CHAPTER V

DISCHARGE OF A SURETY

The ways in which a surety is discharged from his suretyship are exceedingly numerous, for a surety is a favoured debtor. Speaking generally, however, under the law of principal and surety, a creditor must not either act in a manner inconsistent with the contract of guarantee itself, or do anything to prejudice the right of contribution between the co-sureties for should he do so, the surety will be released, either wholly or protanto.

A guarantor may be discharged or released from his liability under the guarantee by a subsequent release or agreement, by operation of law, by payment or by performance of the principal debtor obligation or by a breach of the contract of guarantee and it may be stated as a general rule that any act or omission on the part of the creditor in breach of his duty under the guarantee, that increases the guarantor's risk or otherwise injures his rights and remedies, discharges the guarantor from his liability under the guarantee, at least to the extent of the injury so occasioned.
Variance

Indian law provides for the discharge of surety in different sets of circumstances. The surety is discharged when any variance is effected to the main contract between the principal debtor and the creditor. However, the variance must be without the consent of the surety. When surety has undertaken liability on certain terms, it is expected that they will remain unchanged during the whole period of guarantee. If there is any variance in the terms of the contract between the principal debtor and the creditor, without the consent of the surety, the surety gets discharge as regards transactions subsequent to such a change. The reason for such a discharge is that the surety agreed to be liable for a contract which is no more there, and he is not liable on the altered contract because it is different from the contract made by him. This principle has been incorporated in section 133 of the Indian Contract Act.\(^1\) This section refers to a contract which consists of series of transactions extended over a period of time. It does not purport to make any change in the law in the case of a contract consisting of a single, transaction.\(^2\)
But what is variation in the contract of guarantee has been the subject matter of judicial interpretation. In *N. Sulo Chana v. State*, the petitioner's husband (along with some other person) was the highest bidder for some shops. But no licence was granted by the government for these shops, unless a surety bond in respect of the previous year's arrears of Rs. 75,928/- was granted. The wife accordingly stood as a surety for the amount. The court held the surety bond as regarding the arrears, it was not confined to the amount. Merely because the amount of the arrears was not determined and could be different from the above figure did not mean that there was a variation in the contract of guarantee. The correct interpretation, the court said, was that the wife cannot be made liable for any amount over and above Rs. 75,928 but certainly she is liable for that amount, or for any lesser amount. This obviously is the correct exposition of law.

The principle of law on the discharge of sureties is that the surety, cannot be held bound to some thing for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The
original contract 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 principal debtor will be something different from the obligation which the surety guaranteed.

If an alteration is made in a material part of a deed after its execution, by or with the consent of any party there to or person entitled thereunder, but without the consent of the party or parties liable there under, the deed is thereby made void. The avoidance, however, is not ab initio or so as to nullify any conveyancing effect which the deed has already had, but only operates as from the time of such alteration and so as to prevent the person who has made or authorised the alteration and those claiming under him, from putting the deed in suit to enforce against any party bound thereby who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made.

In the field of law relating to the alteration of documents, the strict rule at one time was that the slightest alteration makes the document void. The leading case for a long time was Pegot's case, where
Lord Coke stated the doctrine as follows:

"These points were resolved, where any deed is raised, whereby it becomes void, the obligar may plead nonest factum, and give the matter in evidence, because at that time of the plea pleaded, it is not his deed". Secondly, it was resolved that when any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. So if the obligee himself alters the deed by any of the said ways, although it is in wards not material, yet the deed is void. But if a stranger, without his privity, alters the deed by any of the said ways in any point material, it shall not avoid the deed".

The principle as to discharge of surety was stated by Lord Westbury L.C. in Blest v. Brown, in the following words:

"It must always be recollected in what manner a surety is bound, you bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit, no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written
engagement is altered in a single line, no matter whether the alteration be innocently made, he has a right to say, the contract is no longer that for which I engaged to be surety, you have put an end to the contract that I guaranteed and my obligation, therefore, is at end."

Material Alteration

A material alteration is one which varies the rights, liabilities or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed or reduced to certainty some provisions which were originally unascertained and as such void. The effect of making such an alteration without the consent of the surety is exactly the same as that of cancelling the deed. In Lakshman Mal v. Narasimharaghava Iyengar, the Madras High Court held that "an alteration in a document which has the effect of enabling the payee to sue on the document in a court where he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document".

Where a compromise decree was passed against the debtor providing for the payment of debt by instalments and a certain person stood surety for the due payment of such instalments on the strength of the
property that was attached before judgment and subsequently permission to mortgage and sell the property privately was granted to the judgment debtor. It was held that under the circumstances the moment permission was granted to the judgment debtor to effect private mortgages or sales, the whole position was changed and the surety stands discharged on the ground of material alteration.

Likewise where a certain partnership, stipulating to be dissolved where losses occur. The firm carries on a business with a certain specified capital. The firm sustains losses and the partners instead of dissolving the partnership, further enlarge the capital and extended the business by amalgamating it with a rival concern. The firm also undertakes another business not originally contemplated. The new changes and liabilities in the business has thus totally changed the character of the business in the original contract of suretyship. This amounts to a material variation and, therefore, the surety cannot be made liable for the losses that may occur in the newly formed business where the variation of the contract has the result of laying an additional burden on the surety, the surety will be discharged. An unauthorised material alteration by the promisee whether that is by adding anything
to or by striking out any part of a written contract avoids the contract against the person otherwise liable upon it. In a printed form of guarantee, if the signature of the guarantor is obtained prior to the filling up of the blanks relating to the material particular of the contract, the filling up of the blank spaces in the form of the guarantee amounts to material alteration. In S. Perumal Reddiar v. Bank of Baroda, the plaintiff, the Bank of Baroda was the creditor having advanced Rs. 15,000 as crop loan to the first defendant who was the principal debtor. The second and third defendants were the guarantors. In the printed form the introduction by way of filling up the blank spaces, relating to the date of execution, name of the principal debtor, names of the sureties, the description of the land for which the loan is advanced, as loan, and the rate of interest. It was held that these were material alterations made without the consent of the surety. The surety was, therefore, discharged from his contract of guarantee. The court did not expressly condemn the practice of obtaining signature of a party on blank (printed) forms. But the legal effect of the decision would put the obtainers (of signatures) to serve test of consensus ad idem
(meeting of minds) of which the problem of variation of the deed of guarantee is only an off-shoot. In Rananund v. Choudhey Soonder, where, under a consent decree, it was provided that in the default of one instalment, the properties in suit may be sold, and the surety proceeded against for any deficiency, the privy council held that the decree-holders' delay in actually bringing the properties to sale had the effect of discharging the surety protanto, as to interest due from the date of the order for sale, because the act of the creditor in postponing the sale laid an additional burden on the surety by increasing the interest.

**Immaterial alteration**

Unsubstantial alterations in an instrument of guarantee which are to the benefit of the surety do not discharge the surety from the liability. An alteration made in an instrument after its execution, in some particular which is not material, does not, in any way effect the validity of the instrument. An alteration is not material, if it carries out the intention of the parties already apparent on the face of the deed. Cotton L. J. stated the Law in Halme v. Brunskill, as follows:
"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alterations although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged. Yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not in an action against the surety go into an inquiry as to the effect of the alteration."

