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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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SECTION 131 OF CONTRACTS ACT AN INJUSTICE TO LEGAL HEIRS?

AUTHORED BY - ISABEL SAVIO BALA
ADVOCATE & GUEST LECTURER

Section 131 of Indian contract act 1872, states revocation of continuing guarantee by surety's death. The death of the surety operates in the absence of any contract to the contrary as a revocation of a continuing guarantee so far as regards future transactions.

Section 50(1) of Cpc of 1908 states that in the event that a judgement debtor dies before the decree has been fully satisfied the holder of the decree may apply to the court which has passed it to execute the same against the legal representative of the deceased.

Section 52(1) of Cpc states where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased it may be executed by the attachment and sale of any such property.

Is it justified to hold the legal heirs of a surety to a guarantee, what would the implications be. Can the liability be restricted only up to the inheritance of the legal heir or the estate of the surety.

There are a very few case laws that have addressed this, we can review these case laws and draw a conclusion as to the liability of legal heirs of a surety.

What if the guarantor dies and the liability continues as in the case of Muhammad Insha Allah khan vs Muhammad Ubed – Ullah and others¹, section 131 says termination of surety as far as future obligations do arise, the court in the above case stated that the guarantee continues for future obligations as well. The court took the wording of the security bond whereby the sureties have agreed that they would bind themselves and their heirs, unless the surety is terminated. The court ruled that

¹ (1921) ALL 287: 43 ALL 132 (DB)

the death of the surety did not terminate the guarantee.

In each case contract between the parties must be looked into in order to determine whether the contract of the surety has been revoked by the death of the surety or not. If there is a contract that the death of the surety would not operate as a revocation then the contract of guarantee continues after the death of the surety.²

When the agreement clearly shows that the guarantee was to continue for all future transactions except when the guarantor disclaimed from his liability through a written statement and the deed mentions that guarantor is merely a surety, it was held that between the bank and the guarantor the surety is the principal debtor and his liability would be co-extensive with that of the borrower.³

The high court of madras has stated that section 131 clearly provides that in the case of death of guarantor, the date of guarantee/ continuing of the guarantee executed in favor of the bank stands revoked in respect of future transactions. Hence, we have no hesitation in holding that the liability of the guarantor cannot be extinguished on his death so far, the liability which existed on the date of the death of the guarantor. It is well settled that on the death of the guarantor, the liability exists and such liability can be fastened on the estate of the deceased, being inherited by his legal heirs and the creditor can recover the dues out of the estate of the deceased.⁴

Through various case laws the courts have arrived at certain reasoning's behind passing on liability to the legal heirs with regard to continuous guarantees. When a surety gives a guarantee for a continuous period like collection of rents, or vouching the behavior of the employee, or in commercial transactions. The creditor is relying on the guarantee which is in addition to the security provided by the principal debtor. If the liability should be terminated with the death of the surety and the provision of notice by the legal heirs, the creditor would need to seek a new surety for an existing or a running risk. Section 131 defends the rights of the legal heirs wherein their liability is only for past debts. If the liability is to be extended then a clause has to be incorporated where in the legal heirs will bear the burden for an indefinite period. Such clauses would create a barrier for sureties to tie up their

² P C Markanda, The Law of Contract, Volume 2-page 1479. Durga Priya Choudhury vs Durga Pada Roy AIR 1928 Cal 204: 55 Cal 154 (DB).

³ P C Markanda, The Law of Contract, Volume 2-page 1479. H.R Basavaraj v Canara Bank, (2010) 12 SCC 458.

⁴ Mulla Dinshaw, The Indian Contract Act, 14th Edition page 304. State Bank of India v Jayanthi, AIR 2011 Mad 179.

estate and pass on their liability to their legal heirs. The outcome being that clauses are incorporated to extend liability for future obligations to the legal heirs provided an opportunity is given for them to terminate with a notice served to the creditor and other sureties with either a time frame of 3 months or an immediate relief.

In continuation to the above understanding the courts in the case of Gopal Singh V Bhavani Prasad⁵, 1888 ILR 10 ALL 530 stated that was contested by the legal heirs of two sureties, that the respective parties clearly intended that the respective guarantees should continue and not be determinable during the currency of the lease, and that the payment of the whole of the rent which might become due under the lease should be guaranteed. Here the courts have disregarded the need to have a contract to the contrary to bind the legal heirs to a continuing obligation and have considered the circumstances and implied that the guarantee is a continuing one and thus liability rests even when the default of the principal debtor was after the death of the surety.

Can it be inferred that the liability of the surety is not revoked with the death of the surety in all cases. Would it be in the interest of the legal heirs to create an extended liability.

The legal heirs have the right of the surety to be indemnified by the principal debtor. The legal heirs of the surety after having paid the debt of the principal debtor become the creditors and can sue the principal debtor to make good their loss. Thus, even though the liability has passed down to the legal heirs of the surety so does the rights too. Thus, it is not an injustice to the legal heirs, debts of the father are born by the heirs as a moral obligation. The liability of the deceased surety can be imposed against his legal heirs but only to the extent of the property inherited by them.

⁵ Bhadbhade Nilima, Pollock & Mulla. The Indian Contract Act, 1872, 14th edition, page 1406.