RESEARCH QUESTION

> *"What is the legal liability of a loan guarantor in India under the Indian Contract Act*, 1872, *can a lender proceed against the guarantor before the borrower, and what have courts held about a guarantor's rights after paying?"*

Liability and Subrogation Rights of a Loan Guarantor under the Indian Contract Act, 1872

TL;DR

The Supreme Court in *Brs Ventures Investments Ltd. v. Srei Infrastructure Finance Ltd. & Anr.* (2024) reaffirmed that a loan guarantor's liability is co-extensive with that of the principal debtor under Section 128 of the Indian Contract Act, 1872, enabling the lender to proceed directly against the guarantor first without exhausting remedies against the borrower. Upon making payment, the guarantor possesses a right of subrogation under Section 140 to recover the amount cleared from the principal debtor. However, if the creditor accepts a partial payment in full satisfaction of the guarantor's liability under an involuntary process like insolvency, subrogation is restricted to the amount paid and does not discharge the principal borrower's remaining debt.

VERIFIED CASES	STATUTES	LATEST RULING
25	5	2024
21 *High Courts* · 4 *SC*		*Supreme Court of India*

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I. Detailed Analysis

KEY PRINCIPLES ESTABLISHED

01 Co-extensive and immediate nature of guarantor's liability

Under Section 128 of the Indian Contract Act, 1872, the liability of a surety is equivalent and co-extensive with that of the principal debtor, arising immediately upon default and not being deferred, as held in *Sunder Singh v. The H.P. State Cooperative Bank Ltd.* (2021). This means the liabilities of the debtor and the surety, though separate and distinct, stem from the same transaction, as explained in *Paramjit Singh Ahuja v. Punjab State Industrial Development Corporation Limited* (2006).

02 Prerogative of the creditor to choose recovery sequence

The lender has the sole discretion to decide whether to proceed against the principal debtor first, or the surety, as established in *Manoj K. v. Kerala State Financial Enterprises Ltd.* (2016). This principle applies to executing a joint and several award or decree, giving the creditor the absolute right to choose the mode of recovery, as held in *Anand People Co-operative Bank Limited v. State of Gujarat* (2013).

03 Inability of guarantor to dictate terms of recovery

A guarantor possesses no legal right to restrain the execution of a decree or dictate which of the secured assets the bank must proceed against first, as held in *Tom Thomas v. State Bank of India* (2016). A guarantor cannot compel the bank to prioritize seizing the company's movable assets before enforcing the personal guarantee, as ruled in *B. Arvind Kumar v. Indian Overseas Bank* (2021).

04 Contractual limits and conditional liability

While surety liability is generally co-extensive, parties can contractually agree to make it conditional upon a written notice of demand, making such demand a condition precedent to enforcing liability, as decided in *Kartik Rajesh Sharma v. HDFC Bank Ltd.* (2009). Parties may also agree to specified validity limits, meaning the bank is discharged once the claim is not raised within that period, as illustrated in *Union of India v. M/s. Bhagwati Cottons Ltd.* (2008).

05 The right of subrogation and reimbursement upon payment

Under Section 140, upon discharging the guaranteed debt, the surety is invested by operation of law with all the rights that the creditor had against the principal debtor, enabling them to sue the principal debtor for recovery, as affirmed in *Usharani Panda v. Subash Ch. Panda* (2015). This right of subrogation allows the guarantor to step into the creditor's shoes to claim reimbursement from the debtor's liquidator, as held in *M/s. Sterling Trade v. The Official Liquidator* (2018), and is also applicable on analogous principles of equity to contracts of indemnity, as ruled in *Ramesh Thawardas Dadlani & Ors. v. State Bank of India* (2006).

06 Surety's discharge upon loss of security by the creditor

Under Section 141, if the creditor loses or parts with any security held against the principal debtor without the surety's consent, the surety is discharged to the extent of the value of that security, as shown in *State of Punjab v. Darshan Singh* (2007). This includes situations where a bank's negligence leads to the loss of pledged securities, as ruled in *Amrit Lal Goverdhan Lalan v. State Bank of Travancore* (1968).

HOW THE COURTS HAVE APPLIED THIS

SUPREME COURT POSITION ON INDEPENDENT LIABILITY AND RECOVERY	The Supreme Court has repeatedly affirmed that a guarantor's liability is joint, several, and co-extensive with the principal debtor, meaning a guarantor cannot restrain the execution of a decree against them on the ground that the principal debtor has sufficient assets, as held in *Ram Kishun and Ors. v. State of U.P. and Ors.* (2012).

HIGH COURT VARIATIONS AND APPLICATIONS	Various High Courts have applied these principles to hold that a surety's liability is independent of the status of the borrower, meaning the guarantor remains bound even if the principal debtor company is wound up, as held in *M.I. Itty v. Kerala Financial Corporation* (2010), or if the guarantor did not join co-guarantors in the proceedings, as held in *H.P. State Cooperative Bank Ltd. v. Ram Gopal Sharma* (2011). Furthermore, creditors are entitled to recover directly by adjusting pledged personal assets of the guarantor, such as insurance policies, without first suing the borrower, as ruled in *Ghanshyam Pd. Srivastawa v. State of Bihar* (2012). It is also settled that the guarantor can be sued alone without suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default, as seen in *State Bank of India v. State of Jharkhand* (2018). Similarly, a creditor is not bound to proceed against the principal borrower first, and can enforce execution against any of the judgment debtors under a joint and several decree, as held in *Judgment Debtor No.* 5 *v. Decree Holder* (2017), since the creditor is not bound to exhaust remedies against the principal before suing the surety, as held in *Amar Nath Dhiman v. Punjab & Sind Bank* (2017).
RECENT EVOLUTION IN INSOLVENCY AND STATUTORY RECOVERY	In the modern corporate insolvency framework, courts have reinforced that while dual insolvency proceedings are permissible, a creditor cannot recover the same debt twice, meaning that any partial satisfaction from one debtor reduces the liability of the other co-obligant or guarantor, as observed in *Maitreya Doshi v. Anand Rathi Global Finance Ltd.* (2022). This principle extends to statutory recovery where state corporations can enforce personal guarantees under SFC regulations without impleading the principal borrower, as held in *S. Subramanyam v. Karnataka State Financial Corporation* (2024).