An instrument is not discharged by an immaterial alteration, that is to say, one which does not alter the legal effect of the instrument or increase a greater liability on the promisor. An unauthorised material alteration by the promisee whether by adding anything to or by striking out any part of a written contract, avoids the contract against the person otherwise liable upon it.

The strictness of the rule was that any alteration without the surety's consent even for his benefit will discharge the surety, tempered in subsequent cases and was departed from in Aldous v. Carnwill, where Lush J. after referring to numerous authorities, observed:
"This being the state of authorities, we think we are not bound by the doctrine in Pigots case or authority cited for it and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of the words which cannot possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of the promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written."

The question whether a document jointly executed by the two persons creating a joint liability is to be regarded as materially altered if the liability is reduced equally for both but the alteration is made by only one of them. Such an alteration must be regarded as unsubstantial and not otherwise than beneficial to the surety and it cannot attract the strict rule.

The rule was applied by the Supreme Court of India in M.S. Anirudhan v. Thomco's Bank Ltd., the facts of the case were that the respondent bank allowed an overdraft of Rs. 20,000 to the principal debtor on the guarantee of the appellant. Originally the guarantee paper showed the sum of Rs. 25,000 which the bank refused to accept. The principal debtor took it back and altered the sum to Rs. 20,000 and gave to the bank. Th
bank brought an action against the surety on the default of the principal debtor. The surety appellant contended that the sum was unauthorisedly altered and, therefore, he was not liable. The Bench consisted of J.L. Kapur, A.K. Sarkar and M. Hidayatullah, JJ. The Supreme Court was divided in this case. It was held by a majority that the surety was not discharged.

As per Kapur J., (as he then was): where a guarantor entrusts a letter of guarantee to the principal debtor and the principal debtor makes an alteration without the assent of the guarantor, then the guarantor is liable because it is due to the act of the guarantor that the letter of guarantee remains with the principal debtor and what the principal debtor did well estop the guarantor from pleading the want of authority. In the same case, Hidayatullah J., (as he then was) said that the particular document, could not be said to have been materially altered, because it had not been altered in such a manner as to change its nature, the alteration does not save the surety from liability arising under it, the alteration was made by co-executant who reduced not only his own liability but that of the surety also. Sarkar J., (as he then was) differed and held, that
the altered document was not binding on the surety for the alteration had not been made to carry out the intention of the parties. If the alteration was ignored, then the document created no liability in the surety, because the bank refused to accept the guarantee on the terms contained in the document before it was altered.

It is submitted that the majority view does not appear to be logical interpretation of section 133. The minority view appears to be in conformance with the provisions contained in section 133. It is submitted with respect that if the bank had handed over the guarantee form to the borrower asking him to get it signed by the guarantor and then return it to the bank, the borrower was acting as the bank's agent. Even assuming that the borrower was acting as the agent of the guarantor, there was no evidence to show that the borrower was authorised by the guarantor to make the alteration. The principle under section 237 of the Indian Contract Act, is not applicable on the ground that was the alteration within the apparent authority of the borrower so that the principal was bound by it vis-a-vis the third party, the bank in this case.
It is difficult to think that the apparent authority of an agent who was authorised merely to deliver a guaranteed document to the bank, extended to an alteration of the amount guaranteed. Assuming that the borrower had the apparent authority to alter the amount, the authority of such as would cover not merely a reduction in the amount but an increase also—in other words, any change of the amount. If the amount had been raised, would the learned judge still have held that the surety was bound by the altered amount?

It should be noted here that the Indian Contract Act which was enacted some year after the _Holmes v. Brunskill_ decision, provides that any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance. The section 133 makes no distinction between a variation that is to the advantage of the surety and one that goes against him.

The moral is that any alteration in the guarantee should be got duly authenticated by the guarantor. Further as a general rule, the guarantor should be required to sign the guarantee in the presence of an official or officials of the bank. From replies to the questionnaire by various banks this practice is
followed. The practice of entrusting the guarantee form to the borrower with a request to get it signed by the guarantor should be discouraged. Once the banks follow this practice a lot of litigation can be avoided between the parties.

Release or Discharge of Principal debtor

A surety is discharged by an arrangement or by a contract between a creditor and a principal debtor whereby the principal debtor is released. Release of the principal debtor also operates as a release of the surety. It has been already noted that the liability of the surety is co-extensive with that of the principal debtor. Therefore, if by any contract between the creditor and the principal debtor the principal debtor is released, or by any act or omission of the creditor, the principal debtor is discharged, the surety will also be discharged from his liability accordingly.

Another reason for the discharge of the surety on the release or discharge of the principal debtor is that according to section 140, after payment or performance of his obligation the surety can seek re-imbursement from the principal debtor. If the principal debtor, is no more liable the surety's remedy would be affected
thereby. If surety's remedy against the principal debtor is affected that should also result in the discharge of the surety. The law concerning the discharge of the surety on the release or discharge of the principal debtor is contained in section 134 of the Indian Contract Act.

If the creditor, by any contract with the principal debtor releases him, he cannot place his remedies at the disposal of the surety without a breach of his arrangement with the principal debtor to release him. To carry out that arrangement, the surety should have right to take action against the principal debtor in respect of the debt, engagement or liability. This cannot be done without the surety's consent. He is, therefore, held discharged altogether.

Likewise, where the surety guaranteed the due performance by the debtor of his obligations under a hire-purchase agreement in accordance with its terms and paid the full amounts due under the agreement, the surety is held to be discharged, even though the hire-purchase company did not receive the full amount it might have expected to receive had the agreement run its full course.

Difficulty sometimes arises in deciding whether a
performance by the principal debtor discharges him in respect of the guaranteed liability or in respect of a separate obligation which is not subject to the guarantee. For example, the principal debtor owes two distinct debts to the creditor, only one of which is guaranteed by the surety, and the principal debtor pays part of the money to the creditor the question may arise as to which debt is discharged. In these circumstances the general rule is that the contract of suretyship does not affect the normal rights which the principal debtor and creditor have of appropriating the payment to a particular debt. Thus if the principal debtor pays without making any appropriation the creditor is entitled to appropriate the money to the debt which is not guaranteed. 22

An express release of the principal debtor from all future will discharge the guarantor since such release extinguishes the guaranteed debt. This is so whatever the express reservations there may be, except where the principal debtor obtained the release by fraudulent means. However, a mere covenant not to sue the principal debtor with a reservation of the bank's rights against a guarantor, does not discharge the guarantor.
In Kearsley v. Cole, where the principal debtor compounded with his creditors, who covenanted not to sue the principal debtor, but the composition was expressed to be without prejudice to any security (which included guarantees) or to any guarantors rights against the principal debtor. One of the creditor's then sued the guarantor successfully, and the guarantor in turn sued the principal debtor. It was held that where the principal debtors, creditors expressly reserve their rights against the guarantor, the guarantor automatically retains his implied right to an indemnity from the principal debtor. Even though the guarantor was not a party to the composition, the principal debtors consent for the creditor to have recourse to the guarantor constituted an implied consent for the guarantor to have recourse to the principal debtor and consequently the principal debtor could not complain when the guarantor sought to enforce his rights against the principal debtor.

