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Interpreting the Extent of Surety's Liability when Principal Debtor is a Minor: Section 128 of the Indian Contract Act

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ABSTRACT

Section 128 of the Indian Contract Act holds that the liability of a surety is co-extensive with that of the principal debtor. However, confusions arise when the principal debtor in a contract of guarantee has no liability. One such instance is when the principal debtor is a minor. Does it imply that surety is not liable? One view is that since any contract with a minor is void-ab-intio under the Indian Contract Act, the debt becomes void and the surety will not be liable. On the other hand, some courts are of the view that irrespective of the fact of minority of the principal debtor and applicability of section 128, the surety may be held liable in two situations – 1) case of misrepresentation where the surety has concealed the fact of minority of the principal debtor from the creditor 2) where the minor was supplied with necessities for which the creditor is bound to be reimbursed. This article attempts to analyze the concept through various contradictory approaches taken by courts, in the Indian and English context.

Keywords: *contract of guarantee, surety, principal debtor, minor, void-ab-initio.*

I. INTRODUCTION

“A surety is undoubtedly and not unjustly, an object of some favor both at law and at equity”

~ *Lord Selborne*

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 while the person in respect of whose default the guarantee is given is called the “principal debtor”. The person to whom the guarantee is given is called the “creditor”.² Section 128 determines the maximum extent of surety’s liability. It declares that the surety’s liability is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Thus, the surety’s liability can neither be more nor less than that of the principal debtor except in cases where

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² Indian Contract Act, § 126, No.9, Acts of Parliament, 1872 (India)

there is a contract with respect to the same.³ Nevertheless, the law is blurred when it comes to the liability of the surety when principal debtor is not liable. For instance, the liability of surety in case of the principal debtor being a minor is an unsettled and controversial point because as per Indian contract act, any contract with a minor is void ab initio. Yet, there are multiple case, both in the Indian and English context which has set contradicting precedents based on different ratios.

II. ANALYSIS WITH PRECEDENTS

The Indian contract act mandates competency of the parties as an essential element for a valid contract. Thus, any contract with a minor is void-ab-initio.⁴ Keeping this in mind, the contract of the creditor with a minor principal debtor is void. Consequently, the debt is void as the law does not require the minor to fulfill the promise. Thus, there can be no liability. In an English case, **Swan v. Bank of Scotland, (1836)** 10 Bli (N.S.) 627, a loan was advanced to an infant. The House of Lords held that since the infant is not liable to repay, the sureties cannot be held liable.⁵

However, in the Indian context, the earliest case revolving around the question of surety's liability in case where the principal debtor is a minor was **Kashiba v. Sripat Narshiv (1894) I.L.R. 19 Bom 697**. The Bombay High Court held that irrespective of whether the debt is void or voidable, the sureties will be liable.⁶ This was contradicted in the case of **Manju Mahadev V. Shivappa Manju (1918) I.L.R 42 Bom**, where it was held that a guarantee give for a non-enforceable obligation is not good thereby discharging the surety of any liability.⁷

Adding on, as per section 128, the liability of the surety is co-extensive with that of the principal debtor. In this view too, the surety will not be liable in all cases where the principal debtor is a minor. The Madras High Court, in **E.K. Kelappan Nambiar Vs. Moolakal Kunhi Raman and Anr (1956)**, relied on section 128 of the Indian Contract Act which provides for 'co-extensive liability of the surety and principal debtor'. It was held that on the basis of section 128, the surety cannot be held liable to the creditor for a debt which the principal debtor himself was not liable.⁸

However, in several cases, the judges, in spite of the applicability of section 128 has held the

³ Ibid, § 128

⁴ Ibid, § 10,11

⁵ Swan v. Bank of Scotland, (1836) 10 Bli (N.S.) 627

⁶ Kashiba v. Sripat Narshiv (1894) I.L.R. 19 Bom 697

⁷ Manju Mahadev V. Shivappa Manju (1918) I.L.R 42 Bom

⁸ E.K. Kelappan Nambiar Vs. Moolakal Kunhi Raman And Anr (1956) 2 MLJ 544

surety liable, either because

- i) the surety concealed the fact of minority from the creditor, which is a clear case of misrepresentation⁹ or,
- ii) the minor was supplied with certain necessities of life for which the creditor is bound to be reimbursed.¹⁰

In **Tikki Lal Jaithu Teli v. Komalchand**, AIR (1940) Nag 327, the creditor sued the surety for recovery of a certain sum due from the principal debtor who was a minor. The creditor was not aware of the minority factor. The court held that the contract with a minor was void. However, since the surety concealed the fact of minority from the creditor, he was held liable to compensate the creditor. Unlike previous cases, this decision was not based on section 128 of the Act, instead on section 11 and misrepresentation.¹¹ But this decision cannot be held as a strong because there may be cases where principal debtor concealed the fact of his minority from both creditor and principal debtor or where the creditor induced the surety to act as a guarantee. In such cases, holding the surety liable will be gross injustice because the ‘default’ as per the words of the provision is certain for the minor will not be able to pay the creditor.