UNSETTLED AREAS OR CAVEATS

Waiver of statutory rights

Guarantee deeds frequently contain clauses where guarantors waive their statutory rights under Sections 133, 134, 135, 139, and 141 of the Contract Act. Courts have upheld such waivers, holding that such clauses prevent the surety from claiming discharge even if the creditor fails to act against hypothecated goods, as illustrated in *Pramila H. Thacker v. Abhyudaya Co-op. Bank Ltd.* (2019).

Discharge by operation of law versus creditor's act

A clear distinction exists where the loss of security or discharge of the principal debtor occurs by operation of law (such as bankruptcy or winding-up), which does not absolve the surety of liability, as opposed to a voluntary release or parting of security by the creditor without the surety's consent, which discharges the surety under Section 141, as seen in *Muhammed Musthafa Padinhakkara v. Banking Ombudsman* (2022).

II. Statutory Provisions

5 PROVISIONS

SECTION 140, INDIAN CONTRACT ACT, 1872 — RIGHTS OF SURETY ON PAYMENT OR PERFORMANCE

A surety, upon paying the creditor everything they are liable for, inherits all the rights that the creditor had against the principal debtor.

> "Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor." *Cited in*: Amrit Lal Goverdhan Lalan v. State Bank of Travancore, Brs Ventures Investments Ltd. v. Srei Infrastructure Finance Ltd. & Anr., Ramesh Thawardas Dadlani & Ors. v. State Bank of India, M.I. Itty v. Kerala Financial Corporation, Tom Thomas v. State Bank of India, Usharani Panda v. Subash Ch. Panda

SECTION 128, INDIAN CONTRACT ACT, 1872 — SURETY'S LIABILITY

The liability of a surety is equivalent and co-extensive with that of the principal debtor, unless specified otherwise in the contract.

> "The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract." *Cited in*: Ghanshyam Pd. Srivastawa v. State of Bihar, Ram Kishun and Ors. v. State of U.P. and Ors., Brs Ventures Investments Ltd. v. Srei Infrastructure Finance Ltd. & Anr., Anand People Co-operative Bank Limited v. State of Gujarat, Judgment Debtor No. 5 v. Decree Holder, Kartik Rajesh Sharma v. HDFC Bank Ltd., Union of India v. M/s. Bhagwati Cottons Ltd., M/s. Sterling Trade v. The Official Liquidator, H.P. State Cooperative Bank Ltd. v. Ram Gopal Sharma, Sunder Singh v. The H.P. State Cooperative Bank Ltd., State Bank of India v. State of Jharkhand, B. Arvind Kumar v. Indian Overseas Bank, S. Subramanyam v. Karnataka State Financial Corporation, Tom Thomas v. State Bank of India, Paramjit Singh Ahuja v. Punjab State Industrial Development Corporation Limited

SECTION 145, INDIAN CONTRACT ACT, 1872 — IMPLIED PROMISE TO INDEMNIFY SURETY

Every guarantee contract contains an implied promise by the principal debtor to indemnify the surety for any sum rightfully paid under the guarantee.

> "In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but, no sums which he has paid wrongfully." *Cited in*: raised in the research question

SECTION 126, INDIAN CONTRACT ACT, 1872 — CONTRACT OF GUARANTEE, SURETY, PRINCIPAL DEBTOR AND CREDITOR

Defines a contract of guarantee, and identifies the roles of the surety, principal debtor, and creditor.

> "A \"contract of guarantee\" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the \"surety\"; the person in respect of whose default the guarantee is given is called the \"principal debtor\", and the person to whom the guarantee is given is called the \"creditor\". A guarantee may be either oral or written." *Cited in*: Paramjit Singh Ahuja v. Punjab State Industrial Development Corporation Limited

SECTION 141, INDIAN CONTRACT ACT, 1872 — SURETY'S RIGHT TO BENEFIT OF CREDITOR'S SECURITIES

Entitles the surety to the benefit of all securities the creditor holds against the debtor at the time the guarantee contract was made, discharging the surety if the creditor loses or parts with them.

> "A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security." *Cited in*: Amrit Lal Goverdhan Lalan v. State Bank of Travancore, Pramila H. Thacker v. Abhyudaya Co-op. Bank Ltd., M.I. Itty v. Kerala Financial Corporation, Muhammed Musthafa Padinhakkara v. Banking Ombudsman, State of Punjab v. Darshan Singh

