
CONTINUING GUARANTEE UNDER SECTION 129 OF THE INDIAN CONTRACT ACT, 1872

Ashita Sharma, B.A.LL.B., Symbiosis Law School, Noida

Introduction:

The concept of 'Continuing Guarantee' under Section 129 is deeply rooted in the law of contract which is a crucial instrument in the modern commercial transactions. This section provides the statutory definition of a type of contract of guarantee which provides a framework for understanding guarantees that extend beyond single transaction to a series of transactions. The Supreme Court of India in the landmark case of *State Bank of India v Indexport Registered* [1992] 2 SCC 338 provided an authoritative interpretation of this section establishing that continuing guarantee creates an ongoing assurance rather than a onetime promise. The endeavour of this project is the deep analysis of the concept of continuing guarantee focussing on the prescribed legal principles and its implications in the commercial settings. The continuing guarantee is an open-ended guarantee which creates a liability on the surety for multiple transactions against a single guarantee which can indefinitely bind the surety for future transactions. This creates an unlimited liability on the surety providing an unjust enrichment to the principal debtor at the expense of the surety. The Indian Contract Act, 1872 acknowledges this by providing a special right to the surety under the concept of continuing guarantee to revoke his guarantee under specific circumstances which was not granted in the contract of specific guarantee under Section 126. The fundamental nature of the continuing guarantee which is on-going and covers multiple transactions over an extended period finds extensive application in the banking and other commercial sectors which sets it apart from the simple guarantee providing a long-term financial security for the creditors while protecting the interest of the guarantor. It contributes to the study of the contract of guarantee which is a special contract under the Indian Contract Act, 1872 delving deeper into the complexities of a continuing guarantee citing its relevance in the modern commercial and financial sector particularly the banking sector covering the credit and overdraft facility ensuring business growth by providing flexible credit arrangements serving the interest of all the parties involved.

Research Objectives:

- i) To analyse the legal enforceability of the implied or express guarantee under Indian and common law jurisdiction.
- ii) To determine the impact of the death of principal debtor and surety on the contract of continuing guarantee under the Indian Contract Act, 1872 and comparing its application and implication to the English Common law.

Research Questions:

- i) Whether the contract of continuing guarantee under Section 129 incurs indefinite liability on a surety for multiple transactions against a single guarantee?
- ii) What are the legal implications on the liability of a surety in an overdraft facility at a bank if the principal debtor utilizes more than the predetermined limit under Section 129?
- iii) Whether the bank can recover the guaranteed amount of a credit facility from the estate of a surety after his death if the surety has authorised the liability on his estate for future transactions?

Main Content:

Concept under the law:

Continuing Guarantee under Section 129 of the Indian Contract Act, 1872 is a type of the contract of guarantee under Section 126 which is a special contract which involves a tripartite arrangement between the parties to the contract which differentiates it from the simple contracts having a bipartite relationship. This tripartite arrangement was extensively analysed in the ***State Bank of India v Indexport Registered [1992] 2 SCC 338***¹ by the Supreme Court of India defining it to be a promise to perform the promise by the surety to incur the liability of the principal debtor in case of his default. However, the primary liability lies on the principal debtor only as the consideration for the entire arrangement is the benefit of the principal debtor. A continuing guarantee exhibits distinct characteristics which set it apart from the simple guarantee under Section 126 which fundamentally lies in its ongoing nature which extends

¹ State Bank of India v Indexport Registered [1992] 2 SCC 338

beyond a single transaction and covers multiple transactions. The continuing nature of the continuing guarantee is emphasized in *Punjab National Bank v Vikam Cotton Mills* [1970] 1 SCC 1² where it was established by the court that the continuing guarantee remains active until properly revoked or terminated by the surety against the creditor. The contract of simple guarantee under Section 126 does not give the right to a surety to revoke his guarantee but the contract of continuing guarantee gives a right to the surety to revoke his guarantee under Section 130 and 131. This right reflects the principle that no one should be indefinitely bound by a contract of guarantee for future transactions which was emphasized by the court in *National Provincial Bank of England v Brackenbury* [1906] 22 TLR 797³ by highlighting that the right of revocation is inherent in the nature of continuing guarantee under Section 129.

Essentials of the concept:

The contract of continuing guarantee under Section 129 is a type of the contract of guarantee and requires all the essentials of the contract of guarantee under Section 126 to be fulfilled as per the provisions of the Indian Contract Act, 1872. The fundamental requirement in the contract of guarantee is the tripartite arrangement where the principal agreement is between the principal debtor and the creditor which becomes the basis for the guarantee that creates the guarantee obligation giving rise to the secondary agreement between the surety (guarantor) and the creditor. At the desire of the surety who is the promisor, the consideration is moving from the creditor who is the promisee to the principal debtor. So, the consideration for the guarantee is the benefit of the principal debtor because of which the primary liability lies on the principal debtor only. In the case of the default of the principal debtor when the liability of the surety becomes certain, it gives rise to a third implied indemnity agreement which creates a right in the favour of the surety against the principal debtor by the principle of subrogation where default must be established as a matter of fact. While Section 126 permits both implied or express guarantee but the courts emphasize the importance of written guarantees in commercial transactions. The basic structure of a contract of guarantee is defined in section 126 along with which all the essentials of a contract defined under Section 10 which is competency of the parties, free consent, lawful consideration and lawful object must be satisfied to be a valid contract of guarantee⁴. The fundamental essential of a continuing guarantee under Section 129