The reason why the surety is discharged if the principal debtor is discharged is that the courts took the view that any other rule would lead to one or other of two strange results, having regard to the surety's normal rights to an indemnity for the principal debtor.
If the surety were compelled to meet the liability, any attempt by him to sue the principal debtor for an indemnity might be met by the plea that the debt had gone and the principal debtor was no longer liable. If this were a good answer to the surety he would be deprived, by the unilateral act of the creditor, of a right which he would have expected to have. On the other hand, if the principal debtor remained liable to indemnify the surety despite his own discharge, the effect would be to render the discharge nugatory. In the result it is treated that the discharge of the surety as a necessary consequence of the discharge of principal debtor. Whatever may be thought of this reasoning it has been the rule to have no application where the creditor reserves his rights against the surety at the time when he discharges the principal debtor, for this is a sufficient notice to the principal debtor that the surety remains liable, and that, therefore, the surety's right to an indemnity remains intact.

**Discharge of Principal debtor by operation of law**

A surety is liable for the debt, default or miscarriage of the principal debtor. A contract of guarantee means a contract to perform the promise or to discharge the liability of a third person in case of his default. There is nothing in the section to
restrict the word default to a voluntary default. Naturally, it should be taken to include an involuntary default. The surety is not discharged by the discharge of the principal debtor by operation of law.

Opinion is divided on the question that where a debt is scaled down, does the liability of the surety extend to the whole of the original debt, or is limited to the reduced amount? The Nagpur High Court has ruled that the liability extends to the whole of the original debt. The court held that "The debt Relief Court proceedings had nothing to do with Balkrishna (the surety) They will hold good as between the principal judgment debtor and the decree-holder by operation of law, but any orders passed therein will not operate in connection with the surety, who was not a party to them. In Keshearao v. Laxman, pollock J. laid down that "The liability of the surety and the liability of the principal debtor are separate liabilities although arising out of the same transaction. Hence, while the application of the principal debtor under the debt Conciliation Act is before the Board, the debt of the surety cannot be said to be a matter before the board". But the Madras High Court has held that the surety is
liable only for the reduced amount. It is submitted that the Madras opinion is correct as it is clear under section 128 that the liability of the surety is co-extensive with that of the principal debtor. It cannot be higher than that of the principal debtor.

Pollock and Mulla while preferring the view taken by the Full Bench decision of the Madras High Court observed that, the judgment of the Court is, however, remarkable, for the curious interpretation placed upon section 140, and the complete failure to mention section 145. The Court considers that to hold the surety liable in solidum would be unjust, as he has no recourse against the principal debtor, in as much as section 140 confines his rights against him to those the creditor has with respect, this is to misread section 140 which is an unabling section, and does not purport to confine the rights of the surety to those possessed by the creditor. The talk of its imposing the burden is a misconception, the right of the recourse against the principal debtor is provided by section 145.

Section 145 gives the surety a right of reimbursement from the principal debtor. If this is so the debtor has no real relief under the Debt Relief Act whose object is thus defeated on the Madras view, the law is
at least clear that the loss caused by scaling down falls upon the creditor. As per the Nagpur view, it is uncertain whether the surety or the principal debtor bears the loss, apparently the latter in the absence of any fresh proceedings under the Debt Relief Act.

The Kerala High Court has expressed its full agreement with the view of the Madras High Court. The Kerala High Court observed:

"It appears to us that section 128 of the Indian Contract Act states the ambit of liability of the surety when it enacts that the liability is co-extensive with that of the principal debtor. It has nothing to do with the consequences of recovery of the debt. Such being the scope and intendment of the section we feel that a statutory reduction or extinguishment of the principal debtor's liability will operate as a protanto reduction or extinguishment of the surety's debt. A reduction or extinguishment of the debt is quite different from its unenforceability against the principal debtor by operation of the law of Bankruptcy or the statute of limitation.

It appears to us that to hold otherwise, would altogether deny the benefit of the ameliorative provisions of the Act to the agriculturist-debtor. On any other view, it would be open to the creditor to recover the debt as scaled down from the agriculturist debtor, and the latter in his turn could seek reimbursement from the principal debtor (vide S.145). Such a construction would completely nullify the benefits of the ameliorative legislation to indebted agriculturist". 30
Act or Omission of the Creditor

The acts or omissions of the creditor, which have the effect of discharging the principal debtor, automatically discharges the surety as well. The act or omission on the part of the creditor must be such the legal consequences of which is the discharge of the principal debtor. Such act or omission of the creditor may be those arising under sections 39, 53, 54, 63 and 67 of the Contract Act. Thus the mere fact that the creditor, after having filed a suit against the principal debtor and the surety allows the suit against the former to abate on his death, will not operate to discharge the surety. On the same principle, where the principal debtor by not taking proper steps for service of summons on the principal debtor allows the suit as against him to be dismissed, the surety's liability on the account is not discharged. The reason being that the plaintiff can yet bring a fresh suit against the same person. The Supreme Court has very recently explained the scope of section 134 in M.S.E.B. Bombay v. Official Liquidator, H.C. Ernakulan, and observed:
"The bank cannot take the plea that it is liable to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of the goods, i.e., the company in liquidation. The liability is absolute and unconditional. The fact that the company in liquidation also would not have any effect on the liability of the bank i.e., the guarantor. Under section 128 the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under section 134 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequences of which is the discharge of the principal debtor, but a discharge which the principal debtor may secure by operation of law in bankruptcy does not absolve the surety of his liability".

Omission to sue principal within limitation

Generally, the liability of a surety is made depend upon the liability of the principal debtor. A positive action of the creditor which discharges the principal debtor releases the surety. However, the laxity of the creditor in pressing his claim against the principal debtor may not be pleaded as a
defence by the surety, although he thereby suffers a detriment. Now can a surety plead a defence which is in essence personal to a principal debtor. Likewise can a surety avoid liability on the ground that a debt is barred by limitation as against the principal debtor.

There was distinct cleavage of opinion among the various High Courts on the point that omission by the creditor to sue the principal debtor will or will not discharge the surety. The majority of the High Courts, namely, Bombay, Calcutta, Lahore, Madras, Rangoon and Nagpur were of the view that the surety is not discharged. While the Allahabad High Court took the view that the surety was discharged. The conflict has, however, been set at rest by the opinion of the privy council, which accepted the view of the majority of High Courts. The Allahabad High Court also in its subsequent Full Bench decision accepted the majority opinion by over-ruling its earlier decision.

