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# ANIL KUMAR AND OTHERS VS. CENTRAL BANK OF INDIA, AIR 1997 HP 5*

***Anil Kumar and Others*** …….Appellants

***Vs.***

***Central Bank of India and Others*** .....Respondents

## FACTS

**Anil Kumar and Others vs. Central Bank of India**

**Deciding Date: 4th January, 1996**

**Himachal Pradesh High Court**

**Case No.: R.S.A. No. 219 of 1984**

**Bench: Lokeshwar Singh Panta**

**Citation: 1996 Indlaw HP 41**
**AIR 1997 HP 5**

The case in hand deals as its subject a guarantee dispute in case of a loan transaction between the creditor and the surety post default in repayment of the loan by the principal debtors. Hence, it is very essential to firstly know the terms involved in a guarantee contract.

**SECTION 126, Indian Contract Act, 1872 defines a contract of guarantee as follows:-**

**A "contract of guarantee" is a contract to perform the promise, of discharge of 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**

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**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.**

Understanding the definition as stated above in accordance with the facts of the case.

1. **Formation of a Contract of Guarantee**
   M/s. Shere Punjab Cloth Depot and its sole proprietor Sh. Dharam Singh Bhatia took on loan (cash-credit facility) Rs. 13, 849 at rate of interest – 15% per annum from Central Bank of India located at Bhuntar in the district of Kullu. This agreement of providing cash-credit facility from time to time that is according to the requirements of the loan-takers was guaranteed by two people, namely, Sh. Roshan Lal and Santokh Singh. Hence, to state, M/s. Shere Punjab Cloth Depot and Sh. Dharam Singh Bhatia are the loan-takers from the above mentioned Bank. Therefore, they are the "principal debtors and Creditor respectively. This agreement of loan is guaranteed by Sh. Roshan Lal and Santokh Singh. Hence, they step into

   the shoes of the surety and as the facts suggest, they become co-sureties to this contract of loan. The duty of the surety arises if the principal debtors are unable or fail to repay off the debt loan. As the section highlighted above states, it is the primary or first liability of the principal debtors to clear off the debt. On their default to do so successfully, the surety's responsibility to repay the debt comes to the forefront. Hence, the sureties are bound to discharge the liability technically that of a third person under the contract of guarantee. This liability is to be discharged against the creditor who in the first instance furnished the loan.

2. **Declaration of a Collateral Security**
   The principal debtors as a security had also pledged their goods with the creditor bank.

3. **Communication of co-surety, Santokh Singh's unwillingness to stand as a surety henceforth as well as warnings against the fraudulent principal debtor**
   One of the sureties, namely, Santokh Singh via a letter sent to the manager of the creditor Bank had warned the latter that the principal debtor had plans to shut his business at Bhuntar for which he had taken loan and abscond. This showed his intention to evade from paying the loan amount. Given this situation, Central Bank of India was urged to not furnish any more cash-credit to the principal debtor. The Bank was also asked to take stern steps to make the principal debtor clear off the loan amount. Santokh Singh via the same letter made it clear that he wished to discontinue as a surety in this loan agreement as the principal debtor appeared to be fraudulent. Inspite of such forewarnings, the Bank continued to grant further loan to the principal debtor, namely, Sh. Dharam Singh Bhatia.

4. **Initiation of a suit against sureties for recovery of loan amount**
   As predicted, the principal debtor absconded and hence the Bank proceeded against the co-sureties for repayment of the loan amount. To achieve this purpose, the creditor bank filed a suit against the sureties and the principal debtor firstly under the trial court and then on appeal in the District Court. The court in the first instance gave a verdict that the Bank failed to prove the liability of the guarantors and hence, they shall not have to pay the loan amount. On appeal by the Bank in

the District Court, the court opined in favour of the Bank and against the sureties hence reversing the order of the trial court. The verdict was passed ex-parte against the principal debtor, Sh. Dharam Singh Bhatia as he did not contest the case.

5. **Dissolution of Santokh Singh's liability as a co-surety**
The court held that Santokh Singh could not be made liable as he had made it clear to discontinue from the services of standing as a guarantor and hence, the liability to pay the debt fell on the other surety, Sh. Roshan Lal.

