
(1998) 11 P&H CK 0048
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 972 of 1997

Pawan Kumar Gupta

APPELLANT

Vs

State of Haryana and others

RESPONDENT

Date of Decision : 27-11-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Contract Act, 1872 — Section 133

Citation : (1998) 11 P&H CK 0048

Hon'ble Judges : N.K. Agrawal, J;G.C. Garg, J

Bench : Division Bench

Judgement

N.K. Agrawal, J.—This is a petition, under articles 226 and 227 of the Constitution, for quashing the notices issued by the Excise and Taxation Officer to the petitioner to deposit, as surety, the arrears of the sales tax payable by respondent No. 4, M/s. Jai Laxmi Rice Mills, Ambala City.

2. The petitioner is running his own business in Haryana as proprietor of M/s. Kishori Lal Pawan Kumar at Old Anaj Mandi, Ambala City. The petitioner stood surety for the firm M/s. Jai Laxmi Rice Mills, which consisted of three partners, Gulshan Kumar and his two sons, Dhanender Kumar and Narinder Kumar. The petitioner executed a surety bond in form ST-50 on September 21, 1987 standing as surety for the said firm in the sum of Rs. 50,000 for securing the payment of sales tax by the firm under the Haryana General Sales Tax Act, 1973 and the Central Sales Tax Act, 1956. One of the conditions in the bond was that the bond could be terminated by giving six months' notice in writing to the Assessing Authority. Two partners, namely, Dhanender Kumar and Narinder Kumar of M/s. Jai Laxmi Rice Mills, retired on April 1, 1993. Gulshan Kumar, thereafter, became the sole proprietor of the business. Gulshan Kumar informed the Excise and Taxation Officer, Ambala City, on April 27, 1993 about the change in the constitution of the firm. The Excise and Taxation Officer asked Gulshan Kumar, on June 22, 1996, to furnish fresh surety bond. Gulshan Kumar had earlier filed, on July 31, 1995, an application before the Excise and Taxation

Officer for cancellation of the registration certificate issued to M/s. Jai Laxmi Rice Mills. The petitioner also filed an application before the Excise and Taxation Officer on September 20, 1995 for the withdrawal of his surety bond executed by him in favour of M/s. Jai Laxmi Rice Mills.

3. The petitioner has challenged the steps taken by the Excise and Taxation Officer against him for the purposes of recovery of the arrears of tax. The petitioner's case is that he is no more liable under the surety bond to discharge the tax liability on behalf of M/s. Jai Laxmi Rice Mills. He has already informed the Excise and Taxation Officer seeking the withdrawal of the surety bond and his liability has ceased after the expiry of six months from the date of the withdrawal. Thus, his liability under the surety bond came to an end after March 19, 1996. The Excise and Taxation Officer wrongly issued a recovery notice to the petitioner on August 21, 1996, asking the latter to discharge the tax liability of the firm. Since the petitioner's liability as a surety has ceased after March 19, 1996, the action taken by the Excise and Taxation Officer against the petitioner is said to be in contravention of the conditions of the surety bond.

4. The petitioner has challenged the issuance of warrant of attachment and arrest against him. His plea is that no tax liability could be raised against him after he had withdrawn as surety on September 20, 1995. The amount of tax is sought to be wrongly recovered from him after the expiry of six months from the date of withdrawal. Since it is not legally permissible to recover tax from the petitioner, the action of the respondents is said to be wholly illegal and without jurisdiction.

5. Shri A. K. Mittal, learned counsel for the petitioner, has also argued that the partnership firm, M/s. Jai Laxmi Rice Mills, had been dissolved on April 1, 1993 and consequently the petitioner's liability as a surety for the firm ceased to exist. Moreover, no proceedings have been initiated by the Excise and Taxation Officer against the partners of M/s. Jai Laxmi Rice Mills. Mr. Mittal has argued that it was a mala fide action on the part of the Excise and Taxation Officer to proceed against the petitioner without taking any effective steps for the recovery of the tax dues from the partners.

6. Shri Mittal has further argued that section 133, Indian Contract Act, 1872, specifies that when any variance is made in terms of the contract between the debtor and creditor without the surety's consent, it would discharge the surety as to the transactions subsequent to such variance. It is contended in the light of that provision that the petitioner had executed surety bond to the extent of Rs. 50,000 for the partnership firm. The liability of the petitioner was, thus, limited to Rs. 50,000 only in respect of the tax liability, which had arisen against the partnership firm before its dissolution. Since the partnership firm came to be dissolved on April 1, 1993 and M/s. Jai Laxmi Rice Mills became proprietary concern owned by Gulshan Kumar alone, the petitioner's liability extinguished thereafter.

