

(2005) 04 AHC CK 0085

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 205 of 1999

Deoki Nandan Gupta and Raj Kumar Pahariya

APPELLANT

Vs

State of Uttar Pradesh and Assistant Collector (Collection),
Trade Tax-II

RESPONDENT

Date of Decision : 27-04-2005

Acts Referred:

Contract Act, 1872 — Section 126, 128, 129, 129A, 130

Uttar Pradesh Trade Tax Act, 1948 — Section 8C, 8C(1), 8C(3)

Citation : (2005) 04 AHC CK 0085

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : Manish Goyal, for the Appellant; K.M. Sahai and S.C., for the Respondent

Judgement

Prakash Krishna, J.—This writ petition has been tiled by two persons namely, namely, Devaki Nandan Gupta, petitioner No. 1 and Raj Kumar Paharia, petitioner No. 2 for quashing the notice dated 7th January, 1999 (Annexure-1 to the writ petition) and dated 24.8.1998 and (Annexure-2 to the writ petition) and also for a writ order or direction in the nature of mandamus commanding the respondents to release the bank account and the shop of the petitioners and not to put on auction the residential house and the agricultural land belonging to them.

2. M/s Atul Dal Mills, Katra Bazar Month, district Jhansi applied for registration with the Trade Tax Department under the provisions of U.P. Trade Tax Act, hereinafter referred to as the Act, and was granted registration on 10th September, 1990. It has been stated in the writ petition that for the purpose of getting registration M/s Atul Dal Mills was directed by the Trade Tax Department to furnish security in the form of surety bond and the petitioner No. 1 stood as surety as directed by the Assessing Officer of M/s Atul Dal Mills as a condition of grant of registration certificate to it, A surety bond was executed on 4th February, 1991, for which the petitioner No. 1 along with one Kishori Saran Sahu

stood as surety to the tune of Rs. one lac. Further averment is that another surety bond was executed with respondent No. 1 for the year 1992-93 and this time both the petitioners stood surety for the amount of Rs. 80,000/- for the year 1992-93. Subsequently, petitioner No. 1 alone withdrew from the suretyship of Rs. 1,00,000/- and communicated his intention to the Assistant Commissioner (Assessment) II, Trade Tax, Jhansi on 2nd August, 1994. A reminder reiterating the intention to revoke the surety executed by the petitioner No. was given on 3rd August, 1995. The assessment of the firm M/s Atul Dal Mills for the year 1993-94 was completed and a tax liability of Rs. 14,87,669/- was determined. A notice dated 4th February, 1997 was served by the Deputy Collector (Collection) on the petitioner demanding a sum of Rs. 80,000/- on account of contract of generator executed by him for the outstanding dues of M/s Atul Dal Mills for the assessment year 1993-94. The petitioner No. 1. filed objections objecting the realization of Rs. 80,000/- from him before the Deputy Collector (Collection), but in vain. The petitioners filed present writ petition as the respondents without considering the objections filed by them proceeded against the petitioners and sealed their shops and bank accounts and have also put to auction the residential house and the agricultural land of the petitioner.

3. In the counter affidavit the respondents came out with the case that the petitioners stood as sureties for the payment of outstanding trade tax dues of M/s Atul Dal Mills, Jhansi. It has been further stated that prior to the application of the petitioner dated 2nd August, 1994 a sum of Rs. 10, 64,751/- was outstanding dues against the firm M/s Atul Dal Mills, therefore, the petitioners are liable to pay the guaranteed amount to the extent for which they stood sureties. The petitioners stood sureties for Rs. 1,80,000/- Rs. 80,000/- respectively and they were rightly directed to deposit the dues to the extent of surety amount undertaken by them.

4. In the rejoinder affidavit, besides reiterating the pleas raised in the writ petition, the petitioners submitted that the surety bond being in the nature of additional security would be valid for a particular year in view of the provisions contained u/s 8-C (wrongly mentioned as 8-A) of the Act and, therefore, it is incorrect to state that the surety bond was not confined only to the year 1992-93. The petitioners can not be made liable for any dues of the firm after revocation of the contract of. guarantee,

5. The petitioners have made an attempt to develop a further case by way of supplementary affidavit and rejoinder affidavit that the department discharged the petitioners as surety and it accepted new sureties in place of them and as such no amount can be recovered from the petitioners. To this, the reply of the department is that the surety furnished by the petitioners continued for the assessment year 1991 -92 and 1992-93 and for some part of 1993-94. The Present recovery which has been proceeded against the petitioners relate to the assessment year 1991-92 and 1992-9. M/s Atul Dal Mills opened a Branch at another place in Chirgaon for the financial year 1992-93 and since the business

was extended to other place a further surety of Rs. 80,000/- was demanded to be furnished by M/s Atul Dal Mills. Deoki Nandan Gupta and M/s Paharia Traders stood as sureties filing surety bond on 24.12.1992 and the said surety bond is still continuing till date as the same has not been withdrawn so far.

