

**Critical analysis of liability of
surety is co-extensive with
principal debtor: Florence
Mabel R.J. v. State of Kerala**

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BURNISHED LAW JOURNAL

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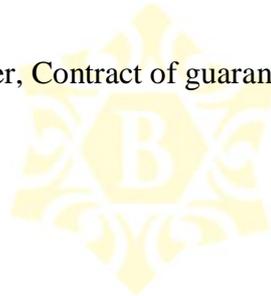
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ABSTRACT

The responsibility of a guarantor is coincident with that of the borrower, as stated in Sec 128 of the ICA. However, complications appear when the borrower in a guarantee contract by no means has responsibility. One example is whenever the borrower is a junior. Is it implying that the guarantor is exempted? According to one point of sight, because any agreement with a junior is ineffective in the ICA, the arrears suits invalid and the guarantor is exempted. Also, a few courts believe that, regardless of the fact of the borrower's opposition and the relevancy of Sec 128, the guarantor perhaps exempted in two circumstances: 1) misstatement, where the guarantor hide the reality of the borrower's opposition from the lender, and 2) provision of essentials for which the lender is obligated to be compensate. Given article examines the idea by the many contradictory perspective grasp at courts in the Indian and English circumstances.

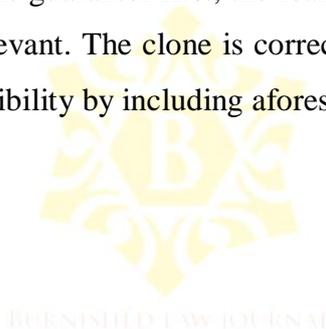
KEYWORDS: Minor, Surety, Borrower, Contract of guarantee, Void-ab-initio



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INTRODUCTION

A guarantee contract is one within a third party promises to perform or discharges his responsibility on condition that he fails to do so. The person which offers the promisee is called as the borrower, while the person whose non-payment is covered by the promisee referred as the "borrower." The person who receives the warranty is referred to as the "lender". On the report of Sec128¹ of the ICA of 1872, the surety's responsibility is coextensive. It has the twin amount as the borrower. It emphasises both the maximum area and the range of the guarantor's responsibility. Surety liability is coincident with respect to the defaulter. This means that if or if not else specified in the guarantee agreement, the guarantor is only responsible for the amount for which the borrower is obligated. It is up to the creditor to decide who desires to go after first. Whether he chooses to proceed in opposition to the guarantor first, the reality that he didn't begin a progress in opposition to the borrower is irrelevant. The clone is correct for assumed and debt property. The guarantor can restrict his responsibility by including aforesaid provisions in the agreement.



¹ Contract Act 1872, s 128.

LITERATURE REVIEW

➤ ARTICLES

INTERPRETING THE EXTENT OF SURETY'S LIABILITY WHEN PRINCIPAL DEBTOR IS A MINOR : SECTION 128 OF THE INDIAN CONTRACT ACT² – BY ABHIRAMI RETHEEV

- The writer, in this article interprets the area of guarantor's liability when borrower is a junior . Aforesaid thing try to examine the idea by many contrary approach held before courts, up on Indian and English circumstances.
- The author also states that as per sec 128, the responsibility of guarantor is coincident unless there exist a contract to the contrary.
- This journal adds that if the principal debtor has no liability, then surety is discharged.

SURETY³ - BY JEETU KANWAR

- The author clearly explains surety's liability with the case 'Bank of Bihar v Damodar Prasad'.
- Also, comes to the conclusion that in case that borrower not responsible because of arrears because of few grounds, then guarantor as well is not responsible for the same. Hence,

²Abhirami retheev, "*Interpreting the extent of surety's liability when principal debtor is a minor : Section 128 of the Indian contract act*", International journal of law management and humanities, volume 5, issue 3, pg. 14-18, 2022, ISSN: 2581-5369

<https://www.ijlmh.com/paper/interpreting-the-extent-of-suretys-liability-when-principal-debtor-is-a-minor-section-128-of-the-indian-contract-act/>

³Jeetu kanwar, "*Surety*", law times journal, june 13, 2019

<https://lawtimesjournal.in/surety/>

the guarantor's responsibility revolve around against the phrase of the agreement and not responsible for payment in addition the borrower has occupied.