The reasons in support of the minority view were that it is obvious that any act or omission of the creditor, the legal consequences of which is the discharge of the principal debtor, discharges the surety, and mere forbearance on the part of the creditor
to sue the principal debtor does not absolve the
surety from the liability. If we were to interpret
the plain words of these two statements, we should
have no difficulty in coming to the conclusion that
the act of the creditor in allowing his suit to be
barred against the principal debtor would amount to
an act the legal consequences of which is to discharge
the principal debtor and, therefore, such act would
automatically exonerate the surety from his respon-
sibility. The court also held "we would have no hesi-
tation in interpreting the words ' mere forbearance '
to mean forbearance of the creditor from suing the
principal debtor within the period of limitation.
The simple reason for this latter interpretation is
that a person can only forbear to do a thing as long
as he has got a right to do it. Directly the suit of
the creditor becomes time-barred, he loses his power
to enforce his claim. Forbearance after the expiry
of the period of limitation would therefore be meaning-
less". It could not be conceived for a moment that
the draftsman who framed the Contract Act proceeded
to undo in section 137 what he had done for the surety
in section 134. Moreover we must stress the words
Legal consequences in section 134. To relieve the
surety, the act or omission of the creditor should be such that its legal consequence would be the discharge of the principal debtor. It clearly includes the omission to sue within the period of limitation because it is purely legal consequence of such omission that the principal debtor is absolved from payment. Again the importance of the word 'mere' before the word 'forbearance' shows that the legislature meant a forbearance by itself that is to say, a forbearance which would lead to no serious consequences.

On the other hand the majority view is based on the ground that a debt does not cease to be a debt, because its recovery is barred by the law of limitation. The right subsists, though the remedy comes to an end. Shadi Lal, C.J. observed, that the balance of judicial authority is decidedly in favour of the view, that the omission of the creditor to sue the principal debtor does not discharge the surety.

The controversy has been, however, resolved by the Privy Council, where the judicial committee have affirmed the majority view of the High Courts and observed that the view of the Allahabad High Court is inconsistent with the English Law also. It was held that not every unenforceable contract is declared void
but not those unenforceable by reason of some procedural regulation but unenforceable by the substantive law. A mere failure to sue within the time specified by the statute of limitation or an inability to sue by reason of the provisions of one of the orders under the civil procedure code would not cover a contract to become void.

It is submitted that the majority view appears to be in conformity with justice. The law Commission in its 13th Report suggests that an explanation shall be inserted in section 134 of the principal Act to adopt the majority view. The Supreme Court has also held that a creditor is entitled to recover the debt from the surety even though the suit against the principal debtor is barred. A time barred debt does not become extinguished but only becomes unenforceable in a court of law. If a debt subsists even after it is barred by limitation, in law, there is no discharge therefrom. The modes in which an obligation under a contract becomes discharge are well defined and the bar of limitation is not one of them. If the law requires that a debtor can be discharged before he can be compelled to pay that
requirement is not satisfied. If he is merely told that in the normal course he is not likely to be imposed to action by the creditor. A barred debt is a valid consideration under sec. 25(3) of the Contract Act for a written promise to pay signed by the party liable to be charged therewith. Equally when section 60 of the Contract Act speaks of barred debt as lawful debt actually due and payable it cannot be considered to be discharged. Surety, as a prudent guarantor, to avoid the risk and the cloth himself with all the creditor's rights under S. 140 of the Contract Act, himself is to pay or perform the obligation within limitation lest he is himself to blame.

Hence by mere failure or forbearance to sue the principal debtor, the surety is not discharged from the liability unless there is an express covenant in that regard or a release by the principal debtor by novation or otherwise. Therefore the ommission to sue the principal debtor by the creditor within the period of limitation does not discharge the surety.49
The word composition means an agreement, or an arrangement, or a compromise. A contract between the creditor and the principal debtor, by which the creditor makes a composition with the principal debtor, discharges the surety unless the surety assents to such contract.

This rule is founded on the principle stated by Lord Laughborough in Ress v. Bessington thus:

"It is the clearest and the most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in any transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

When the creditor makes composition with the principal debtor without the consent of the surety this means variation in the original contract. The composition must tend to aggravate the surety's sufferings. The idea underlying S. 135 of the Indian Contract Act, is that where the creditor does something behind the back of the surety, and does to his prejudice, by advancing facilities to principal debtor, which are
likely to harm the surety, the surety is no more to be bound by his undertaking. Accordingly a surety who seeks to be relieved of the obligation upon him as surety and to be absolved from liability must not only show that the creditor has, by his acts or conduct, either prevented the principal debtor from doing the things which he undertook to do, or has connived at the principal debtor's omission to do those things, or has enabled him to do something which he ought not to have done, but he must also show that the creditor has done some act inconsistent with the rights of the surety.

The question as to whether a surety is discharged on a compromise being entered into between the judgment, debtor and the decree-holder and a consent decree being passed on such compromise depends on the facts and circumstances of each case and particularly on the terms of the bond executed by the surety in each case. Where, therefore, the compromise is effected without the consent of the surety by which he is seriously prejudiced and where such a compromise was not where such a compromise was not contemplated by the surety, when he executed the bond. A consent
decree under these circumstances discharges the surety and absolves him of his liability. However, a mere passing of a consent decree does not absolve the surety because when the surety undertakes to be bound by any decree that may be passed such a recital includes a bonafide compromise which is entered into by the parties without any fraud, but in cases where there is an express recital in the surety bond or by necessary implication by which the liability is restricted only to a decree on contest, the surety will stand discharged if a compromise decree is passed.

The above view is supported by a decision in 52 Trilok Nath v. Kehar Singh, wherein the bond executed by the surety provided that he will be liable only if a decree is passed against all the defendants and if all the defendants are unable to pay the amount. A compromise was entered into whereby the decree-holder absolves all other defendants and restricts his claim only to the principal defendant. It was held that such a contract on the part of the decree-holder is inconsistent with the rights of the surety. It impairs the remedy of the surety against other defendants. The surety stands discharged.
In order to determine whether a surety stands discharged or continues to be liable under the surety bond the real test to apply is to find out the terms of the bond and its scope. Therefore, where there is nothing in the decree which shows that the compromise is at variance with the terms of the surety bond, then notwithstanding the fact that the surety was not at the time of the compromise entered into between the parties to the suit and the consent decree is passed, the surety continues to be liable and does not stand discharged. In *Citibank N.A., New Delhi v. J.K. Jute Mills Co. Ltd., Kanpur*, the Delhi High Court held that the consent decree did not hit the provisions of section 135 and was not a compromise, stemming out of a contract to which the section makes reference. The Court said "It would not make the slightest difference if the decree is consent decree especially in this case when the creditor by way of the consent decree got 100% relief". In fact the consent did not in any way impair or prejudice the right of the defendant surety.
Agreement to give time

It has long been a rule of suretyship that if a creditor releases or extends the time for payment by the principal debtor, or impair the collateral for the debt, knowing of the surety's right of recourse against the other party, and fails either to reserve his rights against the surety or to obtain his consent for the extension or release, the liability on the guarantee will be discharged if the surety should pay all or part of the debt— as he has a right to do at any time after it matured— he then can sue his principal for reimbursement on the theory that the surety was subrogated to the creditor's cause of action.