III. Cases Discussed

25 CASES · SUMMARY TABLE

#	CASE TITLE	COURT	YEAR	KEY HOLDING
01	*Brs Ventures Investments Ltd. v. Srei Infrastructure Finance Ltd. & Anr.* ESCR010005472024	SUPREME COURT OF INDIA	2024	Surety liability is co-extensive; creditor may proceed against surety first without exhausting debtor remedies.
02	*Tom Thomas v. State Bank of India* KLHC010457972016	HIGH COURT OF KERALA	2016	Creditor has sole discretion to choose recovery mode; guarantor cannot prioritize specific properties.
03	*Sunder Singh v. The H.P. State Cooperative Bank Ltd.* HPHC010174842021	HIGH COURT OF HIMACHAL PRADESH	2021	Guarantor liability is co-extensive and immediate; creditor need not first exhaust debtor remedies.
04	*Paramjit Singh Ahuja v. Punjab State Industrial Development Corporation Limited* PHHC010053982003	HIGH COURT OF PUNJAB AND HARYANA	2006	Debtor and surety liabilities are separate and distinct, enabling direct action against surety.
05	*Anand People Co-operative Bank Limited v. State of Gujarat* GJHC240079052013	HIGH COURT OF GUJARAT	2013	Creditor has right to choose recovery sequence; cannot be forced to proceed against debtor first.
06	*M.I. Itty v. Kerala Financial Corporation* KLHC010352302006	HIGH COURT OF KERALA	2010	Surety liability is independent; company winding-up does not discharge guarantor's balance obligations.
07	*Pramila H. Thacker v. Abhyudaya Co-op. Bank Ltd.* HCBM020328992018	HIGH COURT OF BOMBAY	2019	Creditor's failure to seize hypothecated assets does not discharge guarantor due to contractual waivers.
08	*Amrit Lal Goverdhan Lalan v. State Bank of Travancore* ESCR010002481968	SUPREME COURT OF INDIA	1968	Surety is subrogated to creditor rights; creditor's loss of pledged securities discharges surety.
09	*Amar Nath Dhiman v. Punjab & Sind Bank* HPHC010151262017	HIGH COURT OF HIMACHAL PRADESH	2017	Surety liability is immediate; creditor need not exhaust debtor remedies before executing decree.
10	*State Bank of India v. State of Jharkhand* JHHC010002292002	HIGH COURT OF JHARKHAND	2018	Guarantor liability is joint and several; guarantor can be sued alone upon default.
11	*Manoj K. v. Kerala State Financial Enterprises Ltd.* KLHC010832202015	HIGH COURT OF KERALA	2016	Prerogative of the creditor to proceed against either principal debtor or surety first.

#	CASE TITLE	COURT	YEAR	KEY HOLDING
12	*Union of India v. M/s. Bhagwati Cottons Ltd.* HCBM020022601999	HIGH COURT OF BOMBAY	2008	Guarantor liability can be limited contractually to specified amounts, transactions, or time periods.
13	*Judgment Debtor No. 5 v. Decree Holder* HBHC010183362017	HIGH COURT FOR STATE OF TELANGANA	2017	Creditor is free to execute joint and several award solely against the guarantor.
14	*H.P. State Cooperative Bank Ltd. v. Ram Gopal Sharma* HPHC010036082006	HIGH COURT OF HIMACHAL PRADESH	2011	Forbearance to sue principal debtor or release of co-surety does not discharge surety.
15	*S. Subramanyam v. Karnataka State Financial Corporation* KAHC010521032012	HIGH COURT OF KARNATAKA	2024	Financial Corporation can recover outstanding loan dues from guarantor without impleading borrower.
16	*M/s. Sterling Trade v. The Official Liquidator* HCBM020285542012	HIGH COURT OF BOMBAY	2018	Guarantor payment discharges debtor; fully satisfying decree subrogates guarantor to step into creditor's shoes.
17	*Kartik Rajesh Sharma v. HDFC Bank Ltd.* HCBM010360392009	HIGH COURT OF BOMBAY	2009	Guarantee requiring written demand makes demand a condition precedent to establishing guarantor's liability.
18	*Ghanshyam Pd. Srivastawa v. State of Bihar* BRHC010273942011	HIGH COURT OF PATNA	2012	Bank can recover loan from guarantor's pledged insurance policies without first suing borrower.
19	*Ramesh Thawardas Dadlani & Ors. v. State Bank of India* HCBM020005521983	HIGH COURT OF BOMBAY	2006	Indemnifier's right of subrogation to step into indemnified's shoes accrues upon full payment.
20	*State of Punjab v. Darshan Singh* PHHC010072571984	HIGH COURT OF PUNJAB AND HARYANA	2007	Creditor's unauthorized release of mortgaged security discharges surety to the extent of its value.
21	*Usharani Panda v. Subash Ch. Panda* ODHC010244902012	HIGH COURT OF ORISSA	2015	Surety paying off debt is subrogated under Section 140 to recover from debtor.
22	*Maitreya Doshi v. Anand Rathi Global Finance Ltd.* ESCR010007802022	SUPREME COURT OF INDIA	2022	Dual insolvency proceedings are permissible, but creditor cannot recover the same debt twice.
23	*Muhammed Musthafa Padinhakkara v. Banking Ombudsman* KLHC010384252022	HIGH COURT OF KERALA	2022	Guarantor paying outstanding liabilities possesses right of subrogation against borrower and collateral security.
24	*B. Arvind Kumar v. Indian Overseas Bank* KAHC010293212019	HIGH COURT OF KARNATAKA	2021	Guarantor cannot dictate terms or force bank to exhaust remedies against debtor's assets first.

#	CASE TITLE	COURT	YEAR	KEY HOLDING
25	*Ram Kishun and Ors. v. State of U.P. and Ors.* ESCR010003882012	SUPREME COURT OF INDIA	2012	Surety cannot restrain execution of decree against himself until creditor exhausts debtor remedies.

IV. Case Details

25 CASE FILES

01 Brs Ventures Investments Ltd. v. Srei Infrastructure Finance Ltd. & Anr.

SUPREME COURT OF INDIA · 2024-07-23 · 2024 INSC 548

This case concerns the liability of a principal borrower when a corporate guarantor undergoes insolvency. The Supreme Court held that the payment made to a financial creditor under a resolution plan for the corporate guarantor does not extinguish the entire debt owed by the principal borrower. The creditor is entitled to recover the balance amount from the principal borrower, as the liability of the surety and the principal debtor remains co-extensive. Furthermore, the court clarified that a holding company and its subsidiary are distinct legal entities; therefore, the assets of a subsidiary cannot be included in the resolution plan of a holding company. Simultaneous insolvency proceedings against both the principal debtor and the guarantor are permissible under the law.