GUARANTEES AND THEIR ENFORCEMENT BY BANKS : A CRITICAL ANALYSIS⁴ - PROF. (DR.) R. L KOUL

- The author not only specifies s128 but also goes to the extent of guarantee, indemnity, continuing guarantee, limitations etc with the related case laws and committee reports to come to his conclusion that the preceding discussions dealt with the guarantees obtained by creditors to secure repayments and the circumstances under which the guarantor is relieved of his liability, as well as the guarantor's remedy against the principal debtor.

JURISPRUDENCE: LITERARY SOURCES OF LAW- ACADEMIC WRITINGS & TEXTBOOKS⁵ – BY KABIR CHICHIRIYA

- The author, in this article specified on page 728 of Pollock and Mulla on ICA and Specific Relief Act, Tenth volume that “Coextensive.— guarantor's accountability is coextensive by that of the borrower.
- The author too states where the Early English Judges who administered the law introduced their own ideas within the form of common law, which influenced the development about constitution and eventually became an important source of law.

⁴R.L Kaul, “*Guarantees and their enforcement by banks : a critical analysis*”, International journal of English language, literature and humanities, Volume4, Issue5, may 2016, ISSN: 2321-7065
https://www.academia.edu/33374296/Guarantees_and_Their_Enforcement_by_Banks_A_Critical_Analysis

⁵Kabir Chichiriya, “*Jurisprudence: Literary Sources of Law- Academic Writings & Textbooks*”, The law brigade publishers, Volume2, Issue3, June-july 2021, ISSN: 2582-8088
https://thelawbrigade.com/wp-content/uploads/2021/07/AJMRR_Kabir-Chichiriya.pdf

THE LIABILITIES OF SURETY⁶ - BY DANIEL P. CIPOLLONE

- This article discusses while a guarantor perhaps free through his or her duty below a warrant due to a matter change in the chief granting agreement.
- The purpose of this article is to impart a survey whenever sureties perhaps free through their duty below a warrant as a result of a matter change to the chief granting agreement.

BOOKS

“Avtar Singh, 2017, Law of Contract and Special Relief Act”⁷ –

- The author has provided with a detailed view on what basically contract of guarantee is what are the conditions authority to the guarantor’s responsibility, the area of surety’s responsibility, a trial in opposition to borrower alone, a trial in opposition to guarantor solely. Also the author has elaborated about guarantor’s right to control his/her accountability or make it restrictive.
- This author has also described about section 128 of the ICA, 1872 the responsibility of the guarantor is coincident. He also talks about the rightness in opposition to the borrower (s140), rightness in opposition to the lender (s141). Lastly, he also mentions about landmark case laws for surety’s liability.

⁶ Daniel p. cipollone, “*The liabilities of surety*”, Osgoode legal studies research paper series, volume 11, issue 5, 2015
<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1104&context=olsrps>

⁷ Avtar Singh, 2017, Indian Contract & Specific Relief Act, published by - Lucknow: Eastern Book Company, 12th Edition, ISBN-10: 9351454533 ISBN-13: 978935145453.

Meena R.L ,2008, Textbook on Law of Contracts including Specific Relief⁸

- The current Indian Contract Act, 1872 was enacted later integrating applicable circumstances through numerous legislation as to further states in order to refine also modify precise section about constitution related to contract. The book explains the Act's purpose as well as its scope. In addition, the book explains the Act's provisions in an analytical and illustrative manner.
- The fundamental principles affecting the contracts covered by the Act have been traced with extensive use of judicial case-material. English decisions have been extensively used, particularly to explain Act provisions based on English doctrines. The book's text has been updated with recent judicial decisions. Section-by-section commentary has been provided.