Therefore, a valid binding agreement between the creditor and the principal debtor to extend time for payment, although affecting only one material element of the existing indebtedness, stripped the surety of his rights to exoneration, reimbursement, subrogation and contribution because the debt simply was not due at the time originally contemplated by all the parties.\(^5\)

Promise to give the time to the principal debtor means extending the period of payment which was
not contemplated in the contract of guarantee. The surety expects that the creditor will take the performance from the principal debtor without any delay. A binding agreement between the creditor and the principal debtor to give more time to the principal debtor or to repay his debt will discharge the guarantor from liability if made without his consent, whether or not he is in fact prejudiced by the agreement. The reason appears to be that in theory such an agreement necessarily prejudices the guarantor by preventing him from exercising his right to require the creditor to call upon the principal debtor to pay off the debt or his right to pay off the debt himself, and then sue the principal debtor. Because he himself is the fit Judge of what is or is not for his own benefit. If you agree with the principal debtor to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal debtor and, therefore, your act breaks the agreement into which you have entered into with the principal debtor. The point was explained by Smith, L.J. in *Rausa v. Bradfor-...king Co.*, as follows:
"A surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, when he has paid it off, he is at once entitled in the creditor's name to sue the principal debtor, and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his consent".

The Supreme Court of India has held that what really constitutes giving of time is the extension of period at which, by the contract between them, the principal debtor was originally obliged to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to which the surety does not assent. Accordingly where a bank gave time to the principal debtor to make up the deficiency of the goods pledged, it did not testament to giving of time within the meaning of section 135.

Where a joint decree is passed against the principal debtor and the surety and after the passing of decree, the creditor decree-holder without the
consent of the surety, grants instalments to the
principal debtor, that amounts to the principal
debtor, that amounts to giving time to the principal
debtor and the surety is discharged thereby.\textsuperscript{58}

An agreement to pay money in lump sum or six
instalments is not the something as one to pay it in
instalment or ten instalments, if the creditor by a
valid agreement with the principal debtor, extends
the time of performance from the shorter to the longer
time, he supersedes the old obligation by the new,
and cannot enforce payment until the longer period
has elapsed. If the surety is sued upon the old
agreement, to which alone his undertaking was accessory,
he has only to show that has ceased to exist, and no
longer binds his principal debtor and if he is sued
upon the substituted agreement, he is entitled, both
at law and in equity to make the short and conclusive
answer non hou in foredera veni. The agreement exten-
ding the time of payment or performance must be valid
and enforceable by the principal debtor in order to
affect the surety's liability, and if it be void for
want of consideration or for illegality or is voidable
because of fraud or undue influence practiced upon the
creditor or if for any other cause it is insufficient to
say the hand of the creditor as against the principal debtor, the surety is not released. The time for which the extension is granted to the principal debtor without the surety's consent must be definite and fixed, otherwise the surety is not discharged. The reason for this rule is that if no definite time is fixed, the surety may pay the debt and proceed against the principal debtor at any time after its maturity.

Reservation of Right

But any binding agreement between the creditor and the principal debtor, extending the time of payment or performance for any period, however short, entered into without the consent of the surety will release the surety. Unless the creditor reserves his rights against the surety. The reason being that nor does the extension constitute a material alteration or variation of the contract, so that it is no longer the surety's undertaking, but it deprives the surety of the right to pay the debt when it is due according to the original contract or at any time thereafter and thereupon enforce his rights of indemnity and subrogation.
In _Annadanajadaya v. Konamma_, the Madras High Court observed:

"If a creditor agrees to discharge the principal debtor it would be breach of the agreement to entered into for the creditor to pursue his remedy against the surety, for the latter would in his turn enforce his remedy against the principal debtor, and thus the creditor's agreement to discharge would be rendered inoperative, but if the very agreement to discharge the principal debtor contains a reservation of rights against the surety, the agreement cannot operate as absolute release for the obvious reason that the principal debtor has notice that the creditor's remedy against the surety is preserved and that the latter's right of recourse against him is not extinguished".

The early development of the right of reservation grew out of an unreported English opinion, _Richard Burken's case_, which involved an action by a creditor against a co-surety after the former had given an extension of time to the principal debtor Lord Thur-Law in Burken's case, suggested, by way of dictum, that the surety was released only if he were denied remedy against the principal debtor and that if the creditor had reserved his rights against the surety, the action would have been successful for them the surety would have had recourse against the principal debtor.
The orthodox rationale advanced by the Courts to uphold the reservation clause in either extension of time or release is premised on the assumption that, in as much as the principal debtor has specifically agreed to accept a conditional release from the creditor, he thereby impliedly agreed that the surety's right to reimbursement should not be impaired. Thus he cannot complain if the surety, after fulfilling his obligations to the creditor, seeks redress from him. The reason for the existence of these rules were criticized. Coheridge J. disliked it so much that he would have passed long before upholding any such rule; but he was bound by the authorities that established. The reason why this should prevent the release of the surety is difficult to understand. It is said that by reserving the rights the principal debtor agrees that the surety could go against him, the securities are intact, the remedy is gone between the creditor and the debtor, in as much as the creditor cannot sue the debtor but as against all other persons the rights of the creditor are reserved.\footnote{61}

The most serious objection to the rationale offered in support of reservation clause is that it ignores completely the principal debtor's purpose of
entering into the transaction. Literally interpreted, the agreement unqualifidely absolves the principal debtor from the performance of his former obligations to the creditor, if the reservation has the effect of merely forcing the creditor to send another collector after the principal, the value of the particular agreement to the principal debtor would to a large extent be destroyed.

It has been said that when the principal debtor obtains a release from the creditor, he is defrauded if the creditor is allowed to collect from the surety, who in turn will collect from him, and that the surety must be released. Conversely, if the principal debtor consents to a reservation of rights against the surety he impliedly consents to this indirect enforcement of the released obligation. This argument, however, rests upon the doubtful premise that the principal debtor did not consent to this circuitous enforcement when he was released without reservation of rights. This view is also supported by professor Arant as he pointed out, the parties contracted with reference to performance by the principal, and since the agreement between the principal and the creditor makes non-performance
by the principal inevitable, such was clearly not
within the contemplation of parties, and imposes
upon the surety an entirely different risk than that
which he assumed.63

In addition, the simple expedient of the reserva-
tion clause effectively nullifies the rule which has
been declared to be desirable, namely that a surety is
discharged by any alteration in the original contract
which varies his risk. Hence direct action against
the principal debtor is precluded, and the result well
may be that the debtor will lose all efforts to fulfill
his obligations to the material disadvantage of the
surety.

When the reservation rule is applied to releases,
however, the surety is likely to be injured, for the
creditor must bring any action that he may start directly
against the surety. Thus the affirmative burden to take
action against the principal debtor is thrown entirely
upon the surety. A reservation of rights in an agree-
ment to release the principal debtor so substantially
increases the surety's burden as to reach an equitable
result and should be disregarded.

Thus variation in the surety's risk, affording one
basis for discharging the surety when the principal
debtor is released, is equally present whether the rights against the surety are or are not reserved. An agreement between the creditor and the principal debtor, to which the surety is not a party, should in no way be allowed to prejudice the surety's rights. The Courts should follow the lead of the Ohio Supreme Court in refusing to give effect to the reservation clause in a discharge of the principal debtor.

Mere Forbearance

Mere voluntary forbearance of the creditor or his mere passive indulgence in favour of the principal debtor, however, long continued, will not, in general, discharge a surety when such forbearance constitutes no violation of special contract terms, or involves no fraud, collusion or breach of good-faith. The reason usually given for this rule is that a surety is in default the moment his principal debtor is in default and may pay at any time and pursue his remedies against the principal debtor. The surety is subrogated to the rights, remedies and securities of the creditor against him.
Section 137 clarifies in express terms what is clearly implied in section 135. What is required to cause the discharge of the surety is not mere forbearance on the part of the creditor to sue the principal debtor, but a positive act, a promise or a contract, to give time, or not to sue. In view of section 137 the surety's liability towards the creditor remains unaffected even when the creditor has chosen not to sue the principal debtor.

