, there is absolutely no adjudication on the question of possession as on the date of service of notice under rule 2 of the Rules.

6. Shri P.N. Chandurkar, learned counsel on behalf of the first respondent, and Shri A.S. Bobde on behalf of respondents Nos. 2 to 8, on the other hand, sought to support the impugned order maintaining that the first respondent has got jurisdiction to see whether the petitioners had locus to question the attachment. It is also maintained by them that as the petitioners, who were the claimants before the first respondent, since were not in possession of the said property on the date of rule 2 notice, they have no locus to agitate the validity of the order of attachment under rule 11 of the Rules. Therefore, according to learned counsel for the respondents, it was not necessary in the said context to adjudicate possession.

7. As already noted, the impugned order, annexure "E", reveals, the first respondent rejected the claim by the petitioners chiefly on two grounds, viz., the sale deeds violate section 230A of the Income Tax Act, and since the vendor or petitioners had no title to convey, the objections to the attachment are "redundant". The first respondent also is of the view that section 281 of the Income Tax Act has no application as the vendors are not the defaulters. In the context of the aforesaid factors and arguments, it would be convenient first to advert to the question whether as per section 230A of the Income Tax Act, the sale deeds in favour of the petitioners are vitiated, as the question as to the relevancy of title in a summary proceeding under rule 11 of the Rules and whether a contest against the validity of the alienation as per section 281 of the Income Tax Act is contemplated can be gone into later. Photo copies of the two sale deeds were produced by the first respondent. Section 230A of the Income Tax Act, as it stood before the amendment of 1988 and 1995 enjoined, where any document purports to transfer, assign, limit, or extinguish the right, title or interest of any person to or in any property valued at more than fifty thousand rupees, no registering officer shall register such document, unless the Income Tax Officer issues certificate as enjoined u/s 230A(1) of the Income Tax Act. The sale deeds in question are dated July 26, 1972, and July 31, 1972. The consideration for the first sale deed is Rs. 48,000 and the consideration for the second one is Rs. 47,000. What is urged by learned counsel Shri Daga is that it is not the consolidated value of both the sale deeds that matters for the purposes of section 230A but what should be taken into account is the value of the interest that is sought to be alienated by the particular document. Learned counsel, in support of the above contention, relied on the decision in the case of Samudrala Ganesh Rao Vs. State of Andhra Pradesh and Others, , wherein the sisters of the petitioners therein executed a document relinquishing their undivided 3/40ths share in the property in favour of the petitioner. The value of the said interest did not exceed Rs. 50,000. The Registrar declined to register the document for non-production of the certificate u/s 230A(1) on the ground that the value of the entire property exceeded Rs. 50,000. In the said decision the Andhra Pradesh High Court quashed the order of the Registrar, pointing out that the undivided share of the sisters was estimated at Rs. 21,775 on the basis of wealth-tax assessments. The court held that the criterion in the context of section 230A of the Income Tax Act

should be the value of the property or the interest of the person in such property sought to be transferred. The same principle is laid down in the case of N.C. Rangesh and others Vs. Inspector General of Registration and others, R. Lokeswari and others Vs. State of Tamil Nadu and another, and A. Mohan Vs. Dr. Vivekanandan and others, . The principle laid down in these pronouncements certainly will support the argument of learned counsel Shri V.C. Daga, that inasmuch as the value of the property that is sought to be transferred by the individual sale deed did not exceed Rs. 50,000, it was not necessary to produce certificate u/s 230A of the Income Tax Act. Therefore, it is not possible to uphold the view of the first respondent that the sale deeds are void as they violated the provisions of section 230A of the Income Tax Act. Even in cases where there is violation of section 230A of the Act, such transaction would be void only against the claim of tax liability. The Karnataka High Court in the decision in P.B. Shankar and Others Vs. First Income Tax Officer, Hassan Circle, Hassan, held, the effect of the section is that, in cases covered by the said provision, registration of the document without the certificate enjoined in section 230A(1) of the Act would not prejudicially affect the recovery of existing tax liability.