Pollock and Sir Dinshaw Fardunji Mulla, 2017, The Indian Contract Act and Specific Relief Acts LexisNexis⁹

- This revised edition incorporates the most recent case law with law-making changes, furthermore present growth in Indian contract legislation. All notable Supreme Court and various High Court decisions, as well as the adjustment build along the numerous modifying sections, appeared integrated across suitable areas within this book. This also includes condition from suitable parts of furthermore law. Given volume further includes recent choices of the top courts in statute law administration such as the UK, Australia, Canada, Singapore, and Malaysia. This book involves a complete list of contents, a list of cases, and a throughout subject basis for easy navigation with reference.

⁸ Meena R.L (2008). Textbook on Law of Contracts including Specific Relief. Delhi: Universal Law Publishing

⁹ Pollock and Sir Dinshaw Fardunji Mulla (2017) The Indian Contract Act and Specific Relief Acts (15th Ed) Vol.2, Gurgaon, Haryana: LexisNexis

Bare Act of The Indian Contract Act, 1872¹⁰

- This Contract Law bare act be the key to grasping the complexities of contract law. The Imperial Legislative Council enacts every line in the bare act.

Contract-I by R.K Bangia (2019-20 edition)¹¹

- The principles and practises pertaining to these issues have consistently drawn the attention of the Courts. Decisions on the subject have been coming in thick and fast. This edition makes an attempt to include these judicial pronouncements in appropriate places.



INDIAN LAW JOURNAL

¹⁰ Bare act of the Indian Contract Act,1872 (2020 edition), ASIN: B09G6RHZB7, Universal/LexisNexis; 3rd edition (1 January 2020)

¹¹ Contract-I by R.K Bangia, ASIN : B08GYP8ZYZ by Generic (1 January 2019)

STATEMENT OF PROBLEM

While critically examining the liability of a surety we should firstly understand s128 the guarantor's accountability exists coextensive beneath the ICA of 1872. The main intention about this research paper is to analyse the Indian and English contexts, courts have taken various contradictory approaches to the concept. The motive of the research paper is to give a survey about what basically contract of guarantee is, what are the conditions preceding the guarantor's accountability, the scope of the guarantor's responsibility, a case in opposition to the borrower alone, a case in opposition to the guarantor alone.

RATIONALE OF STUDY

According to Sec 128 of the ICA of 1872, surety's accountability is coincident. This possess the ditto amount as the borrower. It emphasises both the greatest area and the scope of the guarantor's responsibility. The Sec only clarifies the scope of the guarantor's duty while no restriction had forced on the rationality of the borrower's duty. This Sec also clarify in what way the guarantor can be in the contract, limit the area of his responsibility when go in for a distinctive agreement. The guarantee contract contains no contra-note regarding the surety's liability, thereby creating an exception under section 128. This is encouraging to record such Indian judiciary recognised the principle of co-extensiveness even prior to the ICA of 1872 was approved.

UNIVERSITY LAW JOURNAL

RESEARCH OBJECTIVES

The purpose of this research is

- To describe about section 128 of the ICA, 1872, the responsibility of the guarantor is coincident.
- To not only specify s128 but also goes to the extent of guarantee, indemnity, continuing guarantee, limitations etc with the related case laws and committee reports.
- To elaborate about guarantor's right to control his accountability or make it limited.
- To provide with a detailed view at what basically contract of guarantee is what are the conditions preceding to the guarantor's responsibility, the area of surety's accountability, a case in opposition to the borrower alone, a case in opposition to the guarantor solely.
- To examine this liability of a guarantor we should firstly understand s128 of the ICA, 1872, the accountability of the guarantor is coincident.
- To explain the scope of the guarantor's duty while no restriction had forced on the rationality of the borrower's duty. Also, how the surety may, in the agreement, limit the area of his responsibility when go in for distinctive agreements.

RESEARCH QUESTIONS

- What are the conditions preceding to the guarantor's accountability, the area of surety's accountability, a case in opposition to the borrower solely, a case in opposition to the guarantor solely?
- Is lender obligated to use up his right in spite of charging the guarantor?
- What is proceeding in opposition to guarantor without used up right against the borrower?
- What is proceeding guarantor's mortgaged property?
- Is surety possess right to control his accountability or make it limited?

