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**CONTINUING GUARANTEE: CONTEMPORARY CONTEXT**- Anubhav Lamba<sup>1</sup>**INTRODUCTION**

According to *Section 129* of the Indian Contract of 1872, “*A guarantee which extends to a series of transactions is called a continuing guarantee.*”<sup>2</sup> Basically continuing guarantee is a type of guarantee that is not limited to a particular transaction but to various transactions. The distinction between an ordinary and a continuing guarantee is important with reference to the duration of the liability of the surety.<sup>1</sup> The most important aspect of consideration of a guarantee as continuing guarantee is the intention of the parties, and not mere the written contract, not considering the circumstances in which the guarantee was given. The concept of continuing guarantee is largely spread in the contemporary world, in our everyday lives, we all are surrounded by the principles of continuing guarantee, such as if we buy something on Easy Monthly Instalments, we are governed by the principles of continuing guarantee.

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<sup>2</sup> ASOKA C. DUTT & HAREKRISHNA SAHARAY, DUTT ON CONTRACT: THE INDIAN CONTRACT ACT, 1872 (Eastern Law House) (2013)

***Objective of Study:***

The objective of the study is to understand deeply the concept of continuing guarantee, and to be able to create a distinction between the concepts of ordinary guarantee and continuing guarantee, and to put light on the relevance of continuing guarantee in the contemporary context, i.e. the importance of the concept of continuing guarantee in our day to day life.

**RESEARCH QUESTIONS:**

1. ***What is Continuing Guarantee?***
  - a. ***What is the distinction between Ordinary Guarantee and Continuing Guarantee?***
2. ***How Continuing Guarantee is revoked?***
  - a. ***Revocation in Special Cases.***
  - b. ***Revocation by Surety's Death.***
3. ***Discharge of Surety in Contract of Continuing Guarantee.***
  - a. ***Discharge by Variation in Terms.***
4. ***How Continuing Guarantee is relevant in contemporary context?***

***Research Methodology:***

The researcher had used doctrinal method i.e. reference from various primary sources like Acts, Statutes. The researcher has also taken references from secondary sources like books, articles, websites, and various newspaper reports to study about the significance of continuing guarantee in contemporary context.

## CHAPTER I: WHAT IS CONTINUING GUARANTEE.

A continuing guarantee is one which extends to a series of transactions and is not exhausted or confined to a single credit or transaction.<sup>3</sup> Continuing guarantee can be basically understood by relating it to collections of rents payable periodically, and payment of goods from time to time. In the case of continuing guarantee, the liability of the parties to the contract of guarantee exists till the completion of the series of transactions agreed upon by parties or till the time the guarantee is revoked.

### *a. What is distinction between Ordinary guarantee and Continuing guarantee?*

The test to distinguish, a continuing guarantee from an ordinary guarantee or simple guarantee is the nature of consideration. If it is fragmentary and divisible supporting, for example running or floating balance is a nature of guarantee is continuing guarantee and its revocable, but the on the other hand if the nature of the consideration is entire and supporting, this form of guarantee is simple guarantee.<sup>4</sup> In case of a continuing guarantee so long as the guarantee has not been withdrawn, the guarantors are liable to for the agreement for the amount due to the principle debtor.<sup>5</sup> So basically a contract of simple guarantee it is a promise to perform the promise or discharge the liability of third person in case of his or her defaults for a single transaction, but in continuing guarantee the liability is spread to various transactions. The question to declare a particular guarantee as continuing guarantee depends upon the intention of the party and surrounding circumstances. A guarantee intended to secure advances to be made from time to time, and the sureties making them liable for a particular of time, is a continuing guarantee with a limit to the guarantors liability, it does not render the obligation void if the advances go beyond it, unless that clearly appears in the intention of the parties.<sup>6</sup> But in a fidelity guarantee i.e. a guarantee on trust, it was held by Privy Council not to be a continuing guarantee, in connection of a person appointed to a place of trust there is no series of transactions but all the transactions in one go thus till the time he is there the guarantee remains and will not be

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<sup>3</sup>Halsbury's Law of England, Vol. 49, 5<sup>th</sup>edn., 1<sup>st</sup> April 2008, Financial Services and Institutions, para 103.