² Punjab National Bank v Vikam Cotton Mills [1970] 1 SCC 1

³ National Provincial Bank of England v Brackenbury [1906] 22 TLR 797

⁴ The Indian Contract Act 1872

is its on-going nature, which should extend to a series of transactions over an extended period which remains active until properly revoked by the surety by a proper written notice properly communicated against the creditor under Section 130 or terminated by death of the surety under Section 131.

Case Laws:

In the *State Bank of India and Ors. v Gourishankar Poddar and Ors.* [2025] NCLAT 13⁵, a corporate debtor secured financial assistance in terms of loan from the State Bank of India ('SBI') in which Mr. Gourishankar (defendant) who was the director of the corporate debtor executed a deed of continuous guarantee in the favour of the SBI. The guarantee explicitly stated that it was irrevocable, unconditional and covered all the present and future financial obligations of the Corporate Debtor ('CD'). In 2013, the CD defaulted on his repayment obligations and the account was classified as non-performing assets which triggered SBI's right to enforce its right against the surety. At the same time, the defendant resigned from his position of the director of the CD and informed the creditor through a proper written notice. But the creditor continued to consider him as the director of CD and surety for the contract of continuing guarantee. It was held that the surety had a right to revoke his continuing guarantee under Section 130 and a written notice was properly communicated to the creditor because of which the contract of continuing guarantee stands revoked, and the creditor is absolved from any right to make the surety liable for any subsequent future transactions and the right to revoke is inherent in the continuing guarantee which cannot be abrogated by the creditor by stipulating it in the contract.

In *HDFC Bank Ltd. and Ors. v State NCT of Delhi and Ors.* [2024] DHC 262⁶, Mr Bharat ('surety') bought a property in New Delhi through Mr. Suresh Mahajan who asked him to become surety for Mr. Karamveer ('PD') to obtain a loan facility from HDFC bank ('creditor') for which he was assured a monthly payment of Rs. 1,50,000/- for a period of two years. The surety went to the bank to sign some documents and the documents of the property he recently bought were deposited with the bank as a security. The surety received no such payment from the PD even after the expiry of two years period and was refused the title of his property when he informed the bank that his role as a surety had come to an end. The HDFC bank-initiated

⁵ State Bank of India and Ors. v Gourishankar Poddar and Ors. [2025] NCLAT 13

⁶ HDFC Bank Ltd. and Ors. v State NCT of Delhi and Ors. [2024] DHC 262

recovery proceedings against the property of the surety deposited with them and the surety came to know that PD had changed the material terms of the loan and extended the time of the contract of guarantee without the consent of the surety. It was held by the court that the contract of continuing guarantee was terminated automatically by the expiry of a specified period of two years as per the provisions of Indian Contract act, 1872. As per Section 133, the surety was discharged as to the subsequent future transactions when the variance in terms of loan facility was made in the original agreement without the consent of the surety because of which his liability is limited to the extent of the two years period only.

In *Lalit Kumar Jain v Union of India and Ors.* [2021] 9 SCC 321⁷, the Supreme Court of India held that resolution passed by the central government seeking an amendment in the Insolvency and Bankruptcy Code 2016 to release the corporate debtor from its liability to the creditor by an involuntary process, i.e. by the operation of law, due to liquidation or insolvent proceedings does not absolve the surety of his liabilities under the contract of guarantee. The discharge of surety by variance, by the discharge of principal debtor, by the acts or omissions of the creditor through a voluntary act under Section 130 to 139 are specified in the Indian Contract Act, 1872 will ultimately decide the extent of liability of the surety upholding the validity of the impugned resolution.

Problems:

The fundamental characteristic of the continuing guarantee is its ongoing nature which distinguishes it from the simple guarantee but the contract of guarantee under Section 126 can only be discharged and cannot be revoked by the surety. Whereas the right to revoke or restrict is inherent in the nature of the contract of continuing guarantee under Section 129 reflecting that no one should be indefinitely bound by the continuing guarantee forming an essential component of a surety's protection under Indian Contract Act, 1872. The contract of continuing guarantee finds extensive application in various facilities of the banking sector such as credit card and overdraft facility. Overdraft arrangements are a classic example of continuing guarantee which extends over a series of transactions allowing the withdrawal of more money than deposited in the bank account up to a predetermined limit. The surety remains liable only for any amount utilized within that limit as Section 128 provides for the co-extensive liability of the surety as that of principal debtor, but this section is qualified with a right extended to the

⁷ Lalit Kumar Jain v Union of India and Ors. [2021] 9 SCC 321

surety to restrict his liability by explicitly stating it in the contract ensuring the freedom of contract. Section 131 establishes that the death of a surety automatically revokes the continuing guarantee for future transactions recognising the individual capacity and creditworthiness of a surety⁸. This section is qualified section where the surety by stipulating explicitly in the contract can make his estate liable for future transactions post his death. This framework has proven crucial in modern commercial relationships, particularly banking and finance sector where the liability can be extended to the estate of the surety by authorisation post his death as well.