RESEARCH METHODOLOGY

The procedure that can be relate as carrying out the study is practical, logical and relative study. Within this research study the key origin as to facts are the law, ICA, 1872, Indian Evidence Act, IT Act, IPC, Specific Relief Act, Limitation Act, Rules, Government Orders, Judicial Precedents,

Report of various Committees. The subordinate origin of facts comprises of issued books, journals , intellectual articles, news releases, print media, Wikipedia, review records and others were used.

MAIN CONTENT

MEANING, NATURE AND SCOPE

CONTRACT OF GUARANTEE

Sec 126¹² of the ICA of 1872 specifies a guarantee contract. According to this section, an assurance contract is one in which a person or a class of persons is required to execute a guarantee when a mediator to the agreement fails to fulfil his/her segment of the assurance. This guarantee can be expressed orally or in writing.

A guarantee agreement includes a mediator: the borrower, the lender, and the guarantor. The creditor receives the guarantee, while the surety provides the guarantee.

If the borrower defaults, the guarantor promises the lender that he or she would dismiss the mediator's responsibility or fulfil the assurance of the principal debtor. The guarantor, appropriately, guarantees the principal debtor's act to the creditor.

The accountability of the guarantor can be interpreted as complementary to the liability of the borrower. A conditional promise holds the surety responsible if the principal debtor defaults.

A guarantee contract must include three essential elements:

- Consideration- This is an important component of a guarantee contract. It's deliberation can be financial, an upcoming act, belongings, or anything else which profits the borrower significantly.
- Not made in good faith- Because a guarantee contract by no means made in absolute good faith, it was not made in good faith. However, in order for the surety to make an informed decision, he must disclose all material facts. As a result, any guarantee obtained by deception or misrepresentation is void.

¹² Contract Act 1872, s 126.

Section 126 of the Indian Contract Act of 1872 states that the contract can be either oral or written.

NATURE OF LIABILITY OF SURETY

The liability of the surety is coextensive, according to Section 128 of the Indian Contract Act of 1872. It is worth the same as the primary debtor. It emphasises the surety's maximum and scope of liability.

The term "coextensive" refers to the principal debt's amount or quantum. This part only clarifies the scope of the guarantor's duty while the principal debtor's obligation is not limited in its validity.

When entering into a special contract, the surety may limit the area of his responsibility in the contract. They can declare that their liability is limited or restricted in some way.

Unless expressly stated in the contract, the creditor cannot hold or sue the surety until the principal debtor defaults. As a result, the surety's liability is secondary or secondary to the principal.

CONDITION PRECEDENT TO THE SURETY'S LIABILITY

If the surety's liability is subject to a condition precedent, he will not be liable until that condition is met. Section 144 is partially based on this principle. For example, if one person guarantees to complete a task unless another person joins as a co-surety, the guarantee is null and void unless another co-surety joins the contract.

Southgate Sands v James Graham & Co (Timber) Ltd, 1986 These were the facts:

The plaintiff supplied timber to the defendant's company, on whose board of directors he served. Because of the company's inability to pay, the plaintiff agreed to suspend the claim for a year in exchange for the debt being jointly and severally guaranteed by the company's three directors.

A guarantee signed by the defendant and other directors, it appears, was provided. The company filed for bankruptcy. The plaintiff sought guarantee enforcement. Prior to the trial, one of the directors' signatures was discovered to be forged.

"If one of the other guarantors' signatures is forged, a joint guarantor under a guarantee who demonstrated that the other joint guarantors were intended to be parties is not liable at law," the court stated.

THE EXTENT OF LIABILITY OF SURETY

The maximum extent of a surety's liability, as well as the extent to which it is currently invoked, remains a critical issue. The question here is when the surety's liability enters the picture - when the debtor fails to fulfil their part of the promise of all the creditor's remedies in opposition to the principal debtor.

IS CREDITOR BOUND TO EXHAUST HIS REMEDIES BEFORE SUING THE SURETY?

