
CRITICAL APPRAISAL ON THE CONCEPT OF 'SURETY' UNDER THE INDIAN CONTRACT ACT, 1872

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Introduction

The Indian Contract Act, 1872 ("ICA") comprehensively codifies the law of guarantee and establishes the position of the 'Surety' under a contract of guarantee. The surety's liability is not a simple, one-dimensional concept, but rather it is influenced by various factors such as the terms of the contract, the conduct of the parties, and the circumstances of the case. This paper aims to examine the multi-faceted personality of the surety under the ICA and identify the relevant and specific provisions of the Act that deal with the role of the surety in a contract of guarantee. Additionally, it will discuss judicial creativity that supports this multi-dimensional personality of the surety.

Due to the fact that the surety can assume multiple identities, it is possible that each of these personas will have a unique set of obligations at various times. This is plausible due to the fact that the surety can assume multiple personas. To be more specific, the obligations of the surety can vary based on the timing of the agreement and the specific requirements that must be met. For instance, if the principal debtor is unable to fulfil their obligations, the surety may be required to fulfil their contractual obligations and make payments to the creditor in order to fulfil the contract. In addition, the surety is expected to make restitution or compensate for damages directly caused by the principal debtor's failure to pay. Due to this, the surety may be viewed as having multiple responsibilities, and their obligations may vary depending on the timing of the agreement and the specific conditions involved. Consequently, the surety may be considered to have multiple obligations.

Multi-Dimensional Personalities of 'Surety'

In the field of law and order, "multiple personality" refers to the various roles and responsibilities that a surety can assume within the context of a contractual agreement. A guarantor is a third party who guarantees an agreement between a principal debtor and a

creditor. Typically, the principal debtor makes payments to the creditor under this agreement. Therefore, the surety is responsible for fulfilling the primary debtor's obligations in the event that the primary debtor is unable to do so. In the vast majority of instances, the responsibility of the surety is specified in a document that is recognised as legally binding and can be referred to as either a guarantee or a bond.

When a surety backs up someone else's debt on behalf of a creditor, that surety also acts as the debtor's guarantor in the event that the principal debtor defaults on their obligations. The surety is obligated to carry out the principal debtor's contractual duties in the event of a default by the principle debtor, just as if the surety were the principal debtor. As a result, in the event of a default by the principal debtor, the surety assumes the function of the principal debtor.

When the surety releases the major debtor from his obligation, whatever claims the creditor had against him become his. As a result, in this instance, the surety has the same rights as a creditor to payment from the debtor. Therefore, in these circumstances, the surety plays the part of the creditor. So, depending on the circumstances, a surety can act as a guarantor, principal debtor, and creditor.

Surety as Guarantor

The duty of a surety in a contract of guarantee is to ensure that the contract is completed or that the principal debtor's liability is discharged in the event of a default on their part. This definition of surety is found in Section 126¹, which states that "The person who gives the guarantee is called the "surety"". The primary personality of a guarantor in a guarantee contract is his duty as a surety. Thus, the creation of the guarantee contract and the surety's conversion into the guarantor are equivalent, and the surety assumes the role of the guarantor immediately.

Surety as Creditor

In this context, the surety acts as a secondary party to the original debtor, assuming responsibility for the debt if the debtor fails to fulfill their obligations. The surety agrees to be legally bound to the creditor and to fulfill the debtor's obligations in the event of default or non-payment. This guarantee provides an additional layer of security for the creditor, assuring them that they will receive the owed amount even if the debtor fails to make the payment. When a

¹ Indian Contract Act, 1872, S 126

surety acts as a creditor, it means that they have provided financing or extended credit to the debtor. This can happen in various scenarios. For example, a surety might provide a loan to the debtor on behalf of the creditor, or they may directly advance funds to the debtor, with the understanding that the debtor will use those funds to satisfy their obligations to the creditor. In such cases, the surety assumes the risk of the debtor's default and becomes entitled to receive repayment from the debtor. They can pursue legal remedies to recover the debt, just like any other creditor. This may include filing a lawsuit, obtaining judgments, or seeking enforcement actions to seize assets or enforce liens on the debtor's property. It's important to note that the role of surety as a creditor is distinct from their primary role as a guarantor. As a guarantor, the surety's primary responsibility is to ensure that the debtor fulfills their obligations to the creditor. However, in situations where the debtor defaults, the surety may step in as a creditor to seek repayment directly from the debtor. Overall, the role of surety as a creditor involves assuming the risk associated with the debtor's obligations and providing financing or credit while having the legal right to recover the debt in case of default.