HELD The liability of the surety and the principal debtor is co-extensive. The creditor has remedies available to recover the amount payable by proceeding against both or any of them, and can proceed against the guarantor first without exhausting remedies against the principal borrower. If the guarantor undergoes insolvency and the creditor receives partial payment under a resolution plan, the principal borrower is only discharged to the extent of the actual amount paid, and the creditor remains free to recover the balance from the borrower.

> “As far as the guarantee is concerned, the law is very well settled. The liability of the surety and the principal debtor is co-extensive. The creditor has remedies available to recover the amount payable by the principal borrower by proceeding against both or any of them. The creditor can proceed against the guarantor first without exhausting its remedies against the principal borrower.”

SUPREME COURT OF INDIA · 2024 | SOURCE ESCR010005472024

02 Tom Thomas v. State Bank of India

HIGH COURT OF KERALA · 2016-11-30 · WA/895/2016

This writ appeal concerned proceedings under the SARFAESI Act initiated by a creditor bank against a borrower company and its guarantors. Initially, the High Court directed the bank to sell other secured assets before proceeding against the guarantors' residential properties. After several years of litigation and failed recovery attempts due to various obstructions, the bank filed a review petition to remove this restriction, which the single Judge allowed. The Division Bench affirmed this, ruling that a debtor cannot dictate the order in which a secured creditor recovers debt. The Court emphasized that banks have the discretion to choose the most efficient method of recovery, and limiting their access to collateral based on the debtors' preferences is legally unsustainable.

HELD The creditor bank has the absolute right and discretion to choose the most suitable and easily realisable mode of recovery of the debt. Neither the principal debtor nor the guarantor is entitled to dictate to the creditor bank the sequence in which the secured properties should be proceeded against.

> “When it comes to the point of recovery or repayment of the said debt, it is open for the creditor or rather it is the right of the creditor to seek for realisation of the debt by resorting to the easiest recoverable mode and against the security which he considers as the most feasible one for effecting recovery. At the said point of time, neither the principal debtor/borrower nor the guarantor is entitled to dictate to the creditor as to the manner in which or as against which of the securities recovery proceedings are to be taken by the creditor.”

HIGH COURT OF KERALA · 2016 | SOURCE KLHC010457972016

03 Sunder Singh v. The H.P. State Cooperative Bank Ltd.

HIGH COURT OF HIMACHAL PRADESH · 2021-08-03 · CWP/3777/2021

The petitioner acted as a loan guarantor for his son, who subsequently defaulted on repayments. An arbitrator held the petitioner liable for the outstanding debt and initiated recovery proceedings. The petitioner challenged this award, arguing against his personal liability. The court dismissed the petition, reaffirming that under Section 128 of the Indian Contract Act, the liability of a guarantor is co-extensive with that of the principal debtor. The court held that a creditor is not required to exhaust remedies against the principal debtor before proceeding against the guarantor. Furthermore, the court noted the petition appeared collusive between the father and son and found no legal merit in the challenge.

HELD The guarantor's liability is co-extensive with that of the principal debtor under Section 128 of the Indian Contract Act. The creditor is not bound to exhaust remedies against the principal borrower before suing or executing against the surety.

> “Surety's liability is co-extensive with that of the principal debtor. A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued.”

HIGH COURT OF HIMACHAL PRADESH · 2021 | SOURCE HPHC010174842021

04 Paramjit Singh Ahuja v. Punjab State Industrial Development Corporation Limited

HIGH COURT OF PUNJAB AND HARYANA · 2006-10-18 · CWP/5397/2003

This case addresses whether a State Financial Corporation can invoke Section 29 of the State Financial Corporations Act, 1951, to seize and sell the property of a surety who provided a personal guarantee and mortgaged assets to secure a loan for an industrial concern. The petitioner argued that Section 29 only permits action against the industrial concern itself. The court examined conflicting precedents regarding the reach of the

Financial Corporation's powers to recover debts from guarantors. The court determined that the State Financial Corporation, acting as an instrumentality of the state, is empowered to recover its dues effectively. It concluded that the recovery mechanisms under the Act, including Section 29, extend to the assets of a surety provided to secure the loan, rejecting the narrow interpretation that restricts such enforcement solely to the principal borrower.

HELD The liabilities of a principal debtor and a surety, although stemming from the same transaction, are separate and distinct. The creditor can proceed against the surety without demand and without first suing the principal debtor.

> “The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct.”

HIGH COURT OF PUNJAB AND HARYANA · 2006 | SOURCE PHHC010053982003

05 Anand People Co-operative Bank Limited v. State of Gujarat

HIGH COURT OF GUJARAT · 2013-10-14 · SCA/3240/2013

This case concerns a dispute over the recovery of bank dues from guarantors. The petitioner bank obtained an award against both the principal borrowers and the guarantors. When the bank sought to execute the award against the guarantors, the Revisional Authority directed the bank to first sell the properties of the principal borrowers before proceeding against the guarantors. The bank challenged this directive, arguing that the liability of the guarantors is co-extensive with that of the borrowers. The court set aside the Revisional Authority's order, holding that under the Indian Contract Act, a creditor is not required to exhaust remedies against the principal debtor before proceeding against a guarantor. The bank holds the right to decide the mode and manner of recovery under a joint award.

HELD A creditor cannot be forced to first exhaust remedies against the principal debtor or the mortgaged property before proceeding against the guarantor under a simple money decree. The liability of the surety is immediate and co-extensive.

> “If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgage decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor.”