If the creditor does not sue the borrower, the surety remains liable. Before suing the surety, the creditor must exhaust all remedies against the principal debtor. If no previous proceedings against the borrower have been initiated, they may still sue. The surety, on the other hand, cannot be held responsible until the contingency occurs.

When the surety guarantees that the creditor will be paid in instalments, interpreting the principle of co-extensiveness becomes difficult.

The Allahabad High Court issued its decision in *U.P. Financial Corpn v Garlon Polyfeb Industries*, 2001, without referring to the Supreme Court ruling. A corporation's loans were secured. According to the guarantee, the surety's liability would arise upon demand. There was no requirement that the financial corporation first try to recover the amount from the hypothecated property. The corporation could go after the surety without first pursuing the corporation. The order directing the corporation to go after the company first was deemed unconstitutional.

A SUIT AGAINST PRINCIPAL DEBTOR ALONE

The creditor may only pursue the principal debtor. His suit cannot be dismissed because he did not name the guarantor as a defendant. The dismissal of the principal debtor's suit does not relieve the surety of his obligations under the guarantee contract. (2004) (*Karnataka State Industrial Investment and Development Corporation Ltd v SBI*)¹³

¹³ *Karnataka State Industrial vs State Bank Of India And Anr.* on 3 February, 2004, IV (2004) BC 118, 2005 (1) CTLJ 331 Kar, 2004 (4) KarLJ 266

A SUIT AGAINST SURETY ALONE

It has been determined that a lawsuit against the surety that excludes the principal debtor is justifiable. In N.Narasimhaiah v. Karnataka State Financial Corporation (2004)¹⁴, the creditor adequately justified his decision not to pursue collection of the prime liability in his affirmation. The terms stipulated both against the guarantors individually and jointly with those of the principal debtor's company rendered a guarantee contract enforceable. The company and the surety may both be named as defendants in a lawsuit brought by the creditor, or the surety alone.

PROCEEDINGS AGAINST SURETY'S MORTGAGED PROPERTY

The surety's mortgaged property cannot be seized by a financial corporation without advance notice. Furthermore, the surety must be informed before the corporation can publicly announce its intention to sell the property. This is true because the surety has a secondary obligation that only becomes due if the principal debtor is unable to pay the debt.

It is possible to pursue the assets provided by the surety as security without using up all of the legal options against the principal debtor.

The petitioner served as a surety for a loan given to the borrower by the State Industrial Corporation. It was determined that the corporation lacked the power to seize the surety's property and sell it without the help of the court under Section 29 of the State Financial Corporations Act of 1951. (Prakashwati Jain vs. Punjab State Industrial Development Corporation, 2012)¹⁵.

SURETY'S RIGHT TO LIMIT HIS LIABILITY OR MAKE IT CONDITIONAL

Liability of the surety could be restricted. His liability under the guarantee may explicitly be stated to be limited to a certain sum, such as "my liability under this guarantee shall in no event exceed the sum of £250." (1871) (Hobson v. Bass)¹⁶

¹⁴ Karnataka State Financial vs N. Narasimhaiah & Ors on 13 March, 2008, 3 RCR (Civil) 183: (2008) 5 SCC 176

¹⁵ Prakashwati Jain v. Punjab state industrial development corporation, AIR 2012 P&H 13

¹⁶ Hobson v. Bass, (1871) 6 Ch. A. 792

In such a case, the surety's liability cannot exceed the sum specified, regardless of what the principal debtor owes. Thus, in a case before the Andhra Pradesh High Court (Yarlagadda Bapanna v Devata China Yerkayya, AIR 1966)¹⁷, a clause in a suretyship contract that made the surety liable up to Rs15,000 also stated that he would be liable for any amount ultimately decreed. The clause was interpreted as not exceeding Rs15,000.

IMPOSSIBILITY OF MAIN CONTRACT

FLORENCE MABEL R.J V. STATE OF KERALA¹⁸

Brief facts: The respondent obtained a loan from a co-operative society for beekeeping, which was guaranteed by the petitioner. The bee died as a result of a viral infection, and the business failed, resulting in the respondent side defaulting on the loan. The petitioner claimed that the contract had been frustrated and that he was not required to pay.