8. The impugned order shows that the Tax Recovery Officer has gone into the question of title and found that the firm, K.S.M. Hassonjee and Sons, vendor of the petitioners, had no title to the property and also held that section 281 of the Act has no application, because the defaulters are not the transferors. Section 281 of the Act enjoins that where, during the pendency of any proceeding under the Act or after the completion thereof, but before the service of notice under rule 2 of the Rules, any assessee creates a charge on, or parts with the possession by way of sale, gift, etc., of, any of his assets in favour of any other person, such transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding. This section is similar to section 53 of the Transfer of Property Act. Rule 11 of the Second Schedule is similar to rules 58 to 63 of Order 21 of the unamended Civil Procedure Code. The question whether a contention u/s 53 of the Transfer of Property Act can be dealt with in a proceeding under rules 58 to 61 of Order 21 of the unamended CPC arose for determination before the Supreme Court in the decision in C. Abdul Shukoor Saheb Vs. Arji Papa Rao and Others, . The argument was in a suit by the defeated claimant under Order 21, rule 63, of the unamended Civil Procedure Code, the attaching decree holder cannot raise a contention u/s 53 of the Transfer of Property Act. The reasoning projected was, in view of rule 61 of Order 21, when the transfer is real though voidable, in view of section 53 of the Transfer of Property Act, the claim of the transferee has to be upheld in the summary proceeding, in which case the attaching decree holder has to bring a suit under rule 63 of the said Civil Procedure Code, which has to be under Order 1, rule 8, Civil Procedure Code. Consequently, it was contended, in a suit by the defeated claimant the attaching decree holder cannot raise a defence u/s 53 of the Transfer of Property Act. Repelling the said contention the Supreme Court observed in paragraph 25 (at page 1159) :

"It would however be seen that this last step which is vital for the argument to have force does not follow for the argument does not proceed on any construction of the terms of section 53(1) nor on any legal theory as to the mode or procedure by which the intention to avoid the transaction which the attaching creditor claims is voidable at his instance may be expressed or enforced. The argument would only establish that if the court investigating claims under Order XXI, rule 58, etc., conformed strictly to the terms of those provisions the transferee under a real sale would succeed in those proceedings and he would be a defendant and need not be a plaintiff in the suit to set aside the summary order under Order XXI, rule 63. This line of reasoning does not take into account at least the following possibilities :

(1) The claim or objection by the transferee may be rejected, not on the merits but because it has been designedly or unnecessarily delayed (vide Order XXI, rule 58, Civil Procedure Code). It is certainly not the contention of learned counsel that when there is a rejection of a transferee''s claim under this provision the order of rejection is any the less final and has not to be set aside by a suit contemplated by Order XXI, rule 63 of the Civil Procedure Code, in order to overcome the effect of that finality.

(2) The court making the summary enquiry might come to an erroneous conclusion that the transfer is sham and not real or that the transferee is in possession for the benefit of the judgment-debtor. In the suit filed by the transferee to set aside this erroneous order, the plaintiff would have to establish his title and even if he succeeds in showing that the sale to him was real and effective, still the question would remain whether, having regard to the circumstances of the transfer, the same is not voidable u/s 53(1). Thus there would be occasions when a defeated transferee whose transfer is real might have to figure as a plaintiff in a suit to set aside a summary order under Order XXI, rule 63 of the Civil Procedure Code.

(3) The attaching decree-holder might raise in the summary proceedings two alternative defences to a transferee''s claim (a) that the sale was sham and nominal and, therefore, the possession of the transferee was really on behalf of the judgment-debtor, and (b) that even if the sale be real and intended to pass title it was voidable as a fraud on creditors. It is, no doubt, true that the second or the alternative defence is not open in the claim proceedings, but if however the same were erroneously entertained and an order passed, rejecting the claim of the transferee, the same would nevertheless be an order which would have to be set aside by a suit by the defeated transferee and he cannot ignore it."