6. **Appeal by Sh. Roshan Lal, surety against the order of the District Court**
Aggrieved by this decision, Sh. Roshan Lal moved to the High Court on appeal where he contended that he never wished to stand as a surety for Sh. Dharam Singh Bhatia's loan contract with the Central Bank of India. He was not aware that he was being made a guarantor as his signatures were fraudulently taken on blank papers and he did not consent to the nature of the agreement and his role as a surety. Also, he wanted to be discharged off the liability to pay the debt as his co-surety Santokh Singh had been duly released. Lastly, another point that he made was that the Bank should firstly, try to materialize the loan amount by selling off the pledged goods that were kept as security by the principal debtor with the Bank as well as the Insurance Company that insured the goods. He asserted that the Bank must utilize the deposited security first and then approach the surety if the security is inadequate to repay off the loan amount. It was further stated that section 141 of the Indian Contract Act, 1872 applied in this case as the Bank negligently did not encash its loan amount from the security and eventually lost possession of the same. Since, the creditor lost possession or parted with the security due to self-negligence, the surety must be discharged off the liability to pay owing to the same section which states, "…… 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".

7. **Pleadings by counsels on behalf of both the contending parties**
Counsel for Central Bank of India made pleadings to oppose the contentions of the appellant (Sh. Roshan Lal). The most central argument was that section 141 did not apply as the Bank was not negligent in parting with the security. It had tried its best to utilize the security, however, the money from the pledged goods went to a person named Jai Ram who, prior to the Bank, had furnished a loan to the fraudulent principal debtor Sh. Dharam Singh Bhatia. Therefore, when he moved the Court that his loan amount must be repaid using the pledged goods, the court too found it fit and hence the Bank received nothing. Also, the goods pledged were stolen once Sh. Bhatia had shut his shop only to be recovered by the police. Hence, the stolen goods were recovered, the insurance company could not be made liable to pay on grounds of theft of the goods and yet again, the Bank did not receive any amount to fulfil its loan amount. Hence, the Bank did not lose the security out of negligence. These arguments have been dealt further on in the submission.

8. **High court's order**
Finally, the High Court ruled in favour of the Respondent Bank and dismissed the appeal plea of the Appellant upholding the same rationale so used by the lower court-District Court that had earlier adjudicated the same matter.

## ANALYSIS

1. **The release of one surety from the guarantee contract should not discharge the other surety from liability.**
   It was contended by the counsel for the appellant, Sh. Roshan Lal that the appellant should also be discharged of his role as a surety as his co-surety had been duly released considering section 139 of the Indian Contract Act, 1872.

   **Held: Section 139 of the Act as mentioned above do not apply to the appellant and hence he shall not be discharged from a surety's liability.**

   ANALYSIS:-

   A. **Release of Santokh Singh as a surety under Section 139 of the Indian Contract Act, 1872**
      Santokh Singh while his tenure as a surety had forewarned the creditor bank, Central Bank of India that the principal debtor Sh. Dharam Singh Bhatia was planning to abandon his business in Kullu and abscond. Therefore, he was plotting to run away by deceiving the Bank which had granted it loan and not repay it back. Inspite, of such forewarnings via a letter to the Manager of the Bank dated 29th October, 1979, the Bank did not pay heed and continued to grant cash as loan to the fraudulent principal debtor. Santokh Singh via the same letter intimidated that he wished to discontinue as a surety for such a fraudulent man as he did not want to take the liability of payment of loan as a surety since he was sure that Mr. Bhatia would deceive and default in loan repayment. urged the Bank to take up steps to recover its money back from Mr. Bhatia.

      To analyze the above situation, it can be said that Mr. Santokh Singh did not revoke his role as a surety suddenly or not according to proper procedure to evade from paying of loan. He was fair in giving his withdrawal in a written letter to the concerned authorities in advance. As he informed of his withdrawal as a surety via a letter which was duly communicated to the Manger of the Bank, it cannot be said that Mr. Santokh Singh illegally withdrew himself from the contract of guarantee.

      The revocation to stand as a guarantor was in a written form and was successfully communicated to the desired authority. Hence, the revocation was guided entirely by procedure. Application of **Sections 139** upon Santokh Singh to discharge his liability is just due to the reason as explained below.