In the same case, it was also contended that the money was given for marriage and construction of house purposes come under ‘necessities’ as per section 65 of the Contract. Hence, the surety was bound to compensate the Creditor. However, the court rejected this contention as necessities under section 68 of the Act includes only basic elements like food, clothing and shelter.

In **Coutts Co. v Browne Lecky**, 1947 KB 10, the bank advanced a loan to an infant by way of overdraft. It was void under section 1 of the Infant Relief Act, 1874. Court held that the surety shall not incur any liability. The decision was rested on two reasoning. Firstly, the contract was void. Secondly, the fact of minority was known to all the parties. There was no concealment. Hence, the surety is discharged.¹²

A contrasting view was held in **Wathier v. Wilson**, (1911) 27 TLR 582, Minor’s debt knowingly guaranteed, surety should be held liable. In this case, the father issued a promissory note in favor of a loan taken by his son. The court held that the surety was liable even if the contract was void.¹³

⁹ Supra, § 142,143

¹⁰ Supra, § 68

¹¹ Tikki Lal Jaithu Teli v. Komalchand, AIR (1940) Nag 327

¹² Coutts Co. v Browne Lecky, 1947 KB 10

¹³ Wathier v. Wilson, (1911) 27 TLR 582

Furthermore, the third view is that the existence of a principal debt is essential feature of a contract of guarantee. With the absence of liability on part of the principal debtor, there is no 'debt' as such. Hence, the very foundation of contract of guarantee is threatened. Many judges have proposed that on the occasion of the debt/ underlying contract being void, the contract metamorphizes into a principal contract between the creditor and surety, leaving aside the principal debtor. More specifically, it is treated as a contract of indemnity and thus, the surety can still be held liable. This was confirmed in *Yeoman Credit Ltd. v. Bartlett*, (1961) 1 WLR 828.

Contrastingly, certain English cases oppose such treatment of a contract of guarantee as an indemnity. In ***Stadium Finance Company Ltd. v. Helm*, (1965) 109 SJ 447**, a minor hired a motor car from a finance company. The agreement was also signed by his mother. The mother was acting as surety and not an indemnifier. This when the PD is not liable, the surety cannot be liable under the guarantee.¹⁴

III. SUGGESTIONS & CONCLUSION

As per section 128, the liability of surety is co-extensive unless there is a contract to the contrary. So, if the creditor drafts a contract which specifies, in spite of the minority of the principal debtor, the surety will be liable, it might help in affixing the liability on the surety. On the other hand, Section 134 of the Indian Contract Act deals with discharge of liability when the principal debtor himself is discharged by way of any contract, act, or omission. The true essence of the section is that if the principal debtor has no liability, then surety is discharged. It may be possible to incorporate this perspective while deciding the cases at hand.

Wrapping up, the area of deciding the liability of surety when principal debtor is a minor is still a vague conundrum. With several contradicting judgements in the English and Indian context, each with its own logical reasoning, it's a tedious work to arrive at a precise conclusion. Still, the courts have tried to bring some light into the area. The only problem being there is no strait-jacket formula in these cases. The affixing of liability on the surety differs from case to case, whether there was any concealment of facts, or whether the contract included supply of necessaries. Certain other cases have deviated to treat the contract of guarantee as that of indemnity in case the underlying debt becomes void. However, these are highly controversial and debatable points.

¹⁴ *Stadium Finance Company Ltd. v. Helm*, (1965) 109 SJ 447

IV. BIBLIOGRAPHY

1. C.S. Raghu Raman, *Surety's Liability – Principal Debtor being a minor Comparative Study of the Law in UK*, Unknown, AIR, pp.1-9 (2010)
2. Shukla, M. C. A MANUAL OF MERCANTILE LAW. INDIA, S. Chand Limited, pp.111-112 (2007)
3. Avtar Singh, CONTRACT & SPECIFIC RELIEF, 599, pp.599-610, EBC Publishing (P) Ltd., (2019).