9. So with respect to the contention that the sale deed is a fraud on creditors, the Supreme Court finds that the said defence is not open in a claim proceeding. This aspect was considered by this court in two decisions - (1) Gangadhar Vishwanath Ranade (No. 1) and others Vs. Income Tax Officer, and (2) the second decision between the same parties Gangadhar Vishwanath Ranade (No. 2) v. TRO at page 176 of the same volume. In the first case, the challenge in the petition was against the order u/s 281 of the Act to proceed against the property of the defaulter with

respect to which a sale deed was executed by the defaulter. It is held therein that when the Tax Recovery Officer passes an order u/s 281 of the Act, to proceed against the property that would only mean that the Department signifies its intention to proceed against the property and, therefore, the same will not acquire the character of adjudication as to the nature of the transfer. But when the same question as to the nature of transfer whether the same is void on account of section 281 of the Act arises in a claim proceeding that involves adjudication and in that regard, relying on the decision in C. Abdul Shukoor Saheb Vs. Arji Papa Rao and Others, , it was held that the Tax Recovery Officer in a proceeding under rule 11 of the Second Schedule cannot entertain the claim on behalf of the taxation authorities that the transfer by the assessee is void on the ground that it was with the intention of defrauding the Revenue while proceedings against him were pending. Thus, now it is clear that section 281 of the Act cannot be entertained in a summary proceeding under rule 11 of the Second Schedule.

10. The above conclusion is reached on account of the nature of the proceedings under rule 11 of the Second Schedule. As noticed the Tax Recovery Officer reached the conclusion that section 281 of the Act is not applicable not because the summary enquiry under rule 11 of the Second Schedule does not permit such a contention to be gone into, but because of his finding that the transfer is not by the defaulter. He has also found that the firm on behalf of which Akbarali effected the transfer has no title to the property. In the decision in Gangaram Ratanlal Vs. Simplex Mills Co. Ltd., , this court observed that (at page 182) :

"It is settled law that complicated questions of title are not to be gone into under the summary procedure of investigation under Order 21, rule 58."

11. In the decision of the Calcutta High Court in the case of Anandilal Goenka and Others Vs. Tax Recovery Officer and Others, , the same view was taken.

12. The impugned order bases its conclusion on the finding that the firm, K.S.M. Hassonjee and Sons, has no title to the property and also that the impugned transfers in favour of the writ petitioners are void as the same were executed in violation of section 230A of the Act.

13. In this context, it is necessary then to see as to what is the nature of enquiry that is contemplated under rule 11 of the Second Schedule. Rule 11 reads :

"11. Investigation by Tax Recovery Officer. - (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection :

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that -

(a) (in the case of immovable property) at the date of service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(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."

14. A reading of the above rule clearly would show that the claimants or the objectors must adduce evidence to show that at the date of service of notice under Schedule II, he had some interest in, or was possessed of the property. Sub-rule (4) of rule 11 enjoins that where the Tax Recovery Officer is satisfied that the property, at the date of service of the notice under rule 2, was not in the possession of the defaulter or some person in trust for him or in occupation of a tenant, etc., or where the defaulter is in possession, the same is not on his own account, but on account of some other person, then the property must be released from the attachment. Sub-rule (5) speaks of the circumstance when the claim has to be disallowed; that is, when the defaulter is in possession or some other person on his behalf is in possession, the claim has to be disallowed. Sub-rules (4) and (5) of rule 11, thus, bring out the real scope of an enquiry under rule 11; and sub-rule (3) states that the

burden is on the claimants to adduce evidence and to prove that the property at the relevant time was in his possession independently of the defaulter. Thus, the central point to be adjudicated in a proceeding under rule 11 is possession. The very scheme of rule 11 shows that the enquiry would include the question whether the possession of the claimant is on behalf of the defaulter or independently of him. Though an adjudication of the title is not warranted in an enquiry under rule 11, the question of title may become relevant incidentally to decide the character of the possession as indicated above. The role of title in relation to rule 11 is only to that limited extent.

15. In the decision in Paparaju Veeraraghavayya Vs. Kilaru Kamala Devi and Others, , in relation to rule 59 of Order 21 of the unamended Civil Procedure Code, it is observed :

"But then it is argued that under Order 21, rule 59, the claimant is bound to show that at the date of the attachment he had some interest in the property attached, which interest, it is contended, means an estate in land. I cannot agree that the interest referred to in this rule is necessarily an interest in land in the sense that expression is used in section 54 of the T.P. Act. . . ."