6. Heard learned counsel for the parties and perused the record.

7. Learned counsel for the petitioner submitted that although petitioner No. 1 stood surety for the trade tax dues of M/s Atul Dal Mills, but that surety was withdrawn by him by means of letter dated 2.8.1994. Thereafter a reminder was given by him on 3rd August, 1995 by means of letter, a copy of which has been filed as Annexure-6 to the writ petition. The Asstt. Commissioner (Assessment) in pursuance of the letter of the petitioner, dated 3rd August, 1995, issued a notice to M/s Atul Dal Mill asking it to furnish fresh sureties as the surety has expressed his intention to withdraw surety. A copy of the said letter dated 18th August, 1995 has been annexed as Annexure-7 to the writ petition. Thereafter M/s Atul Dal Mills got filed a contract of surety of two sureties other than the petitioners and as such in place of the petitioners fresh sureties have been substituted and the outstanding dues if any towards trade tax dues and penalty etc. should be recovered from the substituted sureties. Another argument was, that the sureties extended by the petitioners was limited to the assessment year 1990-91. In other words the petitioners are liable only for the outstanding dues for the assessment year : 1990-91 and not for the subsequent period.

8. In contra, the learned Standing Counsel Sri K.M. Sahai refuted the aforesaid submissions and submitted that from the impugned notice filed as Annexure-1 and 2 it is clear that the department is seeking to recover the outstanding dues only to the extent of the surety amount for which the petitioners stood up. He submitted that the nature of sureties furnished by the petitioners were in the form of continuing guarantee. He further submitted that the withdrawal letter dated 2/8/1994 was given by the petitioner No. 1 alone and as such the petitioner No. 1 is liable to pay all the outstanding dues up to the surety amount for the period up to 2nd August, 1994 from the date of registration. Petitioner No. 1 had Furnished another surety for a sum of Rs. 80.000/- which has never been withdrawn. Petitioner No. 2 Raj Kumar Paharia at no point of time withdrawn from the suretyship and as such he is liable to pay a sum of Rs. 80,000/- as he stood surety for that outstanding amount of M/s Atul Dal Mills.

9. Before proceeding further it is necessary to look to the impugned notices dated 7.1.1999 and 24th August, 1998. The notice dated 7th January, 1999 is addressed to the petitioner No. 1 only. The department has asked petitioner No. 1 to deposit a sum of Rs. 1,80,000/- as against the outstanding dues of M/s Atul Dal Mills for the assessment years 1991-92 and 1992-93. It has been stated therein that petitioner No. 1 furnished one surety of Rs. one lac and he stood another surety for Rs. 80.000/-. The outstanding dues for the assessment year 1991-92 has been shown to be Rs. 19,94,751.00 and for the assessment year 1992-93 it is 35,70,291.00. Thus it is clear that the department is seeking to

recover the outstanding dues to the extent of the surety amount although much more amount of the department is outstanding against M/s Atul Dal Mills for which the petitioner No. 1 stood surety. The second impugned notice dated 24.8.98 is addressed to petitioner No. 2 only and the department has asked him to pay a sum of Rs. 80,000/0 only as against the outstanding dues amounting to Rs. 80,53,259.00 plus interest for the period 1992 to 1995. In this factual situation, we have to examine the merits of the contention of the learned counsel for the petitioner. On an analysis of the pleadings the following factual situation emerges :-

(1) The department is seeking to realize the amount from the petitioner No. 1 for the assessment years 1991-92 and 1992-93 outstanding against M/s Atul Dal Mills and not for the subsequent period.

(2) The petitioner No. 1 according to his own showing executed two surety bonds one for Rs. one lac on 4th February, 1991 and another for Rs. 80,000/-.

(3) On 2nd August, 1994, the petitioner No. 1 expressed his desire to withdraw from his suretyship of M/s Atul Dal Mills. In the withdrawal letter which has been filed as Annexure-5, it is mentioned that the petitioner No. 1 is withdrawing himself as surety and shall not be liable for any dues for the period subsequent to 2nd August, 1994.