Comparative Analysis:

The Indian Contract Act, 1872 codified the contract of continuing guarantee in India drawing its inspirations from English common law principles while adapting them to Indian conditions. The contract of continuing guarantee in England is governed by the **Contracts (Applicable Law) Act, 1990**⁹ while the **Indian Contract Act, 1872** governs it in India. The landmark case of *Birkmyr v Darnell* [1704] established that the contract of continuing guarantee must be in writing to be legally enforceable laid down in **Statute of Frauds 1677**¹⁰ whereas in India Section 126 states that a guarantee can be oral or written but the Supreme Court of India in *Central Bank of India v C.L. Vimla* [2015] recommended that commercial guarantees should be preferably in writing to avoid future disputes on terms and conditions. The contract of continuing guarantee remains unaffected by the death of the principal debtor and the creditor can recover the amount from the surety or the estate of the principal debtor in both Indian and common law jurisdiction, but the death of the surety leads to an automatic discharge of the surety from the guarantee as to future transactions in India whereas in English law the creditor should send a proper notice to the legal representatives of the surety to terminate the contract of guarantee and if the guarantee is divisible revoked by the notice of the death and if the guarantee is entire, the surety's estate is liable for the whole amount¹¹. The surety can revoke his continuing guarantee by giving written notice to the creditor under both jurisdictions, but the English courts also determine the validity of the notice in terms of reasonability of terms and conditions. The insanity of the surety is also a valid ground of revocation of guarantee

⁸ Wayne Courtney, 'Indemnity and Guarantee' [2024] 2 FICL 439

⁹ The Contracts (Applicable Law) Act 1990

¹⁰ Statute of Frauds 1677

¹¹ Avtar Singh, Contract and Specific Relief (13th edn, Eastern Book Co 2017)

under English law whereas it is not explicitly stated in Indian law¹². The Indian Contract Act incorporated the essence of judicial wisdom of the English common law while providing a structured framework suitable for Indian commercial practises.

Gaps and Challenges:

The contract of continuing guarantee is a contract to perform the promise and discharge the liability of a third party in case of default which depends on the personal and professional relationships and creditworthiness of the tripartite arrangement involved. The introduction of e-commerce in the legal and commercial transactions includes a risk of authentication and verification of the parties entering the contract questioning the trustworthiness of the surety. The cyber security concerns can result in unauthorised alterations in the terms and conditions of the contract, modification of the material conditions by data theft and hacking, unverified e-signatures and inconsistencies of structured terms and conditions. The validity of the e-contracts across different jurisdictions also poses challenges for the creditor to rely on the promise of the surety for the discharge of the liability. The consideration of the digital notices through e-mails and messaging apps for the revocation of a guarantee against the creditor also poses authenticity and legal enforceability challenges. The introduction of digital landscapes for the legal and financial transactions provides a convenient and useful framework for the modern commercial transactions but the implementation of secure network, adequate technological infrastructure and authentic digital verification can validate the concept of e-contracts of continuing guarantee in modern commercial transactions.

Conclusion:

The contract of continuing guarantee which is defined by Section 129 of Indian Contract Act, 1872 is a crucial instrument in modern commercial transactions which provides a framework for understanding guarantees that extend beyond a single transaction to cover a series of transactions over time. The on-going assurance of the continuing guarantee rather than one time assurance is a vital tool for financial and commercial sectors extending business security over an extended period while safeguarding the interest of the creditor against the principal debtor. The Supreme Court held that the right of revocation is inherent in the nature of continuing guarantee which provides a freedom of contract to the surety underscoring the

¹² Mindy Chen-Wishart, *Contract Law* (7th edn, Oxford University Press 2022)

legislative intent to protect the surety from indefinite liability while maintaining the sanctity of existing transactions. The concept of contract of guarantee is a foundational principle of the special contracts under the law of contracts which highlights the tripartite arrangement of the parties emphasising the commitment to perform the promise providing a guarantee to protect the interest of the creditor ensuring personal creditworthiness and integrity of the surety for the benefit of the principal debtor which marks a sufficient consideration for a contract of guarantee. It highlights the importance of a critical balance between mutual trust, collaborative environment, alignment with contractual needs, expectations and professional requirements. Therefore, the contract of continuing guarantee plays a significant role in modern commercial sectors specially banking and financial sectors offering a wide range of facilities such as credit card and overdraft facilities proposing flexibility to the transactions serving the interest and safeguarding the concerns while promoting stability in commercial relationships.

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Legislations:

- i) Contracts (Applicable Law) Act 1990
- ii) Indian Contract Act 1872
- iii) Statute of Frauds 1677