16. This court in the case of Nalinkant Bhanushanker Dave Vs. Hiralal Amratlal Parekh and Others, , as regards interest, observed (at page 88) :

"The claimant objecting to the attachment has to show that at the date of the attachment he had some interest in the property or was possessed thereof, and the words ''some interest'' occurring in rule 59 have been interpreted as meaning such interest as would make the possession of the judgment-debtor not on his own account but on account of or in trust for the claimant. (See Satkari Mandal v. Tirtha Narain, AIR 1915 Cal 116), or the claimant may prove his own possession. It is only in such cases that a claim for removal of attachment can succeed."

17. This court in the case of Ganpati Ram Bhande and Others Vs. Baliram Raghunath Jadhav and Others, , with reference to the nature of the enquiry and also as to the interest of the claimant, at page 160, held that :

"It requires to be emphasised that the direction of the investigation, which the court has to carry out, points to possession being the criteria. It is, of course, possible that in the course of such an investigation as to who is in possession of the property subjected to attachment, the question of some legal right or interest or title may also arise and if such legal right affects the determination of the question as to who is the real person in possession in fact or in law, then such a legal right or interest will naturally have to be taken into account. But it is also settled law that complicated questions as to title are not to be gone into under the summary procedure of the investigation under Order XXI, rule 58."

18. In that case, it is also held that where in proceedings under Order 21, rule 58, the lower court instead of going into the question as to the possession of property on the date of its attachment, directed the enquiry as to whose title was superior, the court must be held to have failed to exercise jurisdiction vested in it under Order 21, rules 51 to 61 and the High Court in its revisional jurisdiction can interfere with the decision. Ultimately, in that case on account of the said defect in the order, this court allowed the revision and set aside the order of the trial court and remanded the matter to the trial court for disposal in accordance with law. In the case of Punnen Abraham Vs. Varkey Varkey, , the Kerala High Court held that though the impugned order found that the claimant is in possession, since the order was rendered without further deciding whether the said possession is in trust or on behalf of judgment-debtor, the order is defective. Consequently, the order was set aside and the matter was remanded for fresh disposal according to law.

19. The aforesaid pronouncements would clearly show that adjudication of possession is the main part of the enquiry under rule 11 and once possession is so adjudicated, it will become necessary to see as to the character of the possession, that is, whether the claimant is in possession on his own account. It was urged by Shri Bobde, that a contention that the document is sham can fall for consideration in a proceeding under rule 11 as according to him that would have relevance in discerning as to whether the possession claimed by the claimant is on behalf of the defaulter. Counsel maintained, the decision in C. Abdul Shukoor Saheb Vs. Arji Papa Rao and Others, , does not rule out the said proposition. The relevant portion in the said judgment has already been extracted early. Mr. Daga then maintained that in the decision in Gangaram Ratanlal Vs. Simplex Mills Co. Ltd., , this court did not accept such an argument. But Mr. Bobde urged the said observation is only an obiter and not the ratio as even the question formulated for decision at pages 178 and 180 would show that the question that arose then was only whether the Tax Recovery Officer has under rule 11 power to declare a transfer void. It appears to us, though in such a proceeding a document cannot be pronounced void as the same is sham, yet in discerning whether the possession is on behalf of the defaulter the said question too can arise incidentally.