HIGH COURT OF GUJARAT · 2013 | SOURCE GJHC240079052013

06 M.I. Itty v. Kerala Financial Corporation

HIGH COURT OF KERALA · 2010-04-05 · WA/2002/2006

This case concerned whether the personal liability of guarantors to the Kerala Financial Corporation was extinguished after the principal debtor company was wound up and the Corporation received payments from the Official Liquidator. The appellant, a director and guarantor, argued that the Corporation's claim was fully satisfied through the liquidation proceedings and that no further recovery could be sought from him under the Indian Contract Act. The court held that the liability of a surety is independent and coextensive with that of the principal debtor. Consequently, the winding up of the company and the settlement of claims in liquidation did not discharge the guarantors from their personal obligations to pay the remaining balance due under the loan agreements.

HELD The personal liability of guarantors is not extinguished by the winding up of the principal debtor company. Furthermore, under Section 141, if the security is lost by operation of law rather than a deliberate act of the creditor, the surety is not discharged.

> "Section 141 of the Indian Contract Act, 1872 stipulates that a surety is entitled to the benefit of every security which the creditor has against the principal debtor... interpreting Section 141... where there was no deliberate act on the part of the principal debtor which led to the loss of the security and the security was lost not by any definite act of the creditor or the debtor, but by the operation of law over which none of the parties had any control, it cannot be said that the surety is discharged."

HIGH COURT OF KERALA · 2010 | SOURCE KLHC010352302006

07 Pramila H. Thacker v. Abhyudaya Co-op. Bank Ltd.

HIGH COURT OF BOMBAY · 2019-08-01 · APP/89/2019

This case involved a dispute over the liability of legal heirs and guarantors for a loan defaulted upon after the death of the principal borrower. The bank initiated arbitration to recover outstanding debts and sought to enforce the liability against the personal assets of the legal heirs and the guarantors. The appellants contended that the bank failed to act against the hypothecated goods, thereby impairing their rights under the Indian Contract Act. The High Court upheld the arbitral award, ruling that the bank's decision not to immediately seize hypothecated assets did not discharge the guarantors from their liability. The court emphasized that the Deed of Guarantee included explicit waivers regarding the sureties' rights, and the appellants failed to demonstrate any wrongful act or omission by the bank that would justify their discharge.

HELD The bank's failure to proceed against hypothecated goods does not discharge the guarantors when they have contractually waived their rights under Sections 133, 134, 135, 139, and 141 of the Indian Contract Act.

> "The Guarantors do hereby waive all the rights available to the Sureties under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act. The Guarantors also agree that they will not be entitled to the benefit of subrogation to the securities until and unless all monies due to the Bank secured by such securities are fully re-paid..."

HIGH COURT OF BOMBAY · 2019 | SOURCE HCBM020328992018

08 Amrit Lal Goverdhan Lalan v. State Bank of Travancore

SUPREME COURT OF INDIA · 1968-04-11 · 1968 INSC 100

This case concerned the liability of a surety under a cash credit agreement secured by pledged goods. The surety argued that he was discharged from liability due to unauthorized variations in the credit limit, extensions of time granted to the principal debtors, and the loss of pledged securities. The Supreme Court rejected the claims regarding contract variation and the granting of time, noting that internal bank entries did not constitute a change in terms and that extending time for non-monetary obligations like replenishing stock does not qualify as giving time for payment under the Contract Act. However, the Court ruled that the Bank's failure to secure the pledged goods constituted a loss of security, discharging the surety to the extent of the lost value.

HELD Under Section 140, upon payment of all he is liable for, the surety is invested by operation of law with all of the creditor's rights against the principal debtor. However, under Section 141, if the creditor's negligence leads to the loss of pledged goods, the surety is discharged to the extent of the lost security.

> "Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for is invested with all the rights which the creditor had against the principal debtor(s) ... The language of the section which employs the words 'is invested with all the rights which. the creditor had against the principal . debtor' makes it plain that even without the necessity of a transfer, the law vests those rights in the surety."

SUPREME COURT OF INDIA · 1968 | SOURCE ESCR010002481968

09 Amar Nath Dhiman v. Punjab & Sind Bank

HIGH COURT OF HIMACHAL PRADESH · 2017-12-18 · CR/152/2017

The petitioner, a loan guarantor, challenged an execution order, arguing that the creditor bank must first exhaust its remedies against the principal borrower before proceeding against him. The High Court rejected this contention, reaffirming the settled legal principle that under Section 128 of the Indian Contract Act, a surety's liability is co-extensive with that of the principal debtor. The court held that the creditor has the right to proceed against the surety immediately and is not required to defer recovery proceedings until exhausting remedies against the principal debtor. Consequently, the court dismissed the revision petition, upholding the lower court's decision to permit the bank to execute the decree against the guarantor.

HELD A creditor is not bound to exhaust remedies against the principal borrower before proceeding against the surety. A suit and execution of a decree can be maintained against the surety even if the principal debtor has not been proceeded against.

> "A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

HIGH COURT OF HIMACHAL PRADESH · 2017 SOURCE HPHC010151262017

10 State Bank of India v. State of Jharkhand

HIGH COURT OF JHARKHAND · 2018-07-04 · WPC/6077/2002

This case concerns a dispute over a personal loan guarantee. The petitioner bank challenged an order by the revisional authority that exonerated a former company director from his personal liability as a guarantor for a loan provided to M/s Red Ball Express Carriers Private Limited. The bank argued that the guarantor's liability was co-extensive with that of the principal borrower under the Indian Contract Act and that the certificate proceedings were filed within the statutory limitation period. The High Court of Jharkhand set aside the revisional order, ruling that the guarantor’s liability was joint and several. The Court held that personal guarantee agreements allow a bank to treat the guarantor as a principal debtor, independent of any separate compromises between company directors.

HELD The liability of a guarantor is joint, several, and co-extensive under Section 128 of the Indian Contract Act. The guarantor can be sued alone without suing the principal debtor, so long as default is established.

> “The Hon’ble Supreme Court in the judgment reported in (1992) 3 SCC 159 has held in paragraph 18 that guarantor alone can be sued without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default.”

