**(2016) 03 AHC CK 0044**

**In the Allahabad High Court**

**Case No :** First Appeal No. 177 of 2007

Ashok Kumar Gupta & Another APPELLANT

Vs

State of U.P. & Others RESPONDENT

**Date of Decision :** 08-03-2016

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 96
Uttar Pradesh Trade Tax Act, 1948 — Section 17, 7(c)

**Citation :** (2016) 4 ADJ 509 : (2016) 4 AllWC 3414 : (2016) 116 ALR 736 : (2016) 3 ARC 118 : (2016) 132 RD 410

**Hon'ble Judges :** Sudhir Agarwal;Ram Surat Ram (Maurya), JJ.

**Bench :** Division Bench

**Advocate :** Manoj Misra and N.K. Chaturvedi, Advocates, for the Appellant; P.K. Jain, Advocate, for the Respondent

**Final Decision :** Allowed

## Judgement

1. Heard Sri P.K. Jain learned Senior Advocate assisted by Sri N.K. Chaturvedi, Advocate for appellants and learned Standing Counsel for respondents no. 1, 2 and 3.

2. This is a plaintiff''s appeal under Section 96 of Code of Civil Procedure (hereinafter referred to as ''CPC'') arising from Judgment and decree dated 05.05.2007 passed by Sri Girish Mohan Mittal, Additional District Judge, Court no. 14, Agra dismissing plaintiff-appellants Original Suit No. 669 of 1997.

3. Relevant facts necessary for adjudication of appeal are as under.

4. Plaintiff-appellants instituted Original Suit No. 669 of 1997 in the Court of Civil Judge (Senior Division) Agra, vide plaint dated 08.09.1997 praying for a decree of declaration that plaintiff and proforma defendant-4 be held exclusive and absolute owner of suit property and not liable for recovery of any dues by attachment and auction against the recovery of dues of M/s Bajrang Oil Industries or its proprietor Smt. Prem Wati. It was also prayed that defendants 2

 

and 3 be restrained by granting a decree of permanent prohibitory injunction, from auctioning and selling suit property in realisation of tax dues of M/s Bajrang Oil Industries or its proprietor.

5. The plaint case set up is that Ashok Kumar Gupta and Anil Kumar Gupta, both brothers, being sons of Kailash Chand Gupta, and defendant 4 Pankaj Gupta, son of Mand Chand Gupta, are owners in possession of house bearing Municipal No. 27/104 (Kothi No. 188) situate at North Vijay Nagar Colony, Agra. The said house was purchased in 1969 by Sri Bidhi Chand, grandfather of plaintiff and their brother Pramod Kumar Gupta, vide registered sale deed dated 04.12.1969 for a consideration of Rs. 35,000/- from erstwhile owners of said house. Plaintiffs and their brother Pramod Kumar Gupta became absolute and exclusive owner by virtue of gift by grandfather of said house. Pramod Kumar Gupta transferred by sale, his ? share in the aforesaid house, to defendant 4 Pankaj Gupta who thus became co-owner of suit property along with plaintiffs.

6. Plaintiffs mother Smt. Prem Wati was running a proprietorship business in the name and style of M/s Bajrang Oil Industries at 4227, Nagal Sola Bhoja, Agra. Proprietorship firm of Smt. Prem Wati was registered under U.P. Trade Tax Act, 1948 (hereinafter referred to as ''Act 1948'') with defendant no. 2 for Trade Tax purpose. M/s Bajrang Oil Industries, Agra fell in arrears of tax dues for the year 1985-86 and proceedings for realisation of said arrears of tax dues were initiated by defendant 3. A recovery requisition was sent by defendant 2. In furtherance, of aforesaid realisation of dues to the tune of Rs. 22,84,320/-, a citation for attachment of House No. 27/04 to the extent of share alleging to be owned by Smt. Prem Wati Gupta, was issued by defendant 2 as a result whereof defendant 3 attached the said house.

7. Plaintiffs filed objection before defendant 3, whereupon he being having satisfied that Prem Wati Gupta had no share in the said property, cancelled proposed sale of disputed house vide order dated 28.06.1997. Again defendant 3 without any further information to plaintiffs, proceeded to auction disputed house to the extent of ? share and fixed 22.09.1997 for auction, hence the suit by plaintiffs.

