IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.758 of 2020

CMA No. 5467/20

[Danish Elahi & others v. Mariam Kamran & others]

Dates of Hearing	:	22.10.2021, 26.10.2021, 08.11.2021, 09.11.2021, 19.11.2021
Plaintiffs through	:	M/s. Haider Waheed & Ahmed Masood, Advocates
Defendants through	:	M/s Ravi R. Pinjani, Hamza Hussain Hidayatallah & Ghulam Akbar Lashari, Advocates Ms. Heer Memon, Advocate for the Intervener/Bank Al-Falah

O R D E R

Zulfiqar Ahmad Khan, J:- This order will decide the above referred CMA made under Order XXXIX Rule 1 & 2 read with Sections 94 and 151 CPC where the plaintiffs are soliciting injunctive relief against the Defendants to maintain status quo, till the pendency of suit. What are the implications of this benign looking request will become evident as one goes through this order.

2. Brief facts as gathered from the memo of plaint and the supporting affidavit are that the plaintiffs and defendants are relatives *inter se* conducting businesses in the name of Elahi Group of Companies and Elahi Electronics, respectively. Out of this family, one brother namely Kamran Elahi (husband of the defendant No.1, brother of plaintiff No.2 and uncle of plaintiff No. 1 & 3 and father of Defendant Nos. 2 to 4) established Elahi Electronics and was in active operation thereof till his untimely death in a road accident on 26.06.2016. Case of the plaintiffs is that like any other businessmen, the deceased obtained financial facilities from various banks and in lieu thereof, mortgaged his properties and stocks in trade. Sudden demise of Kamran, while left his widow (defendant No.1) in *Iddat*, also

made his overseas studying child (Defendant No.2) rush to Pakistan. Per Plaintiffs' counsel in this hour of need the Elahi Group of Companies ("Elahi Group") which was run by deceased's brothers and nephews; entered into a Family Agreement on 4th day of Kamran's demise with Kamran's widow (Defendant No. 1). Arif Elahi (not been made a party to the suit – though actively present in all hearings) being elder of the Elahi Family was to supervise the distribution of the proceeds of liquidation of Kamran's assets among Kamran's legal heirs as per their share per *Sheriah*. Full text of the agreement is reproduced in the following:

FAMILY AGREEMENT

The ELAHI FAMILY lost our Mian Kamran Ilahi (Late) on 26th May, 2016 in a road accident while traveling from Lahore to Islamabad. This untimely death has put the entire family and the Business in a devastated condition.

That its time like this that we & our families all should support each other as there are certain liabilities of Kamran Ilahi (late) payable to the Banks, Contractors, vendors, Employees, Transporters etc. these payments need to paid urgently and on its due dates. In addition there are family expenses including domestic, traveling, medical wedding etc which are required to be paid.

Hence the family has decided to resolved as under:

1) That M/s Elahi Group of Companies (EGC) through its own resources and borrowing from other family members shall pay Bank Liabilities after reconciling and negotiating with the Banks. The Assets released by the Banks shall be handed over to EGC for liquidation. That EGC shall also pay monthly payments of Pocket Money, Domestic Servants, Utilities, POL, Mobile, Club Payments etc as per monthly requirements to be ascertained by Mr. Sohail Ilahi. In addition to Travel & Family events.

2) That Usman Elahi to return from Melbourne, Australia after completion of his education of Bachelors;

3) On receipt of the Succession, the properties of Mian Kamran Ilahi (late), these properties, receivable, shares and other current and fixed assets shall be liquidated and all such payments made as per Serial No.1 & 2 above and / loans of late Kamran Ilahi paid by M/s Elahi Group of Companies shall be reimbursed to Elahi Group of Companies.

4) That Mr. Arif Elahi our family elder shall supervise the distribution of the proceeds of such liquidation amicably of Kamran Ilahi's assets as per their Shariah Legal Share to the legal heirs after deduction of all payables. We all have full faith in Mr. Arif Elahi who always treated Late Kamran Illahi as his son and looked after the entire family.

That all decisions by our elder Mr. Arif Elahi shall be final and binding on all members of the family including the Legal heirs of Kamran Ilahi Late.

Signed this 30th May, 2016.