<sup>4</sup>Asoka C. Dutt&HarekrishnaSaharay, Dutt on contract: the Indian Contract Act, 1872(Eastern Law House 11th ) (2013)

<sup>5</sup>Union Bank of India v T.J. Stephen AIR 1990 Ker 180.

<sup>6</sup>Laurie v. Scholefield LR4 CP 622.

## CHAPTER II: HOW CONTINUING GUARANTEE IS REVOKED?

**Section 130** of Indian Contract Act states that, “A Continuing Guarantee may be at time be revoked by the surety, as to future transactions, by notice to the creditor.”<sup>7</sup> This particular section lays down the rule applicable to all types of continuing guarantee. First of all, if a particular mode of revocation is given under the terms of the contract, the revocation is given in that particular mode only and no other mode would be considered as revocation. Also, where a continuing guarantee is constituted on faith of a guarantee, it cannot be revoked during the continuance of that relationship.<sup>8</sup> But a change in a guaranteed situation, i.e. the circumstances in which the guarantee was given may justify a revocation. For operation of this section i.e. **Section 131** the words,

“**Future Transactions**” must be taken into consideration and its meaning is to be understood, i.e.

it is confined to the cases where a series of distinct and separate transactions is contemplated.

### ***a)Revocation In Special Cases.***

**Section 130** is not applicable to the security given by guardian under the Minor’ Act XX of 1864, so a surety cannot be released from his obligation as surety on account of the guardian’s maladministration of the minor’s estate, that being the very object of the security.<sup>9</sup> But the surety may apply to court to revoke his/her guardianship. But this case was distinguished in case of *Narain v. Fulkumari*<sup>10</sup>, where it was held that a surety in charge of administration may discharge himself from the liability by giving notice. It is possible to for a surety to withdraw where the guarantee is a continuing guarantee, but where the surety is given by a definite case, the liability continues till the time the surety is discharged by court.

### ***b)Revocation by Sureties Death***

**Section 131**of the Indian Contract Act states that “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 to future transactions.”. Under this section it is expressly laid down that until and unless the terms of the contract are contrary, the death of a surety operates as a

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<sup>7</sup>Section 130, Indian Contract Act 1872.

<sup>8</sup>Hasan Ali v. Waliullah AIR 1930 All 730.

<sup>9</sup>Bai Somi v Chokshi ILR 19 Bom 245.

<sup>10</sup>Narain v. Fulkumari ILR 29 Cal 69.

revocation of a continuing guarantee. Therefore for considering the same the terms of the contract are to be looked into, and if in the terms of contract it has been stated that the guarantee would not be revoked even after death of the surety, the guarantee must be held to continue even after death of the surety.<sup>11</sup> Also a surety is not released from his liability under a joint or severable liability by death of his co-surety.<sup>12</sup> In case on death of death of Judgment- Debtor, the surety is discharged from the liability, it is not open to the decree-holder to proceed against the surety.<sup>13</sup> The English rule on revocation by death states that, when there is a guarantee that is too be revoked by a notice, and the surety dies without having revoked it, the notice of his death serves as a notice of revocation. But in a case where the guarantee is given in fidelity, the guarantee cannot be revoked during the continuance of the relationship, as nature of transaction implies a contract contrary under section 131.

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<sup>11</sup>Durga v Durga ILR 55 Cal 154.

<sup>12</sup>Beckett Co v. Addyman 9 QBD 783, Halsbury's Laws of England, 4<sup>th</sup> Ed., vol. 9, para 421.

<sup>13</sup>Nabin v. Mrintunjoy ILR 41 Cal 50.

### CHAPTER III: DISCHARGE OF SURETY IN CONTRACT OF CONTINUING GUARANTEE.

A contract of guarantee being first a contract, would also be discharged in any way a contract would be discharged.