Issue: Is the petitioner's suretyship released as a result of contract frustration?

The court ruled that the surety is not discharged and that the petitioner is still obligated to pay the instalment because he agreed to be held jointly and severally liable if the principal debtor defaulted.

Principal of law: Surety liability and principal debtor liability are mutually exclusive. When the main contract is rendered unenforceable, the surety is held liable. The surety could not avoid liability under the doctrine of impossibility of performance.

LEGISLATIVE FRAMEWORK

SECTION 126 - A guarantee contract is described in Section 126 of the Indian Contract Act of 1872. This section defines a guarantee contract as one in which a person or group of people are obligated to keep a promise or release themselves from their obligation under the contract in the event that a third party to the contract does not keep their end of the bargain.

¹⁷ Yarlagadda Bapanna vs Devata China Yerkayya on 21 September, 1964, AIR 1966 AP 151

¹⁸ Smt. Florence Mabel R.J. vs State Of Kerala And Ors. on 2 June, 2000, AIR 2001 Ker 19

SECTION 128 - The surety's liability is coextensive, according to Section 128 of the Indian Contract Act of 1872. It is worth the same as the principal debtor. It emphasises the surety's liability's maximum extent as well as its scope.

SECTION 144 - Contractual assurance that the creditor won't take any action until the co-surety joins. If someone promises on a contract that the creditor won't act until another person steps forward as co-surety, that promise is null and void if the second party declines to join.

JUDICIAL PRECEDENTS IN PREVIOUS CENTURY

Maharaja of Benares v. Har Narain Singh, 1906¹⁹

Brief Facts: In this appeal, the plaintiff demanded payment from the defendants who served as sureties or agents of sureties of a sum that represented rent arrears and interest for Jadunandan Singh's tardy rent payment, which the plaintiff was unable to recover in spite of having a decree. The agreement, according to the defendants, relieved them of paying interest on rent arrears owed by their principal debtor.

Question: Is it required that the plaintiff obtain arrears interest from the sureties?

It was determined that the surety's responsibility was restricted to the arrears because interest on the rent was not mentioned in the agreement.

The principal debtor, as well as the surety, were not liable for the rent interest.

Bank of Bihar v. Dr. Damodar Prasad and anr. 1969²⁰

Brief Facts: In this situation, Damodar received a loan from the plaintiff bank in return for Paras Nath Sinha's guarantee. Despite the plaintiff's demands, neither the principal debtor nor the surety paid the principal or interest. In two days after receiving the demand for \$12,000 plus interest, the surety agreed to pay it. No other guarantee security held by the bank with regard to the amount secured will prevent the plaintiff from enforcing and recovering on the guarantee, according to the bond. The bank sued in an effort to have the total reduced.

¹⁹ Maharaja of Benares v. Har Narain Singh, 1906, ILR (1906-1907) 28 All 25

²⁰ Bank of Bihar v. Dr. Damodar Prasad and anr 1969, AIR SC 297

Question: Can the court order that the creditor sue the surety for the amount recoverable only after exhausting all remedies against the principal debtor?

The surety did not have the authority to set the terms for the creditor or to demand payment before using his legal options against the principal debtor. The court agreed with the appellant's arguments and found that forcing the creditor to postpone using his legal options against the surety is contrary to the guarantee's intended purpose.

Union Bank Of India vs Manku Narayana on 1 April, 1987²¹

Facts in Brief: In exchange for a mortgage on the property and an independent guarantee from the respondent, the appellant bank loaned the principal debtor \$5100. To hold the respondent legally responsible on a personal level, a lawsuit was brought. The respondent opposed the bank's execution, arguing that it must first exhaust its legal options against the principal debtor and the mortgaged property.

Is the respondent held personally accountable?

Because a portion of the loan is secured by a mortgage, the Supreme Court ruled that the bank should go after the mortgage first, then the guarantor.

The sureties' liability is coextensive with the principal debtor's. The creditor may pursue the surety after pursuing the principal debtor, unless otherwise specified in the contract.