(4) From the letter of the petitioner dated 2nd August, 1994 (Annexure-4), petitioner No. 1, expressed his willingness to withdraw from suretyship of Rs. One lac only. In the letter there is no mention that he does not stand surety any more for Rs. 80,000/- furnished by him subsequently along with Raj Kumar Paharia, petitioner No. 2

(5) Petitioner No. 2 who stood surety for Rs. 80,000/- by means of surety bond did not withdraw from suretyship at any point of time. The surety bond executed by him remained valid as there is not even a whisper in the writ petition that the expresses his intention to withdraw from surety ship.

Now we examine the first submission of the petitioners that in view of the fact that subsequently M/s Atul Dal Mills furnished two other sureties the amount can be recovered only for the substituted sureties and not from the petitioners. In this connection learned counsel for the petitioner has placed reliance on American Jurisprudence Second Edition Volume 38 titled as A Modern Comprehensive. Text Statement of American Law State and Federal and Chitty on Contracts, 27 Edition Volume 2, Specific Contract Section 87 of the American Jurisprudence relied upon by the learned counsel for the petitioner is quoted below :-

"87. Taking additional security or another guaranty The fact that the creditor may take, additional security to insure payment of the principal obligation does not release or discharge the guarantor, Taking new security, by itself, neither injures the guarantor nor increases any risks which the guarantor has under the

guaranty contract. If, however, in addition to taking the additional security, the creditor extends the time for the debtor's performance or takes the new security in discharge of the guaranteed obligation or acts to the detriment of the guarantor, then the guarantor is discharged, although the taking of the new security may have been of benefit to the guarantor.

The additional security taken by the creditor may be in the form of a new guaranty. When this occurs the prior guaranty is not extinguished by the execution of the subsequent guaranty unless the subsequent guaranty was executed as a substitute for the earlier one. Nor does a lender's request for an additional guaranty limit the guarantor's obligation under an existing guaranty, particularly if the existing guaranty specified it could only be modified or waived in writing, or if the lender does not assure the guarantor the existing guaranty is no longer effective. Similarly, if a subsequent guaranty is released, that release does not apply to a prior guaranty when the subsequent guaranty did not replace the prior guaranty."

10. From the above it is clear that the additional security taken by the creditor may be in the form of a new guaranty, but the prior guaranty is not extinguished by execution of the subsequent guaranty unless the subsequent guaranty was executed as substituted guaranty in the earlier one. In this connection relevant provisions of Contract Act is to be examined, Section 126 of the Contract Act defines a contract of guaranty as a contract to perform or discharge a liability of a third person in the case of his default. The person who gives guaranty is called surety. The person in respect of whose default the guarantee is given called principal debtor and to whom the guarantee is given is called creditor. In a contract of guaranty then are three parties, namely, a principal debtor (M/s Atul Dal Mills), the liability may be actual or prospective, a creditor (department) and third party who promised to discharge debtor's liability if the debtor should failed to do so (petitioners). Section 128 of the Contract Act says that the liability of the surety is co-extensive with that the of principal debtor, unless it is otherwise provided by the contract. Section 129 and 130 of the Contract Act defines continuing guaranty and revocation of continuing guaranty. A guaranty according to Section 129 which extends to series of transaction is called continuing guaranty and the same can be revoked at anytime u/s 130 of the Contract Act by notice to the creditor. Section 129 and 130 of the Contract a Act being relevant are quoted below :-

"Section 129A guarantee which extends to a series of transaction is called "continuing guarantee".

Section 130-A continuing guarantee may at any time be revoked by the surety, as to the future transaction by notice to the creditors".

11. In the present case the petitioners stood sureties for the principal debtor, namely M/s Atul Dal Mills. Copies of the surety bonds have been filed along with writ petition. A reading of the surety bond clearly shows that the petitioners have

stood surety for the specified amount towards past, present and future trade tax and penalty etc. till their realization from the principal debtor, during the continuance of the registration. In the security bond it is mentioned that the guarantors have agreed to pay the present dues and future dues of the principal debtor.

12. The surety bond is in prescribed form as provided by the department. The terms and conditions of both the surety bonds are identical except there is variation of amount of surety, in one case it is one lac and in another it is Rs. 80,000/-, By means of the surety bond the petitioners have agreed to pay the present and future liability of principal, debtor, namely, M/s Atul Dal, Mills. This surety bond on the face of it is in the nature of continuing guarantee. There is no mention, nor there is any such restriction that the surety bond is for a particular assessment year or for a specified period. The petitioners undertook to stand surety for the principal debtor to the extent of the amount agreed by them until realization of the said amount from the principal debtor towards Trade Tax dues and penalty etc. Therefore, the agreement that the said bonds were valid for the particular assessment year in which they were executed. As contended by the pet turners is not legally sound.