20. The impugned order does not advert to the question of possession at all; much less as to the character of possession. Instead, as indicated early, the Tax Recovery Officer proceeded to adjudicate the title. Confronted with that situation, learned counsel for the first respondent as well as Shri A.S. Bobde, for respondents Nos. 2 to 8, attempted to maintain that though complicated questions as to title cannot be gone into, the Tax Recovery Officer is entitled to peruse the record and come to the conclusion as to the title. This cannot be accepted as the decision referred to earlier does not support the aforesaid argument. Then it was urged that the petitioners have no locus to maintain an application under rule 11. The contention is based on the claim that the impugned transfer was after the service of notice under rule 2. The scheme of the Act would reveal that the Assessing Officer has to issue

certificate. Thereafter, the Tax Recovery Officer issues demand notice under rule 2. As has already noticed, the interest or possession under rule 11 has to be enquired into as on the date of service of notice under rule 2. The sale deeds in favour of the writ petitioners were on July 26, 1972, and July 31, 1972. As per the return and also the copy of the demand notice produced, so far as Hatimali is concerned, demand dated August 6, 1971, was served on September 24, 1971, demand dated January 6, 1972, was served on January 31, 1972, and demand dated May 12, 1972, was served on May 24, 1972. As regards Adamali, demand dated May 9, 1972, was served on May 24, 1972. All these demand notices, of course, were before the two sale deeds. Therefore, the respondents maintain that the petitioners have no locus to object the attachment. But the contention of the petitioners is that there was an agreement to sell in favour of the petitioners on February 1, 1972, and that possession was given to them on the said date pursuant to the said agreement. Therefore, according to the petitioners, demand notices issued after the said date of agreement cannot affect the petitioner''s right in the property. They maintained that since the character of the possession that was handed over pursuant to the said agreement is not on account of the defaulter, even though the sale deeds were after the service of notice under rule 2, the petitioners are bound to succeed. It is also urged that interest mentioned in rule 11 is not same as the expression used in section 54 of the Transfer of Property Act. Reliance was made on the decision in Paparaju Veeraraghavayya Vs. Kilaru Kamala Devi and Others, , referred to earlier. No such agreement as such is produced by the petitioners; but there is reference to the said agreement in the copy of the sale deeds produced by the first respondent. These are matters primarily for evidence as to whether the petitioners were in possession of the same at the date of service of demand notice. The burden of proof is on the petitioners in view of rule 11, sub-rule (3), of the Second Schedule. Then only the other question whether such possession was independently of the defaulter could arise.

21. As already noticed, the Tax Recovery Officer did not address himself to the question as to who was in possession as on the date of service of notice, and if the claimant was in possession as to what is the nature of the said possession. Instead of enquiring into the said aspect, since the Tax Recovery Officer has proceeded to adjudicate title, as is held in the case of Ganpati Ram Bhande and Others Vs. Baliram Raghunath Jadhav and Others, , the same would amount to failure to exercise the jurisdiction vested in him.

22. Shri Bobde, learned counsel for respondents Nos. 2 to 8, made an attempt to support the order of the Tax Recovery Officer contending that a finding by the Tax Recovery Officer that section 281 of the Act is not attracted as there is no valid transfer by the defaulter would tantamount to a finding that the claimant''s possession, if any, is not on their own right. This argument cannot hold good for the simple reason that the scope of the enquiry under rule 11 of the Second Schedule is limited and complicated questions of title cannot be gone into under the said rule.

Apart from the same it is the settled position that when an authority is invested with quasi-judicial function under the statute, the said power has to be exercised in the manner provided for in the statute, and the authority has no jurisdiction to depart from the procedure laid down by the said statute. In the decision in the case of State of Uttar Pradesh Vs. Singhara Singh and Others, , the Supreme Court observed that (at page 361) :

"In AIR 1936 253 (Privy Council) , the Judicial Committee observed that the principle applied in Taylor v. Taylor [1876] 1 Ch. D 426, to a court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, applied to judicial officers making a record u/s 164 and, therefore, held that the Magistrate could not give oral evidence of the confession made to him which he had purported to record u/s 164 of the Code. . . . The rule adopted in Taylor v. Taylor [1876] 1 Ch. D. 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. . ."

23. When rule 11 enjoins that possession must be adjudicated, it is not open to the first respondent to adjudicate title and it goes without saying, the argument that from the adjudication of title possession and its character has to be inferred, cannot be accepted. Thus, it is evident that first the enquiry should be as to who is in possession and then as to the character of the possession. It is not correct procedure first to adjudicate the title and then to decide as to whether the person in possession is in such possession on his own account.