      **Section 139 states: If the creditor does an act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired the surety is discharged.**

      The reason as to why this section applies upon Santokh Singh because he had taken active steps to forewarn the creditor bank of the fraudulent plans of the principal debtor to shut his business and abscond without paying off the debt amount so that the liability to pay would eventually fall upon the sureties. Inspite of such warnings, the Bank continued its transactions with the principal debtor Hence, it can be aptly said that it was a wrong or a fault on the Bank's part to not act upon the warning as forwarded by Mr. Santokh Singh. If the Bank would have taken steps to recover the

loan amount from Mr. Bhatia following such warnings, the liability to repay the loan would not have fallen upon the sureties. Therefore, the Bank's omission to act accordingly damaged the rights of the sureties, one of them being Mr. Santokh Singh as the liability to repay the debt shifted to the sureties consequent to the principal debtor's absconding. The Bank had a duty, a responsibility to act upon the warning which it failed to do, hence this inaction would cause monetary damage to the sureties if they are now made to pay on behalf of a fraudulent principal debtor. The surety also will stand no right of indemnification or subrogation from Mr. Bhatia as he had made an escape. If only the Bank would have recovered its money from Mr. Bhatia following the warning, the surety in the first place would not have to pay on behalf of the principal debtor and hence, would not have to suffer any loss that needed to be made good by the principal debtor. Hence, the omission of the Bank to recover the money from the latter impaired or made it impossible for the surety, Mr. Santokh Singh to have his loss being made good.

Hence, following the above analogy, Mr. Singh was rightly discharged off the liability of that of a surety due to his active measures involved in his attempt in warning the creditor bank against the principal debtor. Hence, it was due to the creditor's fault, the Bank in this instance, its omission to act that made Santokh Singh as a surety liable to pay the loan amount. Also, the Bank's inaction impaired the rights of the surety to recover from the principal debtor. However, the timely discharge of Santokh Singh as a surety owing to his letter where he intended to discontinue as a guarantor saved him from suffering any loss.

The same **section of 139** is however not applicable when it comes to the other surety Mr. Roshan Lal as has been decreed rightly by the District Court as well as High Court. This is because Mr. Roshan Lal made no such attempt to withdraw himself as a guarantor as done by Mr. Santokh Singh.

Today, Mr. Santokh Singh could stand dissolved as a surety as he had made his intention of withdrawal as a surety clear via the letter. Mr. Roshan Lal on the other hand, did not make any such attempt to withdraw his guarantee and hence was a surety in the eyes of law. Therefore, on the default of the principal debtor, the secondary liability of the surety to repay the loan became primary and immediate. Hence, Mr. Roshan Lal's contention to be discharged off liability could not be granted as he did not ask for the same until he stood liable to pay.

Another point in this regard is that the Bank is a financial institution whose duty is to provide loan to ones who approach it for the same. It is not possible for a Bank who in a day sanctions hundreds of loans to keep a check on all its principal debtors. To achieve this purpose only, the concept of a guarantor was devised. A guarantor must be proactive in seeing that the principal debtor pays the loan on time. Therefore, the Bank was not able to act upon the warnings of Santokh Singh, therefore, this cannot be construed to be a major fault on the part of the Bank. It is not the duty of the Bank to keep a minute to minute check on their loan-takers. Sh. Roshan Lal like Santokh Singh should have kept a check on the principal debtor's actions and if any suspicions could be gauged, he should have withdrawn as a surety like Santokh Singh. Therefore, Sh. Roshan Lal cannot hope to escape liability on the grounds that it was the fault of the Bank to not have acted upon the warnings of Santokh Singh.

Section 139 of the Act shall not apply to him and he will not be discharged off liability due to an omission of the Bank to act. This is because, Santokh Singh was

aware of the principal debtor's fraudulent plans and he had accordingly warned the Bank's Manager. When the Bank did not pay heed to the warnings, Santokh Singh could say that the Bank was negligent or ignorant to not have acted, hence, he could have alleged that it was the fault of the Bank. However, when it comes to Mr. Roshan Lal, he was not even aware of the principal debtor's plans and Santokh Singh's letter to the Bank. Therefore, Mr. Roshan Lal did not have the knowledge that the Bank had a duty to perform and because of his own ignorance, he cannot allege that the Bank was at fault as he did not even know that the Bank had a duty to act upon the warnings. To summarize, Mr. Roshan Lal cannot as for a right to be discharged that he did not earn or have at all.

