IS THERE A CONFLICT BETWEEN SECTION 128 AND SECTION 141 OF THE INDIAN CONTRACT ACT?

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Section 126 of **The Indian Contract Act**[1], deals with contracts of 'Guarantee.' Three parties are required in a contract of guarantee: the principal debtor, the creditor, and the surety. The principal debtor or borrower is the person on whose non-payment the guarantee has to be given, the creditor is the person who must be given the guarantee, and the surety is the person who must deliver this guarantee.

Section 128

The nature of the surety's liability is addressed under Section 128 of the Indian Contract Act. "*The liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract*." The term "co-extensive" refers to the surety's liability to the fullest degree possible. A surety is responsible for the entire amount that the principal debtor is responsible for. As a result, the surety's liability is equal to that of the principal debtor. It's neither more nor less than that, but he has the option to restrict his liability. He may specifically set his guarantee to the said amount. In other words, a special contract can reduce a surety's obligation, but it cannot increase his liability over that of the principal debtor.

When the principal debtor defaults, the surety's liability arises. Unless the contract expressly states otherwise, the creditor is not required to sue the principal debtor first before pursuing the surety. The creditor does not have to exhaust all remedies against the principal debtor before suing the surety. If the principal debtor fails to pay, it becomes the surety's obligation to pay the amount. The surety's liability is thus immediate.[2]

In *Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala*[3] observed that "The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety." The agreement between the surety and the creditor is a separate contract. As a result, if the initial contract between the creditor and the principal debtor is void, the

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[1] The Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872.
[2] Bank of Bihar v. Damodar Prasad, AIR 1969 SC 297.
[3] [2009] INSC 1454.

surety is accountable as if he were the principal debtor. Similarly, the surety may not be released from liability if the contract between the creditor and the principal debtor is voidable. The surety's liability is joint with the principal debtor. The creditor can choose to retrieve the money from the principal debtor when he defaults or from the surety. He can sue both the principal debtor and the surety, or he can sue either the surety or the principal debtor separately.

Section 140 and 141

Section 140 and 141 of the Indian Contract Act, 1872 recognise that the surety has the right to pursue any remedy available to a creditor against the principal debtor, including security enforcement. The Supreme Court concluded in the case of *State of M.P. v Kaluram* [4]that the term 'security' in Section 141 of the Indian Contracts, 1872 is not used in any technical sense, but rather encompasses all of the creditor's rights against the principal's property at the time of contract.

It can be inferred from Section 141 that it makes no difference whether the surety was aware of the security held by the creditor previously. If the surety does not receive the security after it has been repaid, he may be released from his liability. This release of liability, however, will be limited to the value of the security that was not properly delivered to the surety. If the lost security's value is less than the surety's liability, the surety will be released to the number of his liabilities. If the value of the security exceeds the liability, however, the surety will be released from all of his liabilities.

This clause emerges as a result of the surety's **Right of Subrogation**, under which the surety is entitled to all of the creditor's rights and assumes the creditor's position after the original creditor has been paid. Sections 140 and 141 of the Indian Contract Act, 1872, address the right of subrogation in India The right of subrogation arises under contract law when a contract requires the one who breaches the contract to compensate the other party who has been harmed by the breach of contract. It is the most basic idea of natural justice, according to the court as stated in, *Amrit Lalan Goverdhan v. State Bank of Travancore.*[5]

[4] 1967 AIR 1105, 1967 SCR (1) 266.
[5] 1968 AIR 1432, 1968 SCR (3) 724.

Moreover, in the case of *State Bank of India v Fravina Dyes*[6] the High Court of Bombay held that if the guarantor believes the debtor is about to remove or dispose of his property with the intent to defraud the creditor, the guarantor can apply for a temporary injunction against the debtor by invoking the doctrine of subrogation.

CONCLUSION

The most desirable reading of Section 128 and Section 141 of the Act is that a creditor's statutory reduction or cessation of the primary debtor's liability acts as a pro rata reduction or extinguishment of the surety's debt. The payment by the guarantor of all that he is accountable for, rather than all that may be owed to the creditor who owns the securities, is the prerequisite for section 140 of the act to exist. When the guaranteed liability is simply a portion of the total amount, the surety's right arises instantly upon payment of that fraction, because that fraction is the whole to him.

Because the principal debtor owes the surety an obligation to indemnify the surety, a surety who has paid the debt for which he has guaranteed has a right to the securities held by the creditors. The complication would have arisen, if in cases where the surety who has guaranteed only a part of the debt pays, all that he is liable for, but the surety's right to the securities would have emerged only when the whole of the creditor's claim gets fulfilled. So as to conclude, section 128 of the Act deals with the liability of the surety to the creditor while section 141 talks about the rights of the surety against the principal debtor. In my opinion, there exists no conflict between the two as both of these sections and the provisions therein protect the rights of different parties to the contract (vis. Creditor and principal debtor, respectively) while putting out the duties and restricting the powers to a certain degree, of the parties involved in a contract of guarantee. Section 141 just acts as a safety valve for ensuring that the surety is not left in a vulnerable position.

The creditor and the surety have an equity agreement that the creditor will not do anything to take away the surety's right. However, the creditor's right to keep his securities, in my interpretation of the Act, is not superior to the surety's claim on those securities, after the surety has paid off his proportionate obligations. This all the way shows how the Indian Contract Act, through a system of checks and balances ensures the nature and extent of obligations that the parties can impose on one another.

[6] AIR 1989 Bombay 95.