Surety as a Principal Debtor

Surety as a principal debtor refers to a situation where a surety, who typically acts as a guarantor for another party's debt, becomes personally liable for the debt as if they were the original debtor themselves. In such cases, the surety assumes the role of the principal debtor, and their obligation to repay the debt becomes direct and primary. This scenario usually arises when the original debtor fails to fulfill their obligations and defaults on the debt. As a result, the creditor has the right to seek repayment directly from the surety as if they were the principal debtor from the beginning. The surety, in this case, is held legally responsible for the full amount of the debt, along with any interest, penalties, or associated costs. When a surety becomes a principal debtor, it means that their personal assets and resources can be used to satisfy the debt. They can be subjected to legal actions, such as lawsuits or debt collection efforts, aimed at recovering the owed amount. The creditor has the right to pursue the surety as the primary source of repayment without having to first exhaust their efforts against the original debtor. It's important to note that the surety's liability as a principal debtor is usually limited to the extent of the original debt. However, depending on the terms of the surety agreement or applicable laws, the surety's liability may extend beyond the principal debt, including interest, costs, and other charges associated with the default. In summary, surety as a principal debtor occurs when a surety assumes personal liability for a debt, stepping into the shoes of the original debtor.

This allows the creditor to seek direct repayment from the surety in case of default, making them legally responsible for the debt as if they were the primary debtor.

Relevant Provisions in Indian Contract Act and case laws

Section 128

Section 128 of the Indian Contract Act² establishes that the liability of the surety is equal to that of the principal debtor, unless the contract states otherwise. This section forms the primary basis for asserting that the surety assumes the role of the principal debtor. Courts have upheld the principle that the surety's liability is co-extensive with that of the principal debtor, as evidenced in cases such as *Maharaja of Benares v. Har Narain Singh*³. In this case, the court ruled that the surety is liable for the entire amount owed by the debtor, including both the principal and the interest. The only exception to this general rule is when there are explicit terms in the contract that state otherwise, as highlighted in the case of *C.L. Phillips v. A.E. Mitchell*⁴. The court further clarified this exception in *Central Bank of India v. C.L. Vimla*⁵, emphasizing that the liability of the guarantor can deviate from that of the debtor only if explicitly provided for in the contract. Therefore, in normal circumstances, the surety is considered to have the same liability as the principal debtor.

Section 134

Section 134 of the Indian Contract Act⁶ states that the surety is discharged if there is a contract between the creditor and the principal debtor that releases the principal debtor, or if the creditor's act or omission legally results in the discharge of the principal debtor. This section highlights the fact that the surety's liability is connected to the liability of the principal debtor. On interpreting this section, it becomes evident that any release of the principal debtor also releases the surety when such release occurs due to an act of the creditor. However, it's important to note that when the principal debtor is discharged due to being declared insolvent, Section 134 is not applicable, and the surety remains liable. This principle was affirmed by the

² Indian Contract Act, 1872, S 128

³ *Maharaja of Benares v. Har Narain Singh*, 1905 SCC OnLine All 115.

⁴ *C.L. Phillips v. A.E. Mitchell*, 1929 SCC OnLine Cal 223

⁵ *Central Bank of India v. C.L. Vimla*, (2015) 7 SCC 337.

⁶ Indian Contract Act, 1872, S 134

court in the case of *Jagannath Ganeshram Agarwal v. Shivnarayan Bhagirath*⁷. Therefore, the surety's obligation is co-extensive with that of the principal debtor and not an alternative liability. This view has been supported by the court in *Maharashtra State Electricity Board v. Official Liquidator*⁸, emphasizing that the surety's liability is directly connected to that of the principal debtor. Thus, the discharge of the principal debtor through a contract or the act of the creditor also results in the discharge of the surety, unless specific exceptions apply.