SBI v Indexport Registered, 30 April 1992²²

The Supreme Court explained how the surety is not excused from paying the debt solely because the creditor did not initiate proceedings against the surety. It was reinstated that the creditor's remedies are not limited and that a suit can still be filed prior to suing the principal debtor.

The Supreme Court initially clarified how legal action against the surety could be taken without first going after the principal debtor. They clarified that, unless otherwise expressly provided, the creditor may commence proceedings directly against the surety without first seeking payment from the principal debtor or filing a lawsuit against him for failing to uphold his portion of the promise.

²¹ Union Bank Of India vs Manku Narayana on 1 April, 1987, AIR 1987 SC 1078

²² SBI v Indexport Registered, 30 April 1992, 1992 AIR 1740, 1992 SCR (2)1031

Lep Air vs Moschi, 1972²³

Despite having fulfilled their end of the bargain, the debtor did not pay the creditor in instalments in this case. The creditor terminated the contract. The question here was whether the creditor could sue the surety for the amount owed to the creditor under the contract at the time of repudiation, despite the fact that the debtor now had a secondary obligation to pay damages rather than a primary obligation.

The surety was required to monitor the debtor's performance of his contractual obligations, and if he failed to do so, the surety was required to compensate the creditor for the loss.

In this case, however, the surety's and debtor's obligations were intended to be coextensive, and no pronouncement could violate this fundamental principle.

JUDICIAL VIEW IN 21ST CENTURY

Central Bank of India v C.L. Vimla on 28 April, 2015²⁴

As part of the guarantee clause, the guarantor agreed to be bound by any judgement or award obtained by the lender bank against the principal debtor. As a result, the guarantor was bound by a settlement or compromise reached between the bank and the principal debtor. It made no difference that the guarantor was unaware of the joint settlement memo.

According to the court, "the guarantor's liability is coextensive with the debtor's." The only exception to the guarantor's liability is provided in the section itself, and it only applies if the contract expressly states otherwise."

Shri Jagdish Sarda vs State Bank Of India & Ors on 18 November, 2015²⁵

The borrower's information is one of the requirements of an auction notice under the SARFAESI Act, 2002. In that case, the auction notice only mentioned the guarantor's information. This was ruled not to affect the validity of the notice because a guarantor is also a buyer because he is equally (co-extensive) liable with the borrower.

²³ Lep Air vs Moschi, 1972 UKHL J0426-2

²⁴ Central Bank of India v C.L. Vimla on 28 April, 2015, 7 SCC 337

²⁵ Shri Jagdish Sarda vs State Bank Of India & Ors on 18 November, 2015, AIR 2016 Cal 2

In Jagdish Sarada vs. SBI, the decision was reversed and the principle of co-extensive liability was reaffirmed. As a result, the surety's liability is joint and several with the principal debtor, which is a well-established principle in contract law.

Central Bank of India v Virudhunagar Steel Rolling Mills Ltd, 2016²⁶

The guarantor's liability is limited to the terms of the guarantee. When the bank's guarantee made no mention of such liability, the bank was not allowed to recover from the guarantor liability due under pre-existing debts. However, the Supreme Court clarified that this does not preclude a guarantor from being held liable for pre-existing debts.

"Had the intent been to make the directors personally liable for the company's outstanding liabilities as well, it could have been provided in the letter of guarantee," the court ruled, "and the directors were thus not personally liable for the dues of prior to the date they signed the letter of guarantee." In addition, because the guarantee deed was drafted by the bank, it had to be read against the bank in the event of a dispute."

Sanjeev Shriya vs State Bank Of India And 6 Others on 6 September, 2017²⁷

Facts- In order to begin the corporate insolvency resolution process, Lohia Machines Limited (Corporate Debtor) applied to the NCLT, Allahabad, under Section 10 of the IBC, and State Bank of India applied to the DRT, Allahabad, under Section 19(3) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Question: With a moratorium in place per Section 14 of the IBC, is it still possible to enforce the personal guarantees of a company's (ex) directors during a corporate insolvency resolution process?