7. Shri Amol Rattan Singh, AAG, Haryana, has, on the other hand, defended the action in respect of the recovery of tax from the petitioner. His argument is that the liability of the petitioner continued till the surety bond was cancelled. The dissolution of the firm or the cancellation of the registration certificate would not help the petitioner inasmuch as the tax liability sought to be recovered relates to the period during which M/s. Jai Laxmi Rice Mills was functioning as a partnership firm. The petitioner is liable as a surety to pay the tax dues of the firm till the expiry of six months from September 20, 1995, the date of the letter of withdrawal submitted by the petitioner before the Excise and Taxation Officer. The petitioner's liability ceased after March 19, 1996 only. The sales tax liability, which became due against the firm up to the year 1992-93, was payable by the petitioner to the extent of Rs. 50,000. Steps were taken against Gulshan Kumar, who remained in the civil prison for 40 days in consequence of the proceedings under the Land Revenue Act. The tax liability was, however, not discharged by Gulshan Kumar as he is a man of no means. Thus, liability of the petitioner continued till the expiry of six months from the date of cancellation of the surety bond. Tax liability arising prior to the dissolution of the firm continued against the petitioner till the expiry of six months from the date of cancellation of the surety bond. Shri Amol Rattan Singh has further pointed out that no warrant of attachment or warrant of arrest was ever issued against the petitioner. Sales tax liability amounting to Rs. 4,81,066 was due against the firm up to the assessment year 1992-93. The petitioner is liable to discharge the tax liability to the extent of Rs. 50,000 under the surety bond executed by him. A tax demand of Rs. 3,83,000 was created for the assessment year 1988-89 on December 30, 1992 under the Haryana General Sales Tax Act, 1973. Another demand of Rs. 98,061 was created for the same assessment year under the Central Sales Tax Act on July 15, 1994.

8. On a consideration of the controversy, it is found that the tax liability created after March 19, 1996 cannot be recovered from the petitioner. Moreover, the firm was dissolved on March 1, 1993 and the business was thereafter owned by Gulshan Kumar as sole proprietor. The petitioner had, undisputedly, not stood surety for the new firm after its re-constitution on April 1, 1993. No recovery of tax dues, arising against the new firm, can be made from the petitioner. The Excise and Taxation Officer can also recover tax dues from the erstwhile partners. The petitioner has pointed out in his petition that Dhanender Kumar and Narinder Kumar, the erstwhile partners of the firm, are running a new business as partners in the name and style of M/s. J.L. Rice Mills, Hisar Road, Nasirpur, Ambala City. It is stated that they have sufficient credit balances in their capital accounts in M/s. J.L. Rice Mills.

9. As has been seen, sales tax liability, for the assessment year 1988-89, exists against M/s. Jai Laxmi Rice Mills. There is some liability for other years also. There appears no tax liability for the period after the firm was dissolved. Thus, the petitioner cannot be allowed to take the plea that he was not liable to pay the tax dues for the erstwhile firm. There is nothing on record to show that any

tax liability was created after the dissolution of the firm on April 1, 1993. At the same time, it is apparent that the petitioner has, under the conditions of the bond, sought withdrawal from the bond by his letter dated September 20, 1995. Since the liability under the terms of the bond continued for six months thereafter, the petitioner cannot escape from the liability till March 19, 1996. He is indeed liable to the extent of Rs. 50,000 only. The petitioner's charge, that no action has been taken against the other two partners, has some substance and it appears strange that the Excise and Taxation Officer has chosen not to take proper and effective steps against Dhanender Kumar and Narinder Kumar, who are still running another business as partners. Action was indeed taken against Gulshan Kumar by sending him to the civil prison but that should not stop the respondents from enforcing recovery against the other two partners, who appear to have sufficient means to discharge the debt.

10. In *State Bank of India v. M/s. Indexport Registered State Bank of India Vs. Messrs. Indexport Registered and others*, , it has been held that a decree holder can execute the decree first against the guarantor without proceeding against the mortgaged property. A guarantor can be sued without even suing the principal debtor. Creditor's liability is co-extensive with that of the principal debtor.

11. In view of the above, the petitioner's plea is found to have some force. The respondents can proceed to recover the amount of tax dues from the petitioner to the extent of Rs. 50,000 only. It is for the respondents to see that the amount of tax dues can be recovered from the other partners or not. From the facts, which have come on the record, it appears that the respondents have not made serious efforts, for the reasons best known to them, for the recovery of the tax dues from the erstwhile partners of M/s. Jai Laxmi Rice Mills.

12. In the result, the writ petition is disposed of with a direction to the respondents not to proceed against the petitioner except to the extent of the recovery of Rs. 50,000, the amount of the surety bond executed by the petitioner.

13. Petition disposed of accordingly.