Section 139

Section 139 of the Indian Contract Act⁹ states that if the creditor engages in actions that are inconsistent with the rights of the surety or fails to fulfill their duty towards the surety, resulting in the surety's eventual remedy against the principal debtor being compromised, the surety is discharged from their liability. In simpler terms, this section provides that if the surety's ability to recover from the principal debtor is hindered by the creditor's acts or omissions, the surety is no longer obligated to fulfill their responsibilities. This provision includes situations where the creditor neglects to safeguard the securities they hold against the principal debtor. If the creditor's negligence leads to the loss or impairment of the security, it can discharge the surety. Several cases, such as *Amrit Lal Goverdhan Lalan v. State Bank of Travancore and Ors.*¹⁰, and *Union Bank of India v. Suresh Bhailal Mehta*¹¹, have illustrated that the surety can be released from their obligations if the creditor's negligence results in the loss or insufficient protection of the provided security. Courts have established that any action or omission by the creditor that diminishes the surety's eventual remedy against the principal debtor will discharge the surety. This principle, as evident in cases like *Radha Kanta Pal v. United Bank of India Ltd*¹², and *Co-operative Commission Shop Ltd. v. Udham Singh*¹³, emphasizes that any act or omission by the creditor that undermines the surety's potential legal recourse against the principal debtor will release the surety from their obligation to the creditor.

⁷ *Jagannath Ganeshram Agarwal v. Shivnarayan Bhagirath*, 1939 SCC OnLine Bom 65.

⁸ *Maharashtra State Electricity Board v. Official Liquidator*, High Court, (1982) 3 SCC 358.

⁹ Indian Contract Act, 1872, S 139

¹⁰ *Amrit Lal Goverdhan Lalan v. State Bank of Travancore and Ors.*, AIR 1968 SC 1432

¹¹ *Union Bank of India v. Suresh Bhailal Mehta*, AIR 1997 Guj 48.

¹² *Radha Kanta Pal v. United Bank of India Ltd.*, 1954 SCC OnLine Cal 74.

¹³ *Co-operative Commission Shop Ltd. v. Udham Singh*, 1944 SCC OnLine Lah 7.

Section 140

Section 140 of the Indian Contract Act¹⁴ provides the right of subrogation to the surety against the principal debtor. This provision can be understood as granting the surety the same rights as the creditor once the principal debtor defaults and the surety fulfills their liability. Consequently, the surety effectively assumes the role of the creditor in the contractual agreement. In the case of *Darbari Lal v. Mahbub Ali Mian*¹⁵, the Allahabad High Court explicitly stated that when the surety fulfills all the obligations of the principal debtor towards the creditor, the surety steps into the shoes of the creditor. Similarly, the Supreme Court in *Bank of Bihar Ltd. v/s Damodar Prasad*¹⁶ held that it is the duty of the surety to pay the decretal amount, and upon making such payment, the surety is subrogated to the rights of the creditors. Thus, Section 140 establishes that the surety is entitled to the same rights and benefits as the creditor after discharging their responsibilities. As a result, the surety assumes the position of the creditor under the law. This principle of subrogation ensures that the surety is not disadvantaged and can exercise the same legal rights as the original creditor in seeking recovery from the principal debtor.

Section 141

Section 141 of the Indian Contract Act¹⁷ states that, “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.”

This section reinforces what has been said in section 139 only its widening its scope to all securities even if surety was unaware of them at the time of entering into contract and instead of arbitrarily discharging surety completely from liability it discharges to the value of the goods.

¹⁴ Indian Contract Act, 1872, S 140

¹⁵ *Darbari Lal v. Mahbub Ali Mian*, 1927 SCC OnLine All 121.

¹⁶ *Bank of Bihar Ltd. V/S Damodar Prasad*, AIR 1969 SC 297

¹⁷ Indian Contract Act, 1872, S 141

Section 145

Section 145 of the Indian Contract Act¹⁸, subsection "Co-Sureties Not Liable for Default of Co-Surety," provides as follows: Co-guarantors are exempt from liability under this provision if another co-guarantor fails to uphold their end of the bargain. Each co-surety is responsible for their own obligations, and the failure of another co-surety does not affect the obligation for which they are responsible.

