

Liability of surety (Section 128)

Regarding the extent of the surety's liability Section 128 provides, thus "the liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract". The phrase "co- extensive with that of the principal debtor" shows the quantum of the surety's liability. Accordingly, the quantum of obligation of a surety is the same as that of the principal debtor, unless there is a contract to the contrary. In general, it will be neither more or less, although by a special contract it may be made less than that of the principal debtor, but never greater.

Case Laws :

(1) **Bank of Bihar Ltd vs Dr Damodar Prasad (AIR 1969 SC 297)** : The plaintiff bank lent money to Damodar Prasad, on the guarantee of Paras Nath Sinha. In spite of demands by the bank, the loan was neither repaid by Damodar Prasad (principal debtor), nor by Paras Nath Sinha (the surety). The bank then filed a suit against both the principal debtor and the surety. A decree was passed in favour of the bank but with the condition that the plaintiff bank shall be at liberty to enforce its dues against the principal debtor. In its appeal before the Supreme Court, the plaintiff bank challenged the validity of the condition in the decree against the surety only after having exhausted the remedies against the principal debtor. The plaintiff's appeal was allowed and the above stated condition in the decree was set aside. The bank, therefore, was held entitled to enforce its claim against the principal debtor.

(2) **Charu Chandra vs L. Faithful (AIR 1919)** : In this case defendants 1 and 2 borrowed a certain sum from the plaintiff on a registered promissory note payable on demand Defendants 3 and 4 in a letter addressed to the plaintiff agreed as follows:

"My brother Shib Chandra Bandopadhaya is for his own necessities, borrowing from you Rs. 150. There is no objection to your paying, him the money and we make ourselves fully liable for it. On that account you need have no-anxiety. He will pay your interest month by month. As to that there will be no excuse or objection." In this case the rule was made absolute.

(3) **Wright vs Simpson** : Lord Eldon in this case observed that " But the surety is a guarantee, and it is his business to see whether the principal pays, and not that of condition".

(4) **Union Bank of India vs Mukku Narayan (AIR 1987 SC 1078)** : It has been held by the Supreme Court that when there is a decree against the principal debtor, the guarantor and also against the mortgaged property, the decree- holder bank should first proceed against the mortgaged property and then against the guarantor.

If the principal debtor's liability is reduced e.g., after the creditor has recovered a part of the sum due from him out of his property, the liability of the decree or otherwise extinguished in whole or in part by the statute, the liability of the surety would also pro tanto be reduced or extinguished.

The words "unless it is otherwise provided by the contract" denote that although the liability of the surety is co- extensive with that of the principal debtor, he can fix or limit his liability. He may make himself liable for a fixed amount irrespective of the liability of the principal debtor.

Maharaja of Banaras vs Har Narayan Singh (ILR 1906) : The bond in question provided that in case of default by the lessee and non payment of by the sureties. The plaintiff would be entitled to realise the arrears from them personally or by attachment etc. The plaintiff brought action against the surety for arrears of rent as well as interest there on. The court held that the plaintiff was entitled to the arrears of rent only because the bond did not mention anything about the interest.

Extent of Surety's Liability (Section 128) :

Nature of Surety's Liability : It is co- extensive.

The fundamental principle about the surety's liability, as laid down in section 128, is that the liability of the surety is co- extensive with that of the principal debtor. The surety may, however, by an agreement place a limit upon his liability.

Surety's Liability :- The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract. In other words, the quantum of obligation of a surety is the same as that of the principal debtor unless there is a contract to the contrary.

Example : S guarantees to C the payment of a bill of exchange by P, the acceptor. The bill is dishonoured by P. S is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Co- Extensive : The surety is liable for what the principal debtor is liable. The liability of the surety can neither be more nor less than that of the principal debtor, though by a special contract, it may be made less than that of the principal debtor, but never greater. The cardinal rule is that the surety must not be made liable beyond the terms of his engagement.

The expression "co extensive with that of the principal debtor" shows the maximum extent of the surety's liability. He is liable for the whole of the amount for which the principal debtor is liable and he is liable for no more.

Case Law :

New Bank of India Vs Sajita Engg Works (AIR 1992 Ori 237) : Even where the suit was decreed against the principal debtor and he was directed to pay by the installments, dismissal of the suit against the surety was held to be not proper. The creditor was allowed to take into his possession the property of the guarantor which he had mortgaged as a part of his guarantee.

[KT Sutochana Vs Orissa SFC AIR 1992 Ori 157]

The section says that if the payment of a loan bond is guaranteed, surety is liable not only for the amount of the loan, but also for any interest and charges which may have become due on it.

Where the overdrafts of a company were guaranteed by the company's directors and the banker had recovered a part of the loan by disposing of certain goods belonging to the company, the Madras High Court held that the liability of the surety had gone down accordingly.

For a proceeding against the principal debtor, sureties are necessary parties.

Industrial Finance Corporation of India Vs PVK Papers Ltd (AIR 1992)

Further, a creditor is not bound to proceed first against the principal debtor before suing the surety, unless otherwise agreed. He can sue the surety without the suing the principal debtor.

References :

- 1) Business Law (6th edition) : MC Kuchhal and Vivek Kuchhal (Vikas Publishing House, Noida)
- 2) Indian Contract Act (12th edition) : RK Bangia (Allahabad Law Agency, Faridabad)
- 3) Indian Contract Act (12th edition) : Avtar Singh (Eastern Law Agency, Noida)