13. The learned counsel or the petitioner placed reliance upon Section 8-C(3) of the Act and submitted that the contract of guarantee was for a particular assessment year. The submission that the security bond furnished by the petitioners was valid up to said assessment year for which it was furnished is misconceived and it is not born out either from the plain language of Section 8-C of the Act or from the objection to be achieved for enacting the said Section. The department may demand security in the interest of Revenue from a dealer, while granting registration under U.P. Trade Tax Act, as a condition of grant of registration. The security is demanded for realisation of any amount of tax penalty or other amount payable by the dealer. Further if a dealer is found to have misused any of the forms referred in sub Section (1) of Section 8-C or fail to keep them in proper custody. If the argument of the petitioner is accepted that the surety of Rs. one lac furnished on 4th February, 1991 was valid only for the year 1990-91 there was no necessity for the petitioner No. 1 to write a letter dated 2nd August, 3 994 withdrawing from suretyship of M/s Atul Dal Mills, which clearly shows that the petitioner No. 1 himself was treating the surety bond as continuing guarantee. Even in the said letter it is mentioned by petitioner No. 1 that he will no more be liable for the acts and deeds of the principal debtor for the period subsequent to 2nd August. 1994. On a plain reading of petitioner's letter dated 2nd August, 1994, it is crystal clear that he stood surety for the period 4th February, 1991 to 2nd August, 1994 for the liability incurred by the principal debtor. Otherwise, the very purpose of obtaining surety bond would be frustrated. After close of assessment year no dealer is required to furnish fresh surety bonds as the surety bonds is in the nature of continuing guarantee. The surety was furnished and the petitioner No. 1 stood surety till its revocation by the letter dated 2nd August, 1994. The amount sought to be recovered by the

department is for the assessment year 1991-92 and 1992-93 which falls within the period 4th February, 1991 to 2nd August, 1994 during which the contract of the guarantee executed by petitioner No. 1 remained valid and operative. Similarly the petitioner No. 2 is bound by the contract of guarantee executed by him for Rs. 80,000/-.

14. The petitioners have filed photostat copies of two challans evidencing payment of Rs. one lac by one of the substituted surety. This fact has not been disputed by the department. The respondents have also not disputed the fact that the principal debtor furnished fresh two sureties, when the petitioner No. 1 revoked the surety bond of Rs. one lac issued by it. In this situation we are of the considered opinion that the surety given by petitioner No. 1 towards the payment of liability of the principal debtor to the extent of Rs. one lac undertaken by him at the time of registration dated 4/2/91 stands revoked. Meaning thereby, the respondents can not recover any amount in pursuance of the aforesaid contract of guarantee from petitioner No. 1. But this does not mean that petitioner No. 1 ceased to be the surety of Rs. 80,000/- which he undertook under a fresh contract. There were two contracts of guarantees or surety bonds executed by the petitioner No. 1 for the dues of the principal debtor. It is not the case of the petitioner No. 1 it has revoked the second contract of guarantee/surety bond Rs. 80,000/-. To that extent the liability of petitioner No. 1 to pay the amount to the extent of Rs. 80,000/- stands.

15. The case of petitioner No. 2 stands on a different footing. At no point of time, petitioner No. 2 revoked the contract of guarantee/surety bond. Admittedly he executed surety bond for Rs. 80,000/-. The said contract of guarantee/surety bond is valid and is enforceable against him. The department has rightly issued the impugned notice dated 24.8.1998 to recover the said amount of Rs. 80,000/- from the petitioner. We find no legality in the said notice.

16. Before parting with the case it is to be noted that the following amount is outstanding against the principal debtor.

Year	Balance	Amount	1991-92(UP)	Rs. 10,64,751/-	1992-93 (UP)	Rs. 7,70,221/-
			1992-93 (Central)	Rs. 28,00,000/-	1993-94(UP)	Rs. 6,97,669/-
			1993-94 (Central)	Rs. 8,00,000/-	1994-95 (UP)	Rs. 8,12,524/-
			1994-95 (Central)	Rs. 9,95,000/-	1995-96 (UP)	Rs. 10,60,000/-
			1995-96 (Central)	Rs. 4,80,000/-	1996-97	Rs. 5,40,000/-

17. In view of the above discussion the writ petition is allowed in part. So far as petitioner No. 1 is concerned it is held that the recovery to the extent of Rs. 80,000/- from petitioner No. 1 in pursuance of the impugned notice is valid and for remaining amount of Rs. one lac the recovery is quashed. Petitioner No. 2 is not entitled for any relief, therefore, the writ petition so far as petitioner No. 2 is concerned is dismissed. No order as to costs.