Mr. Arif Elahi — Mr. Sohail Ilahi

Mst. Mariam Kamran	Mr. Danish Elahi	Mr. Raza Elahi
On Behalf of all Legal Heirs	*On Behalf of EGC*	*On Behalf of SCL*

According to the plaintiffs' counsel, the Family Agreement entered into between the parties is in the shape of Contract of Guarantee whereby the plaintiff No.1 was to pay the liabilities of the deceased Kamran being a surety and in deference of the said Family Agreement, the plaintiff paid an amount of Rs.1,855,904,866/- to various banks, expended an amount of Rs.328,564,000/- on the suit properties as well as paid an amount of Rs.75,000,000/- to the defendants for their personal travelling and general household expenses (*not a single letter from any bank is available to show that deceased's liability has been fully paid*). The plaintiff further averred that the defendant surreptitiously and furtively obtained succession certificate without disclosing the liabilities of the deceased and Family Agreement, as well as breached the Family Agreement. As the time went by, per learned counsel, the banks served notices upon the plaintiff No.1 to pay the liabilities of the deceased as the plaintiff No.1 was directly accountable (*no such letter has been shown either*)

4. Mr. Haider Waheed, Advocate also contended that the plaintiff No.1 was the mainstay of the defendants after the sad demise of Kamran who paid debts of the bank obtained by the deceased Kamran hence the plaintiff No.1 acquired the same rights and entitlements as the original creditor in order to recover the debt owed either amiably or through process of law. Having argued as above, learned counsel cited Sections 126, 127, 140, 141 and 145 of the Contract Act,1872. His main stance is that having paid the debt to the banks as well as to different individuals whom the deceased obtained goods to run the business *(no record shown*), the plaintiff No.1 and other plaintiffs who performed the obligation of paying the debts of the legal heirs of deceased Kamran stand in the place of creditors and entitled to the same rights under the law including any pledge/lien or other security over any property which the financial institution/creditor held before receiving their payments.

5. Contrariwise, Mr. Ravi Pinjani, Advocate presented the case of the defendants. He vociferously contended that the alleged Family Agreement is a forged and fictitious document (not even written on a Stamp Paper nor witnessed by any independent persons) that also contrary to the public policy as well as void in terms of Section 24 of the Contract Act, 1872, therefore, cannot be enforced through a court of law. He next contended that the alleged Family Agreement is shown to have been signed four days after the death of Kamran when Defendant No. 1 was observing "Iddat", therefore, no possibility that she might have signed it existed. The next stance is that three assets/properties in the list of properties ordered to be stayed are personal assets of the widow hence cannot be subject to the terms alleged by the plaintiffs. He states that plaintiff's claim premised on section 141 of the Contract Act is barred under Section 7(4) of the Financial Institutions Ordinance, 2001 as at best, the matter be tried by a Banking Court after making Banks as parties. He also denied that any payments have been made by the Plaintiffs, even if these were made, no accounts were ever given to the Defendants and latter were kept in dark as to terms and conditions of the payments, thus defendants' succession application had no mala fide, rather the only course available to the grieving family to take stock of family assets. Furthermore, the claim is of a money decree, hence the plaintiffs are not entitled to any injunctive relief, therefore, the application in hand be dismissed. While concluding his arguments, learned counsel relied upon the judicial precedents which are reported as PLD 2018 S.C. 322, , PLD 2013 S.C. 641, PLD 1973 Lahore 77, PLD 2011 S.C. 241, 2017 CLD 1752 and 2015 CLD 848.

6. Now coming to the caselaw presented to the court by the learned counsel for the Plaintiffs being PLD 2018 S.C. 322, PLD 1959 (W.P.) Karachi 465, 2017 CLD 1497, 2000 YLR 2407, PLD 20185 Sindh 303 and 2017 SCMR 98. Out of these five cases referred by him, only one related to Contract Act being (2017 SCMR 98) Muhammad Sattar & others v. Tariq Javaid where

the Hon'ble Supreme Court dealt with the issue of the sanctity of an unsigned agreement and held that a valid contract could be oral or it may be proved through exchange of communication between the parties, once communicated, the acceptance thereof could be express or implied, and such acceptance of the offer would include accepting the consideration accompanying the offer or acting upon the said bargain, hence formal signature of both or either of the parties was not a necessary requirement. This reliance it seems is made to prove that the Family Agreement even if not signed, would still carry sanctity. However, learned counsel did not show through any other document that communication was made with the defendants. Other than two agreements which allegedly put the plaintiff in shoes of the creditor, no communication with the defendants have been attached. It's surprising that while the plaintiff claims to be settling accounts of the deceased, latter's legal heirs are kept in dark with the terms and conditions reached with the creditors. As to the issue of res judicata, territorial jurisdiction and competent forum (as answered through the other caselaw) these are not dealt with in this order which is solely deciding an injunction application, as these issues most appropriately are best suited to be answered while considering defendant's Order VII Rule 11 application.