Other Relevant Cases

Farmers Debt Relief Case

An inconsistency arises in the interpretation of Sections 128 and 134 of the Indian Contract Act in relation to debt relief acts, particularly in the context of farmer debt relief cases. The Nagpur High Court, in the case of *Balkrishna v. Atmaram*¹⁹, held that debt relief acts only provide relief to the principal debtor and not the surety. However, the Madras High Court, in the case of *Subramnia Chettiar v. M.P. Narayanswami Gounder*²⁰, took the view that the surety is only liable for the reduced amount. This view was also supported by the Kerala High Court in *Aypunni Mani v. Devassy Kochouseph*²¹. The reasoning behind this view is that if the surety has to pay the full amount to the creditor, they effectively assume the role of the creditor and can then demand that sum from the principal debtor, which defeats the purpose of the debt relief act. Considering that the second interpretation has been upheld by two different courts of the same ranking and is more in line with the mischief rule of interpretation of law, I believe that the second interpretation should be followed. This interpretation takes into account the intent and objective of the debt relief acts, which is to provide relief to the indebted farmers. It recognizes that if the surety is obligated to pay the full amount, it would undermine the purpose of the act and burden the surety with the entire liability. Therefore, the second interpretation, which limits the surety's liability to the reduced amount, is more appropriate and should be adopted.

¹⁸ Indian Contract Act, 1872 S 145

¹⁹ *Balkrishna v Atmaram*, AIR 1994 Nag 277.

²⁰ *Subramnia Chettiar v. M.P. Narayanswami Gounder*, AIR 1951 Mad 48.

²¹ *Aypunni Mani v. Devassy Kochouseph*, AIR 1966 Ker 203.

Debi Prasad Gope v. Sir Dukh Haran Nath Sah Prabhu²²

In the case of Debi Prasad Gope v. Sir Dukh Haran Nath Sah Prabhu, the surety had provided a guarantee that the principal debtor would pay a specific sum of money. The court determined that the surety is entitled to benefit from any security held by the creditor that has been obtained from the principal debtor. Consequently, the court recognized the right of the surety to assert this entitlement. Therefore, if the principal debtor fails to fulfill their obligations when they are due, the surety has the ability to make a claim on the benefit of such security. This allows the surety to seek recourse from the security provided by the principal debtor to the creditor in the event of default.

State of West Bengal v. Debnath Mondal²³

In the case of State of West Bengal v. Debnath Mondal, the petitioner acted as the surety for the defendant in a previous legal proceeding. The court determined that the surety's responsibility is not to guarantee the appearance of the defendant in court, but rather to ensure that the full amount of the bond is returned to the state in the event that the defendant fails to appear. This case highlights the importance of having a thorough understanding of the diverse obligations imposed on a surety in various legal situations. A surety is required to fulfill multiple responsibilities, and it is crucial to be aware of these obligations in order to fulfill them effectively.

Amar Nath v. S.P. Chugh²⁴

In the case of Amar Nath v. S.P. Chugh, the surety had provided a guarantee that the principal debtor would fulfill their contractual obligations. The court determined that the surety has the right to receive compensation from the principal debtor for any financial losses or damages suffered directly due to the principal debtor's breach of contract. Consequently, the surety has the legal capacity to initiate a claim for compensation and restitution for any losses incurred as a direct result of the actions of the principal debtor.

²² Debi Prasad Gope v. Sir Dukh Haran Nath Sah Prabhu AIR 1286 1971 SCR (1) 101

²³ State of West Bengal v. Debnath Mondal (2001) 1 SCC 522

²⁴ Amar Nath v. S.P. Chugh (1984) 4 SCC 196

Conclusion

In summary, the text discussed the role of a surety or guarantor in various legal contexts and their obligations and powers in different contracts. The surety has the responsibility to fulfill the contractual obligations and can be held jointly or severally liable for damages resulting from a breach of the contract. They have the right to seek compensation and restitution for any losses incurred, file claims for reimbursement from the primary debtor, and enforce the rights of the primary debtor. Additionally, the surety is personally accountable for their own commitments. It is crucial for a surety to have a clear understanding of the specific requirements imposed on them in different contractual obligations. The importance of verifying the legality and enforceability of commitments before making them is emphasized, as supported by the covered case laws. Therefore, sureties and guarantors must be fully aware of the contractual requirements and the legal implications of their pledges to fulfill their obligations effectively. To conclude, suretyship plays a vital role in the Indian Contract Act, 1872, which codifies the law of guarantee and establishes the position of the surety in a contract of guarantee. The surety's liability is not absolute and can be influenced by factors such as contract terms, parties' conduct, and case circumstances. The specific provisions of the Indian Contract Act, along with general principles of contract law, provide the legal framework for determining the surety's liability. The Indian courts have also contributed to the development of suretyship law through their interpretation and application of the law, acknowledging that the surety's liability is not absolute and can be influenced by equitable considerations and the creditor's conduct.