The scope of section 137 and 141 has been explained in Hukum Chand Insurance Co. Ltd. v. The Bank of Baroda. It has been held that what emerges from a reading of sections 139 and 141 is that while a mere forbearance to enforce the security against the principal debtor will not discharge the surety, any act by which the creditor loses, or without the consent of the surety, parts with the security, has the effect of discharging the surety to the extent of the value of the security. Whether any particular act on the part of the creditor constitutes mere forbearance without more or constitutes an act by which the creditor puts it out of his power to hand over the security to the surety, will depend upon the facts and circumstances of the particular case.
Then another question arising for consideration is what is the difference between forbearance to sue and omission to sue? Forbearance to sue means refraining or abstaining from suing which may arise out of an agreement or because of the protection given under law, omission signifies breach of an obligation or duty either under law or agreement. Failing to do what ought to have been done results in omission. From a plain perusal of the meaning of the aforesaid terms it is clear that forbearance to sue normally does not result in penal consequences whereas omission to sue may result in penal consequences because there is breach of duty or legal obligation either under law or contract.

Supposing the surety reasonably apprehending that the principal debtor is trying to leave the local limits of jurisdiction of country informs the creditor by letter to proceed against him without fail and the creditor ignores the letter of the surety and keeps quit, this will be a positive omission in which case the surety will be absolved from his liability. The negative act, i.e., deliberate negligence (omission) is mentioned in E. Venkateran's Mercantile Law, where the author says, "that section 141 does not only apply
to cases in which by positive action of the creditor, he has lost or parted with security without consent of the surety. This implies a negative act or negligence on the part of the creditor which would absolve the surety.

Mere forbearance to sue is not omission on the part of the creditor either by positive or negative acts. Section 137 has got to be read with section 128. According to section 128 the liability of the surety is co-extensive, meaning thereby that the creditor can straight way proceed against the principal debtor. Hence forbearance to sue hinges very much on the right of the creditor which gives him power to proceed against the surety. The very purpose of the co-extensive liability of the guarantor will be stultified if section 137 is misinterpreted as omission. So let us not read section 137 in isolation which is very much coupled with section 128. 

Recently it has been observed in Bank of India v. Matha Goundra, that the mere factum of forbearance to sue is not sufficient to constitute consideration for a person becoming a surety for the debt but there must be a promise, an undertaking to forbearer or an actual forbearance at the surety's express or implied request and such promise of the creditor must be capable of being enforced.
Impairing Surety's Remedy

It is a very well known rule governing a contract of guarantee that a person in whose favour a guarantee is given is bound to a faithful observance of the rights of the surety and to the performance of every duty necessary for the protection of those rights. Section 139 incorporates in substance the rule that it is the duty of the person who has secured a guarantee to do every act necessary for the protection of the rights of the surety. It is the duty of the creditor not to do anything which is inconsistent with the surety's rights or omit to do any act which is duty to the surety requires him to do. If the violation of the aforesaid duties impairs the surety's eventual remedy against the principal debtor, the surety is discharged.

Section 139 is a residuary provision, its object being to ensure that no arrangement different from that contained in the suretyship contract is forced upon him and that if the surety pays the debt he has the benefit of every remedy which the creditor has against the principal debtor. The basic principle of section is that it is the duty of the person who has secured a guarantee to do every act necessary for the protection of the rights of the surety, as a surety is a person who
receives no benefit and no consideration out of the transaction but has voluntarily accepted the liability of the principal debtor to the creditor. By the application of this section surety is discharged, when a creditor does any 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 is impaired as a consequences thereof. The impairment of the eventual remedy of the surety is essential for application of the section in addition to the acts of commission and omission on the part of the creditor. In order to attract section 139 there must not only be an act inconsistent with the rights of the surety or any omission to do any act which his duty to the surety requires him to do, but also the impairment of the eventual remedy of the surety against the principal debtor. 73

In Darshun Ram Ganesh Das v. Khair Din Allah Buksh a compromise decree was passed against the principal debtors providing for the payment of the debt by instalments. A person stood surety for the due payment of such instalments. Subsequently permission was granted to the judgment-debtors to mortgage and sell the property that was attached before judgment. Abdul
Raoof, J., said, "when the surety undertook the liability to pay the entire property belonging to the judgment-debtor was under attachment and the surety must have felt secure when he undertook the liability. The moment permission was granted to the judgment-debtors to effect private mortgages or sales the whole position was changed, and in my opinion, the surety was justified in applying to the court to be relieved of his undertaking".

A person standing as a surety, for several defendants in respect of a decree that may be passed against them, is discharged if the plaintiff with the leave of the court proceeds against one of them alone exonerating the rest of the defendants. In a recent case decided by the Supreme Court as surety was held discharged due to the action of the Government. The facts of the case were that the Government allowed the purchaser even after the default in the payment of the price was made to remove the fallen trees which the purchaser according to the terms of the contract was authorised to remove only on full and final payment. In allowing the purchaser to remove the fallen trees the Government had omitted to do what the surety, was required to do and so, the surety's eventual remedy against the security was lost.
The commission or omission on the part of the creditor must prove injurious to the surety. There must be the impairment of surety's remedy. As in 76 Ramanand v. Chowdhry Soondar Narain, the decree-holder postponed the sale of properties under a decree which resulted in increased burden of the interest on the sureties who had executed a bond undertaking to pay any deficiency after sale. It was held that the sureties were discharged from liability for interest subsequent to the court's order for sale.

Mere laches on the part of the creditor or a mere passive acquiescence by the creditor in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties. Mere non-exercise of their rights of super-intendence by the people having that right does not discharge persons standing surety for those who are under supervision from their liability as sureties.

To sum up, if there is a contract, express or implied, that the creditor shall acquire or preserve any right against the principal debtor, and the creditor deprives himself of that right which he has stipulated to acquire, or does anything to release any right which
he has, that discharges the surety unless he can show that he has received some injury in consequences of creditor's conduct.

In order to attract this section there must not be either an act inconsistent with the rights of the surety, or an omission to do an act which it is the creditor's duty to do, but also the impairment of the eventual remedies of the surety against the principal debtor. The last point is most crucial, so that if there is no such impairment the surety is not discharged.

Lord Longdall observed in *Calvert v. London Dock Coy*:

"In almost every case where the surety has been released either in consequence of time being given to the principal debtor or of a compromise being with him, it had been contended that what was done was beneficial to the surety, and the answer has always been that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him, and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether what has been done lessons the security".
Losing or Parting with the Security

Section 140 enshrines the general common law principle relating to cases where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place. A surety, who pays off the guaranteed debt or performs the promise is entitled to be subrogated to all the rights of the creditor which he had against the principal debtor. Section 141 contains the most practical application of the principle laid down in section 140. Because under the section 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 the existence of such security or not, the section also provides that 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 security. It has been observed in Craythorns v. Swinburn.