24. It was urged by the respondents that even the title can be adjudicated in the matter arising under rule 11 of the Second Schedule. Reliance was placed on the decision of the Madras High Court in the case of George Thomas Vs. Tax Recovery Officer IV, . In dealing with the effect of failure to bring a suit under sub-rule (6) of rule 11, the jurisdiction of the Tax Recovery Officer is adverted to in that decision. But the observation regarding jurisdiction of the Tax Recovery Officer has to be read in the context of the statement : "This would, therefore, clarify that the word "possession" used in sub-rule (3) has to be "possession of the claimant or objector in his own right and not in trust for or on behalf of the defaulter". That is not equal to hold that the Tax Recovery Officer has got jurisdiction to adjudicate complicated questions of title.

25. It was further argued on behalf of the respondents that, in view of the provisions of sub-rule (6) of rule 11 of the Second Schedule, since there is effective and efficacious remedy of suit, this writ petition itself is not maintainable. Mr. Daga, learned counsel for the petitioners, relied on the decision in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, , to contend that a writ petition cannot be dismissed on the ground that there is alternate remedy after the matter is heard. In

the said decision, the Supreme Court observed that a writ petition cannot be dismissed as not maintainable merely on the ground of existence of alternate remedy of revision is available after the court has entertained a writ petition and heard it on the merits. Mr. Daga further relied on the decision in Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, , to contend that when the challenge is based on jurisdiction of the authority, the existence of alternate remedy cannot be a bar for entertaining a writ petition under article 226 of the Constitution of India. Therefore, simply because there is alternate remedy by way of suit under sub-rule (6) of rule 11 is available, the writ petition cannot be dismissed as not maintainable.

26. Incidentally, it is necessary to note that there were rival contentions as to the title of the vendor of the writ petitioners. As has already noticed, Akbarali purported to alienate the property in question claiming that the property belonged to the firm and that he being the partner is entitled to effect the transfer. The petitioners sought to sustain the said case by filing rejoinder and documents in support of the said claim. It will be noted that neither of the contesting parties have produced the original document under which this property was acquired. Instead, the writ petitioners produced along with the rejoinder a document styled as "Sauda Chithi" purported to be an agreement to sell. In an effort to counter the said contention, respondents Nos. 2 to 8 relied on the documents produced by them along with their submission in answer to notice before admission. Exhibit A-1 is an extract of record of right and an application to convert the land for non-agricultural purposes. The respondents have an alternate contention that Akbarali himself at the relevant time ceased to be a partner and produced a photocopy of the retirement deed purporting to retire from the partnership with effect from October 18, 1971. Learned counsel, Shri Daga, pointed out that Hatimali and Adamali issued notice, annexure "I", produced along with the rejoinder, wherein they questioned the aforesaid document of retirement. It is also submitted by the respondents by relying on the copy of the draft relinquishment deed forwarded by Akbarali, wherein it is pointed out that, he has admitted that that property is held as tenants-in-common, the others being Adamali and Hatimali. A copy of the gift deed affirming that he gifted a 1/2 share also was produced. These documents are relied on by the petitioners as well as the respondents in support of their rival contentions as to the validity of the sale deeds relied on by the petitioners. We do not consider that we should go into this aspect of the case in a writ petition which challenges the order of the first respondent rendered under rule 11 of the Second Schedule, which failed to adjudicate possession as enjoined in the said rule.

27. In this context it may be necessary to advert to another aspect of the argument on behalf of the respondents. It was urged that even assuming that this is a partnership property since it is an admitted fact that Hatimali and Adamali and after the death of Hatimali his children, were made partners who are referred to as partners in the impugned order itself, since the defaulters were Adamali and

Hatimali, their 1/2 share in the partnership property is liable to be proceeded against as enjoined under rule 32 of the rules. But the impugned order does not advert to the said aspect presumably because the order proceeded as if the property is co-ownership property and it did not belong to the firm. All that is to be observed in this connection is, this alternate case was not considered by the first respondent. Now when it is demonstrated that the order of the first respondent is infirm as it did not advert to the question of possession and, in that context, had no occasion to consider the character of the possession also the order is liable to be set aside. As a consequence, ordinarily the matter has to be remitted back to the first respondent for going into the question afresh.