HIGH COURT OF JHARKHAND · 2018 SOURCE JHHC010002292002

11 Manoj K. v. Kerala State Financial Enterprises Ltd.

HIGH COURT OF KERALA · 2016-01-04 · WP(C)/37385/2015

The petitioner, a loan guarantor, challenged the creditor's decision to initiate recovery proceedings against him before exhausting remedies against the principal debtor. The petitioner argued that the bank should have prioritized recovery from the borrower. The court dismissed the petition, ruling that under established law, the liability of a surety is co-extensive with that of the principal debtor. Consequently, a creditor has the legal prerogative to proceed against either the surety or the principal debtor simultaneously, unless the underlying contract explicitly states otherwise.

HELD It is the exclusive prerogative of the creditor to decide whether to proceed against the principal debtor or the surety to recover the outstanding loan amounts, as the liability is co-extensive.

> “It is also well settled that it is the prerogative of the creditor alone as to whether he should proceed against the principal debtor first, or surety, to realise the loan amounts.”

HIGH COURT OF KERALA · 2016 SOURCE KLHC010832202015

12 Union of India v. M/s. Bhagwati Cottons Ltd.

HIGH COURT OF BOMBAY · 2008-02-22 · SS/2959/1999

The Union of India filed a suit to recover funds after the defendants failed to fulfill cotton export obligations stipulated by the Textile Commissioner. The defendants provided bank guarantees to ensure compliance with export requirements, which they ultimately failed to satisfy. The government invoked the bank guarantees, but the bank refused to pay, arguing that the guarantees had expired prior to the claim. The government contended that amendments to the Indian Contract Act nullified the bank's discharge from liability. The court considered whether the bank remained obligated to honor the guarantees despite the alleged expiration of the contract terms.

HELD Section 128 postulates that a surety's liability is co-extensive unless otherwise provided. Parties are legally permitted to contractually limit the guarantor's liability to a specified transaction, amount, or outer validity period.

> “Section 128 of the Indian Contract Act, 1872 postulates that the liability of the surety is co-extensive with the principal debtor unless it is otherwise provided by the contract. In that sense, the liability of the surety would depend on the nature of contract entered between the parties.”

HIGH COURT OF BOMBAY · 2008 | SOURCE HCBM020022601999

13 Judgment Debtor No. 5 v. Decree Holder

HIGH COURT FOR STATE OF TELANGANA · 2017-06-22 · CRP/2377/2017

This case concerns the execution of a decree where judgment debtors were held jointly and severally liable. The petitioner, identified as a guarantor, challenged the decree holder's decision to initiate execution proceedings against them specifically, rather than against the principal borrower. The petitioner argued that the decree holder should first exhaust remedies against the principal debtor. The court rejected this contention, ruling that under Section 128 of the Indian Contract Act, 1872, the liability of a surety is co-extensive with that of the principal debtor. Consequently, a creditor has the discretion to proceed against the surety without first pursuing the principal debtor.

HELD A decree holder has full discretion to proceed against either the principal borrower or the guarantor to execute a joint and several award. The guarantor cannot dictate recovery terms or compel the creditor to exhaust debtor remedies first.

> “Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/ guarantor to see whether the principal debtor has paid or not.”

HIGH COURT FOR STATE OF TELANGANA · 2017 | SOURCE HBHC010183362017

14 H.P. State Cooperative Bank Ltd. v. Ram Gopal Sharma

HIGH COURT OF HIMACHAL PRADESH · 2011-09-16 · CWP/821/2006

This case concerned the liability of a surety for a loan granted by the H.P. State Cooperative Bank. After the principal debtor defaulted, the bank initiated arbitration proceedings. The appellate and revisional authorities had absolved the surety of liability, citing his request to be discharged from the role and the bank's failure to enforce remedies against the principal debtor or include co-sureties in the proceedings. The High Court overturned these decisions, ruling that a surety's liability is co-extensive with the principal debtor under the Indian Contract Act. Mere requests for discharge do not revoke a guarantee, and the creditor's forbearance in suing the debtor or releasing other co-sureties does not extinguish the obligation of the remaining surety.

HELD Under Section 137, mere forbearance by the creditor to sue the principal debtor does not discharge the surety. Under Section 138, the release of one co-surety does not discharge the other co-sureties.

> “Section 137 of the Contract Act says that mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of agreement to the contrary, discharge the surety.”

HIGH COURT OF HIMACHAL PRADESH · 2011 | SOURCE HPHC010036082006

15 S. Subramanyam v. Karnataka State Financial Corporation

HIGH COURT OF KARNATAKA · 2024-06-27 · MFA/4565/2012

The appellant, a director and guarantor of a company that defaulted on a loan from the Karnataka State Financial Corporation (KSFC), challenged a lower court order allowing the KSFC to recover over 19 crore rupees. The appellant argued that the claim was time-barred, that the KSFC failed to proceed against the principal borrower first, and that the KSFC's negligence regarding mortgaged assets contributed to the loss. The KSFC contended that under the terms of the personal guarantee, they are entitled to recover dues directly from the guarantors independently of the principal borrower, and that the recovery application was filed within the limitation period.

HELD The liability of a surety is immediate, co-extensive, and is not deferred until the creditor corporation exhausts its remedies against the principal borrower. It is not necessary to implead the principal borrower in proceedings against the guarantor.

> “The liability of the surety is immediate and the same is not deferred until the Corporation exhausts its remedies against the principal borrower. It is equally well settled that the guarantor alone could be sued without suing the principal borrower so long as the creditor satisfies the Court that the principal debtor or the principal borrower is in default.”