8. Defendant-respondents contested the suit stating that suit property is owned by plaintiffs to the extent of ?th share each, and ?th share is owned by Smt. Prem Wati w/o Kailash Chand Gupta. With respect to remaining ? share they are getting facts verified from Nagar Nigam.

9. Trial Court formulated eight issues which are as under:-

1- D;k oknhx.k ,oa izksQkekZ izfroknh la[;k 4 fookfnr lEifRr ds Lokeh ,oa dkfct gS] ;fn gka rks izHkko\\

''Whether the plaintiffs and proforma defendant no. 4 are owners of disputed property having possession over it? If so, its effect?

2- D;k fookfnr lWEifRr esa Jherh izseorh dk 1@4 fgLlk gS] ;fn gka rks izHkko\\

''Whether Smt. Premwati has share in disputed property. If so, its effect?''

3- D;k fookfnr lEifRr dk 1@4 fgLlk uhyke gksus ;ksX; gS\\

''Whether share of disputed property deserves to be auctioned?''

4- D;k orZeku okn nk;j djus dk dksbZ okn dkj.k mRiUu gqvk\\

''Whether any cause of action has arisen to institute the present suit?''

5- D;k orZeku okn voewY;kafdr gS\\

''Whether present suit is under valued?''

6- D;k vnk U;k; ''kqYd vi;kZIr gS\\

''Whether court fee is insufficient?''

7- oknhx.k fdl vuqrks"k ds ikus ds vf/kdkjh gS\\

''What relief are plaintiffs entitled to get?''

8- D;k okn fof/kd :i ls pyulkj ugha gS\\

''Whether the suit is not legally sustainable?''

(English translation by Court)

10. Issues 5 and 6 relating to valuation and court fees were taken as preliminary issues and answered by Trial Court vide judgment and order dated 16.01.2002 in favour of plaintiff''s-appellants which has been made part of impugned judgment and decree dated 05.05.2007.

11. Issues 1 and 2 relate to question of ownership of disputed property. Both were taken together. Both these issues have been answered holding that Smt. Prem Wati had no right or ownership over disputed property and she did not own ?th share in disputed house. It also held that disputed house in its entirety is owned by two plaintiff-appellants and defendant 4.

12. Having said so, Trial Court proceeded to answer Issues 3 and 4 together and returned in favour of plaintiffs holding that ?th share in disputed house alleging to be owned by Smt. Prem Wati was not liable to be auctioned since Smt. Prem Wati had no ownership rights over disputed property and both these issues were answered in favour of plaintiff-appellants. Having said so, Court below answered Issue 8 holding that suit in question was barred by Section 17 of Act 1948 and view there of it dismissed suit holding that plaintiffs are not entitled to claim any relief.

13. The only question raised in this appeal is ''whether Court below was justified in holding that suit in question filed by plaintiff-appellants is barred by Section 17 of ''Act 1948''.

14. In order to answer aforesaid question it would be appropriate to reproduce

 

Section 17 of Act 1948 as under:-

"Bar to certain proceedings-No assessment made and no order passed under this Act or the Rules made thereunder by any authority shall be called in question in any Court, and, save as is provided in this Act, no appeal or application for revision or review shall be against any such assessment or order."

15. In the present case, it is not in dispute that appellants did not challenge any order of assessment or an order passed under Act 1948. Defendant-respondents passed orders against Smt. Prem Wati and were entitled to recover outstanding tax dues from Smt. Prem Wati by taking action as permissible in law against property owned by Smt. Prem Wati.

16. Against property in dispute under the impression that it was co-owned by Smt. Prem Wati to extent of . However, this fact has been found incorrect by Trial Court and a categorical finding has been recorded that she had no share whatsoever, in the property in dispute. It is not case of defendant-respondents that plaintiffs or respondent no. 4 any tax liability of their own and therefore, defendant-respondents are proceeding to recover outstanding dues from properties of plaintiff''s-appellants and defendant no. 4. It is admitted case of defendant-respondents 1, 2 and 3 that liability of tax outstanding and under recovery is owned by M/s Bajrang Oil Industries solely owned by proprietorship of Smt. Premwati and hence the recovery has to be made and is being proceeded against property owned by Smt. Premwati, the owner of said firm. It is also evident from the stand taken by defendant-respondents 1, 2 and 3 that they are proceeding to recover tax dues by attachment and auction of disputed property to the extent ?th thereof on the foundation to that extent it is owned by Smt. Premwati and therefore, recovery to this extent can be made from the property in dispute.