#### a) *Discharge of Surety by Variance in terms of the Contract.*

*Section 133* of the Indian Contract Act states that “Any variance made without the surety’s consent, in the terms of the contract between the principle debtor, and the creditor, discharges the surety as to transactions subsequent to the variance.<sup>14</sup> The word ‘consent’ in this section implies the surety has knowledge of the nature of variation.<sup>15</sup> A contract of guarantee is said to be a contract *stictissimi juris*, i.e. the surety is entitled to insist to a rigid adherence to terms of the contract or his obligation by the creditor. He is only liable to pay the loses arising out in natural and ordinary course of things from a breach of terms of contract of guarantee.<sup>16</sup> Basically the principle talks about that surety, cannot be held bound to something for which he has not agreed to contract. If the original parties have expressly agreed to vary the terms of the original contract, it has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principle debtor. Even under section 128 of the Indian Contract Act, the liability of the surety only extends to the liability on the contract guaranteed, and not on something for which he is not contracted. The principle of discharge not only extends to personal liability of the surety but also to the merely deposited documents that a surety has submitted in regard to the contract i.e. variation doesn’t only discharge a surety from personal liability but also releases the property which was included in the contract as security for the promise guaranteed.<sup>17</sup> But if there is a case of ambiguity in terms of contract, the courts interpret the guarantee as, *contra proferentem* i.e. a manner favorable to the surety. The surety is the sole judge as to whether decide he will continue to remain liable to the new contract.<sup>18</sup>

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<sup>14</sup>Section 133, India Contract Act of 1872.

<sup>15</sup>KR Chitguppi & Co. v. Vinayak Kashinath Khadilkar, (1921) 45 Bom 157.

<sup>16</sup>Mercantile Bank v. Tahilram 27 IC 309.

<sup>17</sup>Bolton v. Salmon (1891) 2 Ch 48

<sup>18</sup>Keshavlal Harilal v. Pratapsing Moholalbai, AIR 1932 Bom 168.

## **CHAPTER IV: HOW CONTINUING GUARANTEE IS RELEVANT IN CONTEMPORARY CONTEXT?**

Contemporary world is surrounded by the concept of continuing guarantee, every one of us has at one point of time has accepted a contract of continuing guarantee, the banking sector, the real estate sector, the industrial sector, almost every sector of the present world is governed by principles of continuing guarantee, in banking sector the concept of EMI is based on the concept of continuing guarantee, the real estate sector, the concept of rent, lease are based have concepts of continuing guarantee in it, the industrial sector, the concepts of supply on credit bases is based on concepts of continuing guarantee. Thus, the concepts of continuing are present largely in contemporary world. Every person from illiterate till highly educated, everyone uses the concept of continuing guarantee in his life, its just that a person doesn't know the exact term for it. A person taking a loan another person on behalf of someone else is continuing guarantee.

## **CONCLUSION:**

The concept of continuing guarantee is a very wide concept, the difference between a simple guarantee and continuing guarantee is also huge and its determination is by number of transactions, if a contract of guarantee is spread across various transactions, it is called the contract of guarantee. The intention of the parties and the surrounding circumstances also plays a major role in determining whether it is a continuing guarantee or not. Another factor that come into play for determination of continuing guarantee is consideration, if paid all at once, simple guarantee, if in series of transactions, then it is a continuing guarantee. The surety also have right to revoke continuing guarantee by means of a notice, that is to be given to the parties if a surety want to revoke the guarantee given by him/her, secondly revocation can also be done when the surety no more, thus the news of a surety's death serves as notice of revocation in cases of death of surety. Other than revocation a surety is also discharged from all of the liabilities by all the various means, one of them being variance, in section 133 of the Indian Contract Act, if there is any variation in terms of the contract that is agreed by both the parties but is not consented to surety the surety is discharged of all the liabilities arising out of that particular contract of guarantee, the sure is sole judge in a case of contract of guarantee, and it on surety to decide whether or not to continue with the contract or not. The concept of continuing guarantee is also very much present in the contemporary context, every one of us have used its concepts in our life, and are using it, it's just that we aren't aware about it, and awareness should be spread about the same, there are various instances where people of inferior education background are caged in loans by big business tycoons and are not able to pay it back then because every time the principle debtor changes the terms of contract and a person is not able to pay back his or her amount for his whole life, even after him his family members have to pay.

*“At last there is a law for everything, better enforcement and awareness would make the laws  
Effective”*



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4. *Contract & Specific Relief* by Avtar Singh, 12<sup>th</sup> Edition.