HIGH COURT OF KARNATAKA · 2024 | SOURCE KAHC010521032012

16 M/s. Sterling Trade v. The Official Liquidator

HIGH COURT OF BOMBAY · 2018-08-30 · CA/81/2013

This case concerns the distribution of assets from a company in liquidation and the reimbursement of security expenses to secured creditors. The court examined whether secured creditors, such as SICOM and Canara Bank, were entitled to recover costs incurred in preserving assets during the liquidation process under the Companies Act, 1956 and the Companies (Court) Rules, 1959. Additionally, the court addressed the issue of adjusting payments received from guarantors against the principal debtor's liability. The court considered the statutory framework, specifically Rule 292, which permits creditors to be reimbursed for expenses advanced to preserve company assets. The matter involved evaluating claims for security charges, dividend declaration, and the management of funds in a separate account for creditors.

HELD Because guarantor and principal debtor liability is co-extensive, payment by the guarantor discharges the principal debtor to that extent. Upon satisfying the decree, the guarantor is subrogated to step into the creditor's shoes to claim reimbursement.

> “The liability of a guarantor and principal debtor is co-extensive... payment by one will discharge the other. The Hon’ble Supreme Court... has held that the guarantor's rights and liabilities are co-extensive... once the decree is satisfied, the guarantor will step into the shoes of SICOM and claim from the liquidator...”

HIGH COURT OF BOMBAY · 2018 | SOURCE HCBM020285542012

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17 Kartik Rajesh Sharma v. HDFC Bank Ltd.

HIGH COURT OF BOMBAY · 2009-11-21 · APPLN/4568/2009

This case concerns a challenge to criminal proceedings initiated under Section 138 of the Negotiable Instruments Act against guarantors of a corporate loan. The applicants had provided personal guarantees for a loan extended to a company, with one applicant issuing a cheque as security for the debt. When the company defaulted, the bank presented the cheque, which was dishonored. The applicants argued that since the liability under the guarantee agreement was contingent upon a formal demand—which the bank had failed to make—no debt or liability existed at the time of the cheque's presentation. The Court determined that because the specific terms of the guarantee deed required a written demand to trigger liability, and no such demand had been issued, the cheque was not discharged against a pre-existing debt. Consequently, the Court quashed the criminal proceedings initiated against the guarantors.

HELD Parties can contractually agree to make the guarantor's liability conditional upon a written notice of demand. If the contract of guarantee contains such a stipulation, a formal demand is a condition precedent to enforcing liability.

> “Under the Indian Contract Act, it is permissible for the parties to agree that the liability of a surety would be different and may not be the same as that of the principal debtor. It is also possible for the parties to agree that the liability of the surety would be contingent upon the principal debtor not paying the amount or would arise on demand being made on the surety.”

HIGH COURT OF BOMBAY · 2009 | SOURCE HCBM010360392009

18 Ghanshyam Pd. Srivastawa v. State of Bihar

HIGH COURT OF PATNA · 2012-10-09 · CR. MISC./1050/2011

The petitioner, a bank manager, sought to quash a criminal complaint filed against him for criminal breach of trust under Section 406 of the Indian Penal Code. The complainant, acting as a guarantor for a car loan, alleged that the bank acted illegally by forfeiting his pledged life insurance policies to cover the borrower's loan default. The High Court, relying on Section 128 of the Indian Contract Act, reaffirmed that a guarantor's liability is co-extensive with that of the principal debtor. Consequently, the bank had the legal right to recover the debt from the guarantor without first exhausting remedies against the borrower. The Court set aside the order of cognizance against the petitioner.

HELD Under Section 128, a bank has the legal right to adjust the outstanding loan amount from the guarantor's pledged life insurance policies directly, without first proceeding against the principal borrower.

> “From the reading of the aforesaid section it appears that the money which was due for loan can be recovered either from the borrower or guarantor and the liability to pay the amount of loan is co-extensive against borrower as well as guarantor.”

HIGH COURT OF PATNA · 2012 | SOURCE BRHC010273942011

19 Ramesh Thawardas Dadlani & Ors. v. State Bank of India

HIGH COURT OF BOMBAY · 2006-12-18 · S/1012/1983

This matter involved cross-suits between a bank and its clients regarding an irrevocable Letter of Credit (L/C) facility. The clients contested the bank's decision to honor payment under the L/C, arguing that the beneficiary's documents contained significant discrepancies and violated the terms of the credit. Specifically, the clients alleged that the shipment requirements were not met and that the intermediary bank's actions in processing the documents were improper. The Court examined whether the bank had acted correctly under the Uniform Customs and Practice for Documentary Credits (UCP) in settling the payment despite the client's objections. The central issue was whether the bank could debit the client's accounts to cover the payment made to the intermediary bank in the face of these disputed documents.

HELD Analogous to Section 140, the right of subrogation for an indemnifier to step into the shoes of the indemnified and enforce rights against third parties accrues only when the indemnifier makes full payment.

> “On a parity of reasoning and on principles analogous to Section 140, the rights of the indemnifier to step into the shoes of the indemnified would accrue upon the former making payment to the latter.”

HIGH COURT OF BOMBAY · 2006 | SOURCE HCBM020005521983

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State of Punjab v. Darshan Singh

HIGH COURT OF PUNJAB AND HARYANA · 2007-11-14 · RSA/3060/1984

The plaintiffs sought a declaration that they were not sureties for an agricultural loan taken by a third party and challenged the subsequent recovery proceedings against their property. While both the trial court and the first appellate court found that the plaintiffs did indeed stand as sureties, the appellate court ruled that they were discharged from their liability under Section 141 of the Indian Contract Act. This was because the creditor had allowed the principal debtor to dispose of the mortgaged land, which served as security for the loan, without the sureties' consent. The High Court upheld this decision, finding that the loss of the security legally discharged the sureties to the extent of the security's value.

HELD Under Section 141, if a creditor allows the principal borrower to dispose of land mortgaged as security for a loan without the sureties' consent, the sureties are discharged from liability to the extent of that security's value.

> “A surety is entitled to the benefit of every security which the creditor has against the principal debtor… and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.”