**B. Vague Argument with no evidence forwarded by the Appellant**

The other argument that Roshan Lal took was that he never signed on the proper contract papers of guarantee and was instead made to sign on blank papers. Due to this, he was unaware of the nature of the agreement and did not know that he was made to stand as a surety. This argument can be defeated on the face because, Mr. Roshan Lal, himself being a businessman is prudent enough to not sign on blank papers. His experience is enough to suggest that a man who is himself engaged in the world of business would not be so foolish so as to sign on papers blindly. It is without doubt that he knew of his role as a surety. Also, no evidence was forwarded to support his claim that his signatures were obtained on blank papers and hence, this contention is vague and appears false. Therefore, Roshan Lal cannot state that he never was a surety in this agreement of guarantee.

**C. Doctrine of "Vigilantibus non dormientibus"**
**The laws aid the vigilant and not those who slumber**

This doctrine is universally true in the legal domain and has been highlighted by the Supreme Court of India in the case of **Tilokchand Motichand and Others vs. H.B. Munshi and Another (1970 AIR 898)** This doctrine puts light on the significance of due diligence or verification. It is revealed from the acts of the case that the principal debtor Sh. Dharam Singh Bhatia earlier too defaulted to pay a loan he had taken from a person named Jai Ram. Hence, the tendency of the man can be gauged that he generally does not repay off debts taken. In such circumstances, it was the duty of the surety to verify whether the principal debtor had repaid loans on earlier occasion before he stood as a guarantor. He should have realized that a surety's liability is immediate for the default of a third party. The man should have been vigilant enough to keep a track of the principal debtor's actions like Santokh Singh.

The latter was vigilant or cautious enough to keep a check on Mr. Bhatia and therefore, he was able to furnish the warnings and get himself absolved off the liability of a surety. Mr. Lal on the other hand failed to do so. Therefore, he cannot plead the court to protect him for the fault or loss he suffered due to his own negligence or ignorance. The liability to pay the debt on default by the principal debtor for a surety is secondary. He must firstly be able to make sure that the principal debtor pays the debt for which he should have kept a track on Mr. Bhatia's activity to escape his own liability. He should have taken steps to see that Mr. Bhatia was available to repay the loan within the stipulated time. He could have avoided his own liability in this way. He also did not furnish any intimation, written or oral that he wished to withdraw as a surety like Mr. Santokh Singh. Hence, he was ignorant of his role as a surety and therefore, cannot ask the court to protect him for his own negligent omission.

**D. Applicability of Section 138 of the Indian Contract Act, 1872**

Also, invoking **section 138 of the Indian Contract Ac, 1872 which states:**

**Release of one co-surety does not discharge others: Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.**

Therefore, this section clearly states that release of one co-surety on valid grounds is not a compulsion upon the creditor to release another off his liability too. The creditor receives the right to hold the other surety liable for the entire amount or debt taken by the principal debtor. Therefore, release of Mr. Santokh Singh will not make it mandatory for the release of the other co-surety that is Sh. Roshan Lal.

Following the above arguments, it can be said Mr. Santokh Singh was rightfully discharged off his liability as a surety. The same grounds could not be used to discharge Sh. Roshan Lal of his liability.

2. **The appellant is not legally correct in contending that in presence of a security, the creditor must firstly utilize that to clear the loan and only if the security happens to be inadequate, should he proceed against the surety.**

The sole argument of the counsel for the appellant was that in presence of a security, the creditor must firstly conduct sale proceedings of the aid goods and try to realize its loan amount. The latter should not hold the surety liable for payment when he already has the security to utilize. Only if the security's sale value falls short of repaying the loan, can the appellant be approached. Therefore, it was asserted that the Bank must only realize or recover its unreturned debt by selling the goods kept as security by the principal debtor and hence should not make the surety pay initially.