"The whole doctrine of principal and contribution, etc., rests upon the established principles of a court of equity, not upon contract, except it may be so represented upon the implied knowledge of these principles. There is no express contract for contribution of bonds generally, if not universally being joint and
several-creating several obligations by in as surety is to be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment to stand in the place of creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have for that, and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract, but upon a principle of natural justice."

On the scope of section 141 Ramaswami, J., of the Supreme Court in Amrit Lal v. State Bank of Travancore, said, that as pointed out by the Court in State of Madhya Pradesh v. Kalusan, the expression 'security' in this section is not used in any technical sense, it includes all rights which the creditor has against the property at the date of contract. The surety is entitled on the payment of the debt or performance of all that he is liable for the benefit of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability. The surety is, therefore, on payment of the amount due by the principal debtor entitled to be put in the same position in which
the creditor stood in relation to the principal debtor. If the creditor has lost or parted with the security without the consent of the surety the latter is by the express provision contained in section 141 discharged to the extent of the value of the security lost or parted with.

Section 141 deals with a situation when the principal debtor has offered more than one security. Even if the surety is not aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by any action or in action which implies negligence appearing from lack of supervision undertaken in the contract, the surety will be discharged under the combined operation of sections 139 and 141.

Section 141 embodies the equitable principle in favour of the surety. This is one of the instances of some favour shown to the surety. Section 137, however, make quite clear that by 'mere forbearance' the surety is not discharged. The difficult question is whether there is a mere forbearance by the creditor or whether he has lost or parted with the securities to the prejudice of the security. The Supreme Court decided in favour of the sureties under section 141.
On the contrary in *Karnataka Bank Ltd. v. Gajana Sharkara Rao Kalkarni*, the Karnataka High Court has come to the conclusion that the surety was not discharged under section 141. The bank had financed the instalmental purchase of a truck by way of security, besides providing two sureties for the repayment of the loan. Under the hypothecation bond, the creditor was entitled to seize the truck and sell it, if the principal debtor committed default in the payment of any one instalment. Though all the instalments have become overdue, the creditor bank did not seize the truck. In the meanwhile, the truck deteriorated in value and was reduced to a mere scrap. The creditor sued the principal debtor and sureties for the amount due. The sureties invoked the protection of section 141 and contended as the creditor bank had allowed the security to be impaired and lost owing to its own negligence, they stood discharged. The trial court found favour with their claim but the Division Bench on appeal, held that section 141 would not apply to the case.

Venkatachaliah J., stated the reasons thus:

"A mere passive inactivity or passive negligence on the part of the creditor by failing to realise the debt from the collateral security is not sufficient in itself to discharge the
surety, for the reason the surety can himself avoid consequences of such passivity by himself paying the debt and becoming subrogated to the rights of the creditor. In the absence of a contract to the contrary, the creditor is under no obligation of active diligence for the protection of the surety, so long as the surety himself remains inactive. Thus tested, the inaction on the part of the bank will not of itself, mitigate sureties liability.

The court distinguished the Supreme Court decisions on the ground that unlike the present case, the creditors there had physical custody of the security and that they were not cases of 'mere forbearance' but of security lost owing to the negligence of the creditors. There was a unsuccessful contention that a hypothecation of goods was only an extended idea of the pledge and that the obligation to preserve the security enjoined by law upon a creditor extended not merely to the security which was in his actual possession but also that which he ought to have taken into his actual possession by exercising the right to seize the goods upon default. The decision which, it is submitted with respect, is eminently sound and is bound to be welcomed by bankers and other instalment credit financeries.
The same High Court reached the same conclusion in *R. Lilavati v. Bank of Baroda*. The Punjab and Haryana High Court in a recent decision while overruling its earlier decision has in *Bank of India, Bom.* v. *Yogeshwar Kantwadhera*, held that a surety in the case of hypothecation is not entitled to invoke section 141 of the Contract Act for his benefit. Under the said section if the creditor loses or without the consent of the surety, parts with the security pledged, the surety is discharged to the extent of the value of the security. Such a question cannot arise in the case of hypothecation, of goods for the simple reason that when the goods are not in possession of the hypothecatee, there is no question of his losing or parting with the same. Therefore, the sureties could not claim the benefit of section 141 of the Act.

Section 141 of the Indian Contract Act has limited the surety's right to securities held by the creditor at the date of his becoming surety and has modified the English rule that the surety is entitled to the securities given to the creditor both before and after the contract of surety.

According to section 141 a surety is entitled to the benefit of every security which the creditor had
against the principal debtor and section 140 lays down that the rights should have been available to the surety upon payment or performance of all that he is liable for. But the Act nowhere lays down at what point of time the creditor's securities should be made over to the surety. Whether when the debt is paid off, or when the surety pays the sum guaranteed.

In Goverdhandas v. Bank of Bengal, it was held that the surety was not entitled to the creditor's securities until the whole of the debt was paid off. Farran, J., said:

"It seems to me to be a strange doctrine that a creditor not fully secured by a mortgage who obtains the benefit of a surety for part of his mortgage debt in order to further secure himself by that very act is deprived of portion of the security the inadequacy of which was a reason for demanding the surety; or that a person advancing say Rs. 10,000 on a mortgage which is valued only at Rs. 5,000 and has Rs. 5,000 of his advance guaranteed by a surety is only in reality secured to the extent of Rs. 7,500 by reason of the surety's right to claim the benefit of half the mortgage security on paying his half of the debt. To hold so would, I think, defeat the intention of the parties to such a transaction. A principle of equity is seldom adopted which had that effect. If such were the result of
section 141 of the Contract Act, I should expect to find the wording in section 140 repeated in section 141. The striking difference in the language of the two sections is a strong argument against the plaintiff's contention."

In Porvateneni Bhushayya v. Pootluri Suryanayana, a different view has been taken while in the case only section 141 was invoked, in the Madras case both sections 140 and 141 were relied upon. But in the Madras case the security was given subsequent to the contract of guarantee. In this case the surety had guaranteed only part of the debt. This guarantee he discharged and so the court held that as against the subsequent assignee of the creditor he was entitled to a proportionate share in the security held by the creditor at the time the surety discharged his liability. This was so even if the creditor was not fully paid. The Madras High Court held:

"There is little doubt on the language of section 140 that the surety is entitled to demand all the securities held by the principal debtor at the time of the payment, whether they had been received simultaneously with the loan advanced or subsequently. What is important to remember in this connection is that section 141 does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid or in any way to detract from the rights of the creditor as declared by section 140. Section 141 only gives
him liberty in action in respect of securities not held by him at the time of the contract of suretyship provided he exercises it before payment".93

Pollock and Mulla, agreed with the opinion expressed by Faran J., when they state:

"The Madras Court doubts the view of Faran J., but no attempt is made to deal with his argument on the equities. Further, the solution in the Madras case, it is submitted, is inequitable. The Court considers that any other view would enable a creditor to make an appropriation to the detriment of the surety who has already paid. But it is submitted that if the creditor has negligently sold the security to H at least than its market value the surety is protanto released.95 If on the other hand H has paid the full market value, it is inequitable that he should be called upon to share it with B. Further, the very basis of the surety's right to securities rests upon the obligation of the principal debtor to indemnify the surety. It would be strange if the surety could use these rights to hamper the creditor in recovering the debt.96 It is submitted that the creditor's right to hold securities until the whole debt has been paid is paramount to any claim of the surety whether based on section 140 or section 141."