17. If the property in dispute is not owned at all by Smt. Premwati, the defendant-respondents 1, 2 and 3 had no cause or foundation to proceed to recover tax dues by attachment and auction of disputed house. This is evident from the stand taken by defendant-respondents 1, 2 and 3 in the written statement as well as before the Court below and it is also not disputed before this Court that they are proceeding against defendant-respondents.

18. Having come up in cross-appeal or cross objection in respect to the findings recorded by Trial Court on Issue 1, 2 and 3 holding that Smt. Premwati has no ownership rights in the property in dispute and therefore, recovery from said property was not justified. In fact, we find that having recorded its finding with respect to Issues 1 to 4 in favour of plaintiff''s the Trial Court ought to have granted injunction against defendant-respondents 1, 2 and 3 restraining them from recovering tax dues from disputed house which is not owned in any manner by Smt. Premwati, in view of its findings recorded while returning Issues 1 to 4. What we find that Trial Court thereafter has made out a new case by relying on Section 7-C of Act 1948. Since Prem Wati in the meantime has died therefore,

 

recovery can be made from plaintiff-appellants property. It has said that they are liable to be treated as ''dealer'' under Section 2-C of Act 1948 and can seek remedy under the said Act, hence no relief can be granted in the suit.

19. Referring to Section 7-C the Court below has said as under:-

"Tax due from deceased person payable by his representatives:- (1) Where a dealer dies, his executor, administrator or other legal representative shall be deemed to be the dealer for the purposes of this Act and the provisions of this Act shall apply to him in respect of the business of said deceased dealer:

Provided that-

(i) in respect of any liability of the deceased, his executor, administrator of other legal representative shall be liable only to the extent of the assets of the deceased in his hand;

(ii) any proceedings including the proceeding for recovery, may be continued from the stage at which it was pending at the time of the death of the dealer.

(2) The provisions of sub-section (1) shall mutatis mutandis, apply to a dealer being a partnership firm which may stand dissolved in consequence of the death of any partner."

20. Proviso clearly shows that after death of ''dealer'' his executor, administrator or other legal representatives shall be deemed to be a dealer but shall be liable for tax dues of deceased only to the extent of assets of deceased coming in the hands of such legal representatives.

21. In the present case, there is neither pleading nor any evidence, nor it was the case of defendant-respondents that plaintiff-appellants have received/ succeeded certain assets from Smt. Prem Wati and they are making recovery from such assets.

22. A new case has been made out by Court below so as to attract Section 17 read with Section 7 (C) though in this regard there is no pleading, no evidence and nothing on record. The defendant-respondents proceeded against property in dispute by selling ? share of said property under the belief that it was owned by Smt. Prem Wati. This fact has been found incorrect and Court below has clearly recorded a finding deciding Issues 1 to 4 that Smt. Prem Wati has no share in the disputed property and it was solely owned by plaintiff-appellants and defendant 4 hence property in dispute could not have been auctioned for recovery of tax dues of plaintiff Prem Wati.

23. On account of death of Prem Wati, whether any assets have been received by plaintiff-appellants was neither the case pleaded by defendant-respondents nor adduced any evidence for such premises and conjectures. The Court below was wholly unjustified and tell in grave error by taking recourse to Section 7 (c ) and to attract Section 17 so as to non suit the appellants.

24. In the circumstances, without any hesitation we answer the aforesaid question in favour of plaintiff-appellants and held that the Court below committed grave error and recorded perverse finding while answering Issue 8 that suit is barred under Section 17 of Act 1948 and this finding deserve to be reversed.

25. That being so, the impugned judgment becomes unsustainable and therefore, set aside to the extent it dismissed the suit filed by plaintiff-appellants and we substitute the same by declaring the suit decreed in granting declaration as prayed by plaintiff-appellants in respect to property in dispute as also restrain the defendant-respondents from auctioning 1/4 of disputed property for recovery of tax dues by Smt. Prem Wati. However, this judgment shall not preclude the defendant-respondents from proceeding to take appropriate steps for recovery of outstanding dues by Smt. Prem Wati from such assets, if any received by plaintiff-appellants or others, after her death in accordance with law, provisions of Act 1948. The plaintiff-appellants shall also be entitled to cost throughout.

26. Appeal stands allowed accordingly in the manner as above.