**Held: Under Section 128 of the Indian Contract Act, 1872, the surety's liability is co-extensive in nature. This means, that in contracts of guarantee, a surety is liable to the same extent as that of a principal debtor, his liability shall stretch to the fullest extent that the principal debtor himself agreed upon in the contract of loan or debt.**

**Section 128 of the Indian Contract Act, 1872 states the 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.**

ANALYSIS:



**A. Applicability of Section 128 of the Indian Contract Act, 1872- Co-extensive liability of surety**

I agree with the decree of the court that a surety's liability is co-extensive with that of the principal debtor. This means that a surety is liable to the same extent as that of the principal debtor. The only difference is the time at which their respective liabilities arise. The principal debtor's liability comes first and hence it is called as primary liability. It is the duty of the principal debtor to firstly discharge his liability. It is only if he fails or defaults to do what he must primarily do, the role of a surety becomes important that is his liability was essentially secondary. On default by the principal debtor, the liability begins for the surety. Post default, the liability of the surety is immediate and the creditor can exercise his rights against the surety too.

**B. The creditor is not under the obligation to exhaust all remedies against the principal debtor first to hold the surety liable**

Another point that needs to be brought in here is that under the Indian Contract Act, in cases of guarantee where the principal debtor has failed to discharge his liability with it now falling upon the surety, the creditor has the right to exercise his right to have his money repaid by the surety while ignoring to sue the principal debtor.

**[1]"Co-extensive 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."**

**[2]"Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."**

**[3]"It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."**

**The same principle has been reiterated in the significant case of Bank of Bihar Ltd. Vs. Damodar Prasad and Another [1969] 1 SCR 620**

**Quoting from the judgement:**
**"It is the duty of the surety to pay the decretal amount.....The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety….The decree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes….."**

From the above, it can be summarized that the significance of a guarantor is not only to protect the principal debtor from any abuse by the creditor, it is also to safeguard the creditor's interests. In case, the principal debtor fails, the surety must protect the creditor from suffering loss. Since, a surety's liability is co-extensive with that of the principal debtor, the creditor may sue any one of them jointly or severally to recover his amount. In this regard, it is completely at the discretion of the creditor to decide how he wishes to exercise his right. He may utilize the security or proceed against the principal debtor or the surety. Even if he does not proceed against the principal debtor at all and sues the surety only, his action will stand justified as it is completely based on the will of the creditor. Therefore, in our present case, the contention of the appellant is to direct the bank to first exhaust its remedies against the principal debtor by using the security which had been deposited by him and then approach the surety. This step is not supported by law, the creditor cannot be asked to exhaust his remedies against the principal debtor first and only then to approach the surety.

Hence, the Bank is not under an obligation to either sue or utilize the principal debtor's security that is to completely exhaust all remedies available to him against the principal debtor and only then move against the surety. Since, a surety is equally liable, proceedings against him are justified without even bringing the principal debtor into the picture.

[1] Pollock and Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at Page 728.
[2] Chitty on Contracts, 24th Edition Vol 2 at Page 1031 Para 4831.
[3] Halsbury's Laws of England, 4th Edition at Page 87 Para 159.

**C. Discretion of Creditor is of prime importance**

Secondly, what will be discussed is of prime importance. In the presence of a security as deposited by the principal debtor, is it mandatory for the creditor to realize his loan amount by utilizing the security first and then only approach the surety if the security clears the debt inadequately.

To answer this, the case of **State Bank of India vs. Indexport Registered (1992 Indlaw SC 1185)** will be discussed. The case's issue was the same as highlighted above that in presence of a mortgage or security, should the creditor firstly use the security or is it justified in asking the surety to pay the amount instead without using the security.

**It was held, "Where the money decree was against all the defendants including the guarantor and a mortgage decree against one of the defendants who had mortgaged the shop with the plaintiff bank, so far as the said shop was concerned and the decree did not put any fetter on the right of the decree-holder to execute it against any party whether as a money decree or as a mortgage decree, the decree-holder would be entitled to proceed against the guarantor first for the execution of the decree. Moreover, it is the right of the decree-holder to proceed with it in a way he likes, Section 128 of the Indian Contract Act itself provides that."**

The case as a precedent stated that it was at the discretion of the creditor completely as to whether he wants to execute a money decree against a person first or a mortgage decree. The creditor will be entitled to have his way. If going by the earlier point in the analysis, that a creditor may choose not to sue the principal debtor and instead sue the surety, he will be allowed to do so because it shall be his discretion completely, the same analogy can be used in this situation where the discretion to sell the mortgage or security or recover it from the surety will again be completely the creditor's. All this is because of **section 128 of the Indian Contract Act, 1872** which holds the surety's liability co-extensive or to the same extent as that of the principal debtor's.