Judgement- An Insolvency Resolution Professional was also appointed in this regard by order dated May 30, 2017, and the NCLT, Allahabad, approved the start of the corporate insolvency resolution process and declared a moratorium under Section 14 of the Insolvency and Bankruptcy Code (IBC). The Corporate Debtor and Guarantors requested a stay of proceedings from the DRT in response to the NCLT's order due to the moratorium it had imposed. The DRT ordered that

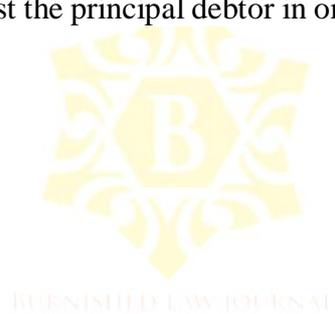
²⁶ Central Bank of India v Virudhunagar Steel Rolling Mills Ltd, 2016, 16 SCC 207

²⁷ Sanjeev Shriya vs State Bank Of India And 6 Others on 6 September, 2017

proceedings against the guarantors continue even though it granted a stay of the Corporate Debtor's legal actions because the moratorium only affects the Corporate Debtor. The guarantors petitioned the Supreme Court following their dissatisfaction with the DRT's decision.

Mukesh Hans & Another vs Smt. Uma Bhasin & Others on 16 August, 2010²⁸

Corporate directors have a fiduciary duty to the corporation but no contractual duty to third parties. The Delhi High Court ruled that a company's director owes a fiduciary duty to the company but no contractual duty to third parties. However, there are a few exceptions to this rule. When the director or directors personally bind themselves, such as by signing personal guarantees, indemnities, and the like, this is an example. The guarantee is also activated if the principal debtor fails to pay the entire or a portion of the amount owed. "The guarantee is a separate contract that must be honoured in order for the creditor and surety to fulfil their contractual obligations." Furthermore, unless expressly stated otherwise in the contract, there is no requirement for the creditor to exhaust all remedies against the principal debtor in order to enforce its rights under the personal guarantee.



²⁸ Mukesh Hans & Another vs Smt. Uma Bhasin & Others on 16 August, 2010

CRITICAL ANALYSIS

To summarise, determining a surety's liability when th The actual constructed document's guarantees would govern the precise degree and extent of the surety's liability, and the parties would be free to impose certain restrictions on the surety's liability while remaining true to the guarantee contract's actual nature. The precise and exact extent will always be governed by the guarantee provisions on how the document was drafted, and the parties can add limitations on the surety's liability, if any. The fact that the principal debtor is a minor is still a difficult problem.

Whether or not proceedings should be initiated before the principal debtor's available remedies have been exhausted has been debated. In the Damodar Prasad case, the Supreme Court ruled that the surety can be sued before any other remedies are exhausted. The judiciary has repeatedly reaffirmed this fundamental principle in numerous decisions over the years, removing relevant ambiguities and issues concerning the scope of the surety's liability. Although each case clarified the interpretation of the principle, there is still room for improvement. The courts will continue to ponder and expound on the principle's validity in light of the nuances of the time.

SUGGESTIONS AND CONCLUSION

Section 128 states that a surety's liability is co-extensive, unless otherwise specified in the contract. As a result, if the creditor draughts a contract stating that the surety is liable regardless of the minority of the principal debtor, the surety may be liable. On the other hand, Section 134 of the Indian Contract Act addresses liability discharge when the principal debtor is relieved by any contract, act, or omission. If the principal debtor is not liable, the surety is released. This point of view could be taken into account when making decisions in the current cases.

To summarise, determining the liability of a surety when the principal debtor is a minor remains a difficult problem. Reaching a precise conclusion is a difficult task with several contradictory judgments in the English and Indian contexts, each with its own logical reasoning. Despite this, the courts have made an effort to bring some light into the area. The only issue is that in these cases, there is no straight-jacket formula. The surety is liable depending on whether there was any concealment of facts or whether the contract included the provision of necessities. In other cases, the guarantee contract has been treated as an indemnity contract if the underlying debt is declared void. These, however, are extremely uncommon.

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