7. While rebutting to the submissions of learned counsel for the defendants, learned counsel for the plaintiffs submitted that the defendant No.1 resides in Karachi, therefore, this Court has exclusive jurisdiction to try the suit. To meet the objection of learned counsel for the defendants to the extent of signature on the Family Agreement by the widow, he submitted that conduct of parties including further agreements which were executed, belie plea of defendant No.1 and demonstrate that there was such a contract in the shape of Family Agreement between the plaintiff No.1 and the defendants. He further emphasized that plaintiffs being a

guarantor/surety paid the liabilities of the deceased, and by doing so the plaintiffs are now vested with the rights of the original creditor, and Sections 140 and 145 of the Contract Act empower the plaintiffs to recover sums paid by them in the capacity of guarantor and till such payments are returned, they will have rights over the deceased's properties and other securities in the like manner as the original creditor had before any payments made to it by the plaintiffs.

8. Learned counsel for the Intervener/Bank submits that the instant suit is not maintainable in view of Section 7(4) of the Financial Institution Ordinance, 2001, since the jurisdiction of the instant issue lies with the Banking Court. She points out that properties have been mortgaged with the Bank for which Suit No.B-14 of 2020 having been filed against the defendants.

9. Heard the parties and perused the record. Force of the arguments of Mr. Waheed was his reliance on the provisions of the Contract Act, 1972 ("the Act") in particular Sections 140 and 145 thereof. The core question posed by the learned counsel for the Plaintiff hence becomes that once the Plaintiffs have (assumingly) paid moneys to the creditor banks under a contract of gurantee, do they enter into the shoes of the creditor under Section 140 of the Act and acquire all the rights of the creditor against the principal debtor, hence all the assets of the deceased in his name or in the name of his wife first be used to discharge liability towards the Plaintiffs before the Defendants could be given a right to dispose those off, or to use them for their daily livings as bank accounts of the deceased are also taken over by the plaintiffs.

10. As reliance is heavily placed on Sections 140 of the Act, I reproduce it hereunder:

> *Rights of surety on payment or performance. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for,*

is invested with all the rights which the creditor had against the principal debtor.

11. Before I come to a thorough analysis of Sections 140/145, its useful to examine the scheme of the law contained in Chapter VIII of the Act titled “OF INDEMNITY AND GUARANTEE”. The said chapter starts with Section 124 defining a "Contract of indemnity" to be a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Section 125 provides for the rights of indemnity holder when sued. It states that “The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies; (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit; (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit”.

12. Section 126 while at one hand defines what a “Contract of Guarantee” is, it also describes what its three actors are. In essence, the section states that a contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". Hence in the case at hand following the scheme of law as

emphasized by the learned counsel for the Plaintiffs, the Plaintiff are "Surety", Defendants are legal heirs of "Principal Debtors" and banks are "Creditors".

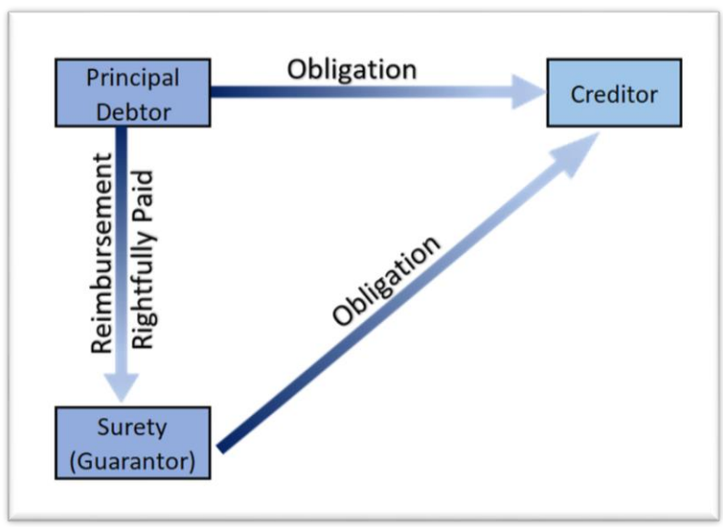
13. Consideration for guarantee as provided under Section 127 could be anything done, or any promise made, for the benefit of the principal debtor and may be a sufficient consideration to the surety for giving the guarantee. Section 128 provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract". Section 133 titled 'Discharge of surety by variance in terms of contract' provides that "any variance, made without the surety's consents, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance". While Section 134 dealing with the issue of Discharge of surety by release or discharge of principal debtor provides that "the surety is discharged 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 consequence of which is the discharge of the principal debtor", also of importance are the provisions of Section 135 which cater for the possibility of a comprise between the creditor and the principal debtor that might result in discharge of surety. It states that through "a contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract". Discharge of surety is also possible through Section 139 if the 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 himself against the principal debtor is thereby impaired, the surety is discharged. Also, of importance to keep in mind are the provisions of Section 141 which at one hand empowers surety to benefit of creditor's securities, also discharges him from the

liability if the creditor losses, etc. Full text of the said section is reproduced in the following: -

> *Surety's right to benefit of creditor's securities. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.*

14. Also of importance are the provisions of Section 145 titled 'Implied promise to indemnify surety' which provides that "in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully".