Hence, I shall state that the law states that the guarantor cannot direct the creditor as to how the latter should recover his debt, it is the creditor who is to decide how he wishes to realize the debt amount. Due to the surety's co-extensive liability with that of the principal debtor, the creditor may sue the surety instead of the principal debtor to realize his debt as upon the default of the principal debtor, the liability of the surety too becomes immediate. According to the same analogy a creditor may according to his will choose to sue the surety to realize its debt instead of selling the security.

**3. The Central Bank of India did not act negligently in parting with or losing the security provided by the principal debtor and therefore, the surety, Sh. Roshan Lal should not be discharged off the liability to pay the loan amount.**

Reviving the facts of the case, it is known that at the time of taking cash-credit facility from the Central Bank of India, the sole proprietor of M/s. Shere Punjab Cloth Depot, Sh. Dharam Singh Bhatia had pledged the goods that he manufactured as part of his business with the Bank. This means, that a collateral security by way of the goods was also furnished by the principal debtor. This security is furnished in circumstances where the principal debtor gives an additional security that in case, he defaults to repay the debt, the creditor has the right to attach or sell the given security to recover the loan amount. The goods were also insured with an insurance company. The events unfold like this that once Mr. Bhatia absconded shutting his business in Bhuntar, there was a theft of the goods from

the shop. Eventually, the stolen goods were recovered by the police. Therefore, the Insurance Company did not feature in the picture and no money was granted by the Insurance Company.

Given the above facts, the appellant, Sh. Roshal Lal, the surety contented that the Bank should have attached or sold off the security in order to recover the debt amount and not hold the surety liable to pay instead. Only if the security value would fall short or inadequate in paying off the loan completely, should the surety be called upon to pay the rest. By selling off the goods, it would be possible for the Bank to recover the money and this would release the security from having to pay on behalf of the principle debtor. It was stated that the Bank was negligent to not have done the above and consequently had lost possession of the goods to a third person Jai Ram. It had parted with the security over which even the surety had his rights. Under **section 141 of the Indian Contract Act, 1872**, it is stated that if the creditor without the approval of the surety loses or parts with the security deposited by the principal debtor, then the surety shall be discharged to the extent of the value of the security. Therefore, the appellant too wished to be discharged off liability henceforth, owing to his contention that the Bank lost the deposited security to Jai Ram due to utter negligence.

**Section 141 of the Indian Contract Act, 1872 states the Surety's right to benefit of creditor's securities**

**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.**

**Held: The Court sided with the contention of the counsel for the Bank and said that the Bank was not negligent in not utilizing the security goods. Since, there was no fault on the part of the creditor in parting with the security, the surety could not be discharged off his liability.**

ANALYSIS:

**A. Non-applicability of Section 141 of the Indian Contract Act, 1872 on Sh. Roshan Lal**

The Creditor Bank in its arguments made it very clear that the sole concern of it is to recover the debt amount. For this, as a matter of fact the Bank had attempted to utilize the security goods by selling the same to recover the debt. In order to achieve the purpose, the bank contended a case against Mr. Jai Ram who on an earlier had given a loan to the same principal debtor- Sh. Dharam Singh Bhatia. The same fate fell upon Mr. Jai Ram as Mr. Bhatia did not clear his debt. On grounds of fairness and also because Jai Ram's loan was an earlier instance to that of the Bank giving loan, the court allowed Jai Ram to utilize the security leaving the Bank with nothing. Also, the Bank could have utilized the insurance amount as certain goods were stolen from the shop premises of the absconded principal debtor, but eventually, the said goods were recovered by the police and therefore, the possibility of gaining the insurance amount due to theft of goods was also nullified. The above instances prove that it was not the intention of the Bank to aggrieve the surety by making him pay the debt. It had tried its best to get hold of the security but had to part with it not due to any fault or negligence.

**B. No scope of retrieving money from Insurance Company**

Also, there was no scope from recovering money from the insurance company as insurance clause could not be invoked due to recovery of the stolen goods. Therefore, it can be aptly said without a doubt, that the Bank did not lose or part with the security but could not use the same for other valid reasons. Therefore, section 141 which talks about losing or parting with the security by the creditor does not apply here and hence, the surety cannot be discharged off his liability. There was no negligence on the part of the Bank too as it tried its best to use the security, it even contested a case for the same. Therefore, the instance of the Bank not able to use the security cannot be termed to be losing or parting with the same. Following this logic, the surety cannot be discharged off his liability.