HIGH COURT OF PUNJAB AND HARYANA · 2007 | SOURCE PHHC010072571984

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21 Usharani Panda v. Subash Ch. Panda

HIGH COURT OF ORISSA · 2015-05-08 · RSA/88/2012

The appellant, acting as a guarantor for the respondent, had her fixed deposits adjusted by a bank to satisfy the respondent's outstanding loan. The appellant sued the respondent for recovery of this amount. The lower courts dismissed the suit, erroneously holding that a guarantor has no right to claim money from a principal debtor and citing an incorrect provision of the Limitation Act. The High Court set aside these findings, clarifying that under Section 140 of the Indian Contract Act, a surety is entitled to subrogation and possesses the right to recover from the principal debtor any amount paid to discharge the guaranteed debt.

HELD When a bank adjusts a guarantor's fixed deposit to satisfy a borrower's defaulted loan, the guarantor is subrogated under Section 140 and has the legal right to recover that adjusted sum from the principal borrower.

> “As soon as the guarantor has paid to the creditor, what is due to the creditor under the guarantee, he is entitled, unless he has waived them to be subrogated to all the rights possessed by the creditor in respect of the debt, default or miscarriage to which the guarantee relates.”

HIGH COURT OF ORISSA · 2015 | SOURCE ODHC010244902012

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22 Maitreya Doshi v. Anand Rathi Global Finance Ltd.

SUPREME COURT OF INDIA · 2022-09-22 · 2022 INSC 1004

The case involved a dispute over the initiation of the Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code against Doshi Holdings. A financial creditor had provided a loan to M/s Premier Ltd., while Doshi Holdings pledged shares as security. The creditor initiated separate insolvency petitions against both companies. Doshi Holdings argued it was merely a pledgor and not a borrower, meaning no 'financial debt' existed under the Code. The Supreme Court upheld the lower court's finding that the contractual agreements classified Doshi Holdings as a co-borrower. The Court ruled that CIRP proceedings could be initiated against both co-borrowers, provided that the total recovery does not exceed the outstanding debt.

HELD Financial creditors can initiate simultaneous insolvency proceedings against co-borrowers or guarantors, provided that the creditor does not recover the same debt twice. Part realization from one debtor reduces the outstanding amount claimable from the other.

> "Needless to mention, the same amount cannot be realised from both the Corporate Debtors. If the dues are realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over."

SUPREME COURT OF INDIA · 2022 | SOURCE ESCR010007802022

23 Muhammed Musthafa Padinhakkara v. Banking Ombudsman

HIGH COURT OF KERALA · 2022-09-15 · WP(C)/18761/2022

The petitioner, a guarantor and co-obligant for credit facilities granted to two entities, sought to settle outstanding liabilities with the respondent bank to exercise his right of subrogation against the principal borrowers. The petitioner argued that by discharging these debts, he is entitled to the bank's security interests under the Indian Contract Act and relevant precedents on equitable subrogation. The court disposed of the writ petition by recording a mutual settlement agreement between the petitioner and the bank. The terms allow the petitioner to settle the debts within a specified timeframe, require the bank to acknowledge the payment and the petitioner's right of subrogation, and direct the bank to hold the collateral title deeds for a set period to enable the petitioner to pursue legal claims.

HELD Under Sections 140 and 141 of the Indian Contract Act, 1872, a guarantor who settles the outstanding loan liabilities of the principal borrower acquires the right to proceed against both the principal borrower and the securities held by the bank.

> "Sections 140 and 141 of the Indian Contract Act, 1872... suggest that the petitioner has the right to proceed against the principal borrower and also to proceed against all securities held by the respondent bank."

HIGH COURT OF KERALA · 2022 | SOURCE KLHC010384252022

24 B. Arvind Kumar v. Indian Overseas Bank

HIGH COURT OF KARNATAKA · 2021-02-12 · WP/44047/2019

The petitioners, former directors and guarantors of a company, sought to restrain the respondent bank from selling their mortgaged properties to recover outstanding loan dues. They argued that the bank should instead exhaust its remedies by seizing the company's movable assets. The court dismissed the petition, citing well-settled legal principles that a guarantor's liability is co-extensive with that of the principal debtor. The court held that the creditor has the discretion to initiate recovery proceedings against either the borrower or the guarantor, and the guarantor cannot dictate the mode of recovery or compel the bank to prioritize assets of the principal debtor.

HELD A guarantor cannot compel a creditor bank to prioritize seizing the movable assets of the principal borrower before proceeding against the guarantor's personal mortgaged properties.

> "The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract... In view of the settled position of law with regard to the liability of the guarantor and the option of the creditor... [the petition is dismissed]."

HIGH COURT OF KARNATAKA · 2021 | SOURCE KAHC010293212019

25 Ram Kishun and Ors. v. State of U.P. and Ors.

SUPREME COURT OF INDIA · 2012-05-24 · 2012 INSC 247

This case involved a challenge to an auction sale of land conducted by the government to recover bank loan dues. The petitioners, heirs of a deceased guarantor, argued that the auction was improper, the property was undervalued, and the entire land should not have been sold to recover a smaller balance. The Supreme Court reaffirmed that a guarantor's liability is co-extensive with that of the principal debtor, meaning the creditor is not required to exhaust remedies against the principal debtor first. While acknowledging that public authorities must follow strict valuation and auction procedures to prevent arbitrary sales, the Court upheld the specific auction in this case, noting that no fraud or fundamental procedural error had occurred.

HELD The liability of a guarantor is co-extensive with that of the principal debtor under Section 128 of the Indian Contract Act. The surety cannot restrain the execution of a decree against themselves or dictate how the creditor should recover the debt.

> "The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/ guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance."

SUPREME COURT OF INDIA · 2012 | SOURCE ESCR010003882012

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