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The above view is in conformity with the provisions of law and no surety can step into the shoes of the creditor until he has discharged his liability and until the entire debt due to the creditor has been paid in full. This rule shall apply also where the surety is only for the part of the debt.

The Law Commission has also taken the same view.

Another question worth examining relates to the case where more than one security is available to the creditor. In case the creditor takes more than one security on the basis of which the advance was made, it shall not mean that section 141 would not be attracted and the surety will not be discharged. Even if it is found that surety gave personal guarantee on the good-faith of the other security being offered by the principal debtor, which itself may be a consideration for the surety offering his personal guarantee, and the creditor by his own negligence lost the securities. In case such an interpretation is provided, it would mean that law is rewarding negligence and that law is putting a premium on the negligence of the creditor to the detriment of the surety who is usually described as a favoured debtor.
In any case the bank should exercise the care of a prudent man one would expect in management of its own affairs.

The next question for consideration is that whether under section 141 of the Contract Act, a surety undertaking to pay the amount due to the creditor under a particular debt or account is entitled to the benefit of the security held by the creditor against the same debtor to secure the same amount under other debt due to him. This matter came up for decision in the Rajasthan High Court in Bank of Baroda v. Krishna Ballabh and others, the court held:

"Keeping in view the language of section and illustration appended to it, it is clear that the principle incorporated in section 141 applies, so as to discharge the security from the liability, only in a case where the creditor loses or parts with the security held by him to secure the same debt for which the contract of suretyship was entered into. If there are two or more debts each secured by security the surety for one of the debts is not discharged if the creditor loses or parts with the security relating to other debts. In view of the above, I do not agree with the learned Additional District Judge that the plaintiff's liability as surety was discharged on account of the release of the goods pledged.
with the Bank to secure the amount under cash credit Account of M/s Jem Chemical and Pharmaceutical Works”.

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. In fact the contract of suretyship has the foundation of indemnity. The surety can claim from the principal debtor whatever sum he has rightfully paid under the guarantee. He however, cannot claim any amount which may have been paid by him wrongfully. In case surety pay less than what is due from the principal debtor he is entitled to receive the sum actually paid by him.
REFERENCES

1. Appendix - I
5. 11 Coke, 266; Willistan, Discharge of Contracts 18 Harvard Law Review, P. 105
6. (1862) 45 E.R. 1225
12. (1878) 4 Cal. 331 (P.C.)
13. (1878) 3 Q.B.D. 495
14. (1868) 3 Q.B.O. 573
15. Supra Note 5
17. Ibid, P. 748
18. Section 237 is as:

When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were
within the scope of the agent's authority. 

Illustrations

(a) A consigns goods for B for sale and gives him instructions not to sell under a fixed price. C being ignorant of B's instructions, enters into a contract with E to buy the goods at a price lower than the received price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in Blank. B sells then to C in violation of private orders from A. The sale is good.

19. Supra note 12
20. Appendix-II
21. Annexure- I
22. Chitty on Contracts, vol. 11 Ed. 24th., p. 4832
23. (1846) 16 M & W 128
26. A.I.R. 1940 Nag. 91
28. Indian Contract and Specific Relief Acts, 9th Revised Ed. 1972, P. 629
29. Supra note 26
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<td>31</td>
<td>Nur Din v. Allah Ditta</td>
<td>A.I.R. 1932 Lah. 419</td>
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<td>33</td>
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<td>A.I.R. 1982 S.C. 1497</td>
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<td>34</td>
<td>Hazarimal v. Krishna Rao</td>
<td>(1880) 5 Bom. 647</td>
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<td>35</td>
<td>Kaisho Kishori v. Radha Raman</td>
<td>A.I.R. 1918 Cal. 707</td>
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<td>36</td>
<td>Dil Mohamad v. Sanidas</td>
<td>A.I.R. 1927 Lah. 396</td>
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<td>37</td>
<td>Subsananya v. Gopal</td>
<td>A.I.R. 1920 Mad. 216</td>
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<td>38</td>
<td>Kanahai v. Sukanen</td>
<td>(1937) 14 Rai. 594</td>
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<td>39</td>
<td>Abdeali v. Askaran</td>
<td>A.I.R. 1924 Nag. 411</td>
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<td>40</td>
<td>Radha v. Kinlock</td>
<td>A.I.R. 1928 All. 46</td>
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<td>41</td>
<td>Mahanth Singh v. Uhayi</td>
<td>A.I.R. 1939 D.C. 110</td>
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<td>42</td>
<td>Aziz Ahmad v. Sher Ali</td>
<td>A.I.R. 1956 All. 8</td>
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<td>43</td>
<td>Chattar Singh v. Makhan Singh</td>
<td>A.I.R. 1936, Per. 20</td>
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<td>Supra Note 40</td>
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<td>47</td>
<td>Ranjit v. Naubal</td>
<td>(1902) 24 All. 504</td>
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<td>48</td>
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<td>2 Vergs 540</td>
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52. A.I.R. 1962 J & K. 72
54. A.I.R. 1982 Del. 487
55. Agreements not discharging sureties, on, when to take up the whip. Arkansas L.R. Vo. 30 P. 544
56. (1894) 2 Ch. 32
59. A.I.R. 1933 Mad. 309
60. The effect upon the surety of a Reservation clause in a Release of the Principal debtor, Yale L.J. Vol. 50 P. (1485).
62. Raymond H. Rapaport - Effect of Release of Principal debtor with Reservation of rights against the surety- Michigan L.R. Vol.40 P.317
63. Arant, suretyship (1931), P. 264
64. Referred in Note 57 Cholsan v. Savim, 31 N.P. (2 d.) 858
65. Appendix - I


67. A.I.R. 1977 Kart.14

68. 1975, 8th Ed. P. 119


70. T.L.N.J. 117 (1980)

71. Appendix- I


76. (1878) 4 Cal. 331 (PC)

77. 44 P. 304 Illustrates illustration (a) of S.139

78. Appendix - I

79. Ibid.

80. (1807) 14 Ves 160
81. A.I.R. 1968 S.C. 1432
82. A.I.R. 1967 S.C. 1105
83. State Bank of Sausashtra v. Chitraranjan
     Ragnath, A.I.R. 1980
84. Supra 78,78
85. A.I.R. 1972 Kart. 14
86. Id. at P. 18 S.C. 1528
88. A.I.R. 1987 Kart. 2; B.S! Patra v. State
     Bank of India, A.I.R. 1986 Ori. 247
89. M/s Quality Bread Factory, A.I.R. 1983 P.& H.244
90. A.I.R. 1987 P.& H. 176
91. (1890) 15 Bom. 48 at 64
92. A.I.R. 1944 Mad. 195
93. Id. at P. 200
94. Indian Contract Act etc., 9th Ed. Pages 642-643
95. Penal v. Deacon, (1857) 24 B. 156
96. Farej, J. Supra Note 87
97. Thirteenth Report (1958) P. 54
     Appendix - III