The Bank also has to protect its own interests first. The concept of guarantee evolved not only to safeguard the interests of the principal debtor against the abuse of the creditor, but also to protect from loss the creditor too. If the creditor would not be protected in these type of guarantee contracts, then principal debtors would refrain from repaying debts in the first place. However, the presence of a surety paying instead of the principal debtor on the latter's default gives a form of security that the creditor would receive his money back. Therefore, it is not illegal on the part of the Bank if it tried to recover the debt amount from the surety. The role of a surety is all about discharging the liability of a third party due to the latter's default to do the same. The bank in this case is not asking for anything extraordinary but is just demanding performance of the role of a surety in guarantee contracts on default of the principal debtor.

Hence, the Bank's failure to utilize the security does not arise out of a negligent loss of the same with no consent from the surety. It tried its best to regain from the security but lost it to a prior creditor of the same principal debtor Jai Ram. No money could be gained from the Insurance Company as the stolen goods were restored by the police. Therefore, the surety cannot be discharged from liability under the grounds of reason that section 141 of the Indian Contract Act, 1872 provide.

## CONCLUSION

1. **The release of one surety from the guarantee contract does not discharge the other surety from liability.**

- Combining the analysis of non-applicability of section 139 of the Indian Contract Act on the appellant and applicability of the Doctrine of Vigilantibus non dormientibus (The laws aid the vigilant and not those who slumber), it can be said that Santokh Singh, the other surety played a proactive role in keeping a check on the principal debtor and communicated the latters's fraudulent plans to not repay the debt to the Manager of the creditor Bank via a letter. He also communicated that he wished to absolve or end his role as a surety to Sh. Dharam Singh Bhatia and also urged the Bank to take steps immediately to realize its debt from the principal debtor itself. Santokh Singh played his role successfully and the Bank not acting upon his warnings was a matter of negligence on its part. It was the Bank's fault and if for a faulty act or omission of the creditor, the surety is later held liable to bear the damage, it will be violative of section 139 of the Act which states clearly that for a faulty act or omission on part of the creditor, the surety's rights are impaired or he has to

suffer loss, then he can be discharged from his role of a surety. Therefore, Santokh Singh was ably discharged under section 139 of the Act. It would not have been fair if he would be made to still pay and suffer losses as a surety for an omission of the creditor. Since the principal debtor had already absconded before the suit was even filed, the surety held no right of subrogation or indemnification from the principal debtor himself and therefore, his eventual remedy would be impaired.

However, Sh. Roshan Lal was ignorant of his role as a guarantor and did not keep a check on Mr. Bhatia. He did not send any communication to the Bank of his desire to withdraw as a surety too and therefore, must continue to be a surety. He was in the first place not aware of the fact that Mr. Bhatia had plans to deceive the Bank and escape, he was not aware of Santokh Singh's attempt to warn the Bank and eventually, could not gauge that the Bank had a duty to work upon the warnings of Santokh Singh. A person who was not aware that he had a right in the first instance cannot claim later that his right has been violated. This is against the universal legal doctrine already highlighted above. The appellant was not aware that the omission of the Bank to act against the principal debtor was violative of the right of sureties received under section 139 of the Indian Contract Act, 1872. The appellant was completely ignorant that by omitting to act, the Bank had impaired a right that the surety was entitled to, thereby discharging the surety. Due to his ignorance, the appellant cannot claim his discharge from the role of a surety. Since, he did not make any attempt to withdraw as a surety when he had the time and scope, now that he is faced with liability, he cannot request to be discharged. Therefore, he shall continue to be a surety.

- Under Section 138 of the Indian Contract Act, 1872, release of one co-surety does not discharge the liability of another. Hence, the contention of the appellant that the release of Santokh Singh from the role of a co-surety should allow his own discharge as a surety invoking section 138 of the Act is not justified.

- The other argument by the appellant that since he was made to sign on blank papers, he did not possess the knowledge that he was being made a surety for the principal debtor Sh. Dharam Singh Bhatia and that he was entering into a contract of guarantee cannot be relied upon. This is because, Sh. Roshan Lal himself being a businessman would not be foolish or ignorant as to have signed upon blank papers. With his experience of occasional transactions with the respondent bank as the facts suggest, he would not be so naive as to sign upon blank papers. This arguments falls flat all the more as the counsel for the appellant could not furnish any evidence that his client's signatures were taken upon blank papers or he was under coercion.