28. Learned counsel, Shri Daga, maintained that in the particular facts and circumstances, a remand to the first respondent is not called for. According to learned counsel, since the possession of the writ petitioners is admitted and since complicated question of title arise for determination, recourse should be by a suit as is enjoined under sub-rule (6) of rule 11 of the Second Schedule. In short, his submission is that the order has to be quashed and set aside, and it will be for the aggrieved then to proceed under rule 11(6) of the Second Schedule. In support of the said submission, learned counsel relied on the reply by the first respondent against the case of the petitioners in paragraph 3 of the writ petition. In para. 3 of the writ petition it is maintained that the property in question is a partnership property and, therefore, it was not liable to be attached. Para. 3 further states that the petitioners were put in possession pursuant to an agreement to sell and they are collecting rent. All the said averments in para. 3 are denied in the reply. The reply asserts that it is co-ownership property and also states the claim of possession and that the petitioners are recovering rent are unauthorised as the said claim shows that they encroached on the property. An admission has to be read as a whole. So read the same cannot be said to contain an unequivocal admission especially when in the beginning of para. 3 of the reply the averments in para. 3 of the petition are contended to be false and misleading. This is particularly so as respondents Nos. 2 and 8 in their reply in para. 3 specifically denied that the respondents were put in possession of the property on or about February 1, 1972. It was also urged by Shri Daga that in the suit instituted by the defaulters, Spl. C.S. No. 77 of 1974 for partition, these writ petitioners are also defendants. According to him, the possession of writ petitioners is admitted in the plaint, copy of which is produced. What is alleged in para 10 of the plaint is that defendants Nos. 2 and 3 in collusion with defendant No. 1 therein claimed to have purchased some portion of the suit property from the said defendant No. 1 and it proceeds further to state that defendant No. 1 had only a 1/2 share in the suit property and the transaction entered into by defendant No. 1, on the one hand, and defendants Nos. 2 and 3, on the other, cannot affect the rights or interest of the plaintiffs therein. It is urged by learned counsel for the respondents that the said allegation in no way can be treated as an admission of title and possession claimed by the writ petitioners. The

said argument cannot be brushed aside as unsustainable; when the said plea is read the same maintains only the possession of the defendants as a co-owner.

29. Therefore, the investigation as to possession is open in the context of rule 11 of the Second Schedule. Once it is said that complicated question of title cannot be gone into, that cannot mean that the authority who is to adjudicate the question under rule 11 is incompetent to go into the question of possession and the character of the possession in the context of the materials placed before him. As per rules 11(4) and 11(5) of the Second Schedule, the Tax Recovery Officer has to "satisfy" as to who is in possession and whether such possession is independently of the defaulter. This is so, as rule 11 mandates, the Tax Recovery Officer has to satisfy whether the possession is for the defaulter or independently of him. And that satisfaction has to be reached from the materials placed before him. The question of title could arise only incidentally in discovering the said character of possession and to that extent the Tax Recovery Officer is competent to go into the said aspect. In a similar situation though the matter arose in a proceeding u/s 115 of the Civil Procedure Code, this court in Ganpati Ram Bhande and Others Vs. Baliram Raghunath Jadhav and Others, , referred to earlier, set aside the order as there was no finding as to possession and remitted the matter. In Punnen Abraham Vs. Varkey Varkey, , referred to earlier, since the impugned order did not decide whether possession was in trust for or on behalf of the judgment-debtor the order was set aside and the matter was remitted. In the former case it was held, omission to adjudicate possession amounted to failure to exercise jurisdiction vested in him. Therefore, in this matter which arises under article 226 of the Constitution, the impugned order is liable to be set aside and the matter remitted to the first respondent for disposal according to law.

30. In the result, the impugned order at annexure "E" is set aside and the matter is remitted to the first respondent to go into the questions afresh in accordance with law with due regard to what is stated in this judgment and dispose of the matter as expeditiously as possible.