15. Relationship between Chapter Eight's three actors i.e., Creditor, Surety and the Principal Debtor could be represented by the following simple diagram showing that an obligation of a Principal Debtor towards a Creditor can be settled by the Principal Debtor by itself, or in alternate such obligation could be enforced by the Creditor upon the Surety, in which case the Principal Debtor has to reimburse all such rightfully paid sums under the guarantee, but Principal Debtor has no obligations to reimburse sums wrongfully paid by the Surety to the Creditor:



16. In the case at hand while the Plaintiffs claim to be the Surety, the Defendants are legal heirs of the Principal Debtor but interestingly the Creditors were not made as a party to the suit, while as mentioned in the previous paragraphs, Plaintiffs claim to have settled obligations of the deceased principal debtor with several creditors, of peculiar interest in this background is the fact that one of such creditors (Bank Al-Falah Limited) during the pendency of the instant case (and hearing of the present application) made an application under Order I Rule10 CPC to be added as a party claiming that it has already commenced litigation against the Defendants for the financial facilities provided to the principal debtor. Meaning thereby the claim of the Plaintiffs to have settled obligations of the Principal Debtor with the Creditor couldn't be ascertained on account of failure of the Plaintiffs to add those as parties, nor the Plaintiffs version that it has settled the obligations of the deceased with these Creditors (in the presence of one of the Creditor claiming settlement of deceased's liability) shows that full truth is not before the court.

17. Now coming back to Sections 140, 141 and 145 in the context of rights of Surety against Principal Debtor and Creditor (core case of the plaintiffs as argued by the learned counsel), it seems the cycle of settlement of Principal Debtor's obligations by the Surety blessed with aforementioned statutory sanctions would only commence on happenings of either (a) guaranteed debt becoming due, or (b) the Principal Debtor having defaulted in performing a guaranteed duty. It is only upon happening of any of these two pre-requisites that Section 140 permits Surety to make payment or perform all that he was liable for, and upon such payment/performance, Surety is "invested with" all the rights which the creditor had against the Principal Debtor. It is for these reasons, Section 141 (immediately following Section 140) prescribes that if in the process envisaged by Section 140, the Creditor loses, or, without the consent of the surety, parts with such security, the surety would be

discharged to the extent of the value of the security, meaning thereby the initial battle of performing a guaranteed duty has to be fought in between the Principal Debtor and the Creditor and Surety has to watch out as its obligation would be discharged if Creditor loses or the battling parties settle the dispute without involving the Surety. Not only so, language of Section 145 is also couched in similar restrictive manner, where first of all it makes it a responsibility of the Principal Debtor to fulfil its implied promise of indemnifying the surety (i.e., not to expose Surety to the direct wrath of the Creditor), and if such an implied promise is not performed and Surety upon payment or performance of all that he was liable for is entitled to recover from the principal debtor only those sums which he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

18. Addition of the words “sums which he has paid wrongfully” seems to cater of the situations where the Surety in his zeal to get some benefit from the Principal Debtor’s inability to perform latter’s guaranteed duty may make certain payments which the Principal Debtor might not have made or negotiated with the creditor. In the case reported as 1968 PLD 222 (Alavi Sons Ltd. v. The Government of East Pakistan & another), this court in an application seeking for Injunctions that defendant Bank be restrained and prohibited from paying over guarantee amount to person entitled held that such an application was not maintainable as surety Bank was entitled (under Section 145 of the Contract Act, 1872) to indemnify itself only if guarantee was "rightfully" paid.

19. As drawn from the forgoing analysis, relationship between Principal Debtor and Surety seems to be governed by the principles of the Contract of Guarantee which is one of a specific performance contract. It is so because it calls for an equitable relief as it is not the usual legal remedy where compensation for damages could be adequate as the law prescribes that in an event where the actual damage for not performing the contract

cannot be measured or monetary compensation is not adequate, one party can ask the court to direct the other party to fulfil the requirements of the contract, which is a discretionary relief, i.e., left to the court to decide whether specific performance should be given to a party asking for it or not. It is thus not unusual for courts passing orders and judgments on such specific performance suits where the Surety after making payment of obligations on behalf of a Principal Debtor in a banking suit comes to a court of civil jurisdiction to claim the sums paid by him to the Creditor on behalf of the Principal Debtor. Such suits are however filed as aftermath of a Banking trial, which hasn't happened in this