**2. The appellant is not legally correct in contending that in presence of a security, the creditor must firstly utilize that to clear the loan and only if the security happens to be inadequate, should he proceed against the surety.**

- An analysis of Section 128 of the Indian Contract Act and the cases of Bank of Bihar Ltd. Vs. Damodar Prasad and Another [1969] 1 SCR 620 and State Bank of India vs. Indexport Registered (1992 Indlaw SC 1185) states that the law gives the creditor the discretion or freedom in case of the principal debtor's default to pay back the debt as to

how he wishes to recover the amount. Under Section 128 of the Act, a surety's liability is co-extensive with that of the principal debtor's that is to the same extent as that of the latter and also immediate once the default has taken place. In such circumstances, the guarantor cannot take the defence that the creditor must proceed against utilizing the deposited security to recover the debt first since it exists and discharge the surety from having to pay instead. The precedents also suggest that since a surety's liability is now immediate owing to default by the principal debtor, the creditor shall himself decide whether he wants to recover the debt by selling the security or by making the surety pay for it. Section 128 also states that it shall not be illegal if the creditor chooses to sue only the surety and not the principal debtor for recovery of its debt. He is allowed to do so under the able ambit of law.

- This will become clear if a particular line can be quoted from the case Bank of Bihar Ltd. Vs. Damodar Prasad and Another [1969] 1 SCR 620:-
  "It is the right of the decree-holder to proceed with it in a way he likes….."
  Hence, section 128 comes to the rescue of creditors in case of defaulters and provides them with the complete discretion to execute a suit either against the principal debtor or against a surety or realize it by selling the security. It has been left at the complete will of the creditor. Therefore, the surety cannot allege that the creditor should proceed against the security first and then the surety if the security value is found to be inadequate jointly or severally.

**3. The Central Bank of India did not act negligently in parting with or losing the security provided by the principal debtor and therefore, the surety, Sh. Roshan Lal should not be discharged off the liability to pay the loan amount.**

- The analysis clearly takes care of the actual facts of the case and is able to prove that the contention of the appellant is flawed. The appellant stated that the bank was negligent in parting with the security so deposited by the principal debtor. They did so without the consent of the surety and lost the security over which even the surety has a right. Since, the security is done away with, it has impaired the rights of the surety to recover for his losses from the security once he makes payment to the creditor.

However the case facts suggest

- The Bank was not negligent in parting with the security, it tried its best to gain possession over it for the purpose of its sale that could have eventually given rise to the loan amount. The Bank had to contest a case against a third person named Jai Ram who on an earlier occasion had given a loan to the same principal debtor Sh. Dharam Singh Bhatia which had not been repaid. Therefore, Jai Ram asserted that he too had a right over the security in order to realize his loss. In this situation the court said that since, Jai Ram's loss is from a previous cause, he is entitled to the security. Hence, the Bank could not retrieve the security and therefore, could not sell the same to recover its debt amount. Therefore, the Bank's attempt to utilize the security cannot be ignored, the argument that the creditor was negligent in parting with the security can be well turned down.

- To state the facts, post Mr. Bhatia shutting his business in Kullu and absconding, there was a theft of goods from his shop. The goods were insured and hence, on their theft, the Insurance Company would be obliged to pay for the loss suffered. The appellant contended that the Bank should have received the money from the Insurance Company to recover its loan amount. However, the true facts of the case are somewhat different. The stolen goods were recovered by the police and hence the Insurance Company did not have to pay any amount for the theft. Therefore, the Bank was not left with a scope to recover from the Insurance Company either.

- Therefore, the goods that were a security for the Bank went to Jai Ram and there was no theft for the Insurance Company to provide money for as the stolen goods were found by the police. Due to these circumstances, the Bank received no money either from the sale of the security or from the Insurance Company. Hence, it was left with no choice but to sue the surety whose liability to pay for the debt taken by the principal debtor had now become immediate since the latter had defaulted owing to a surety's co-extensive liability to the same extent as that of the principal debtor.

To conclude, the judgement as given by the District Court as well as the High Court regarding the present case seems entirely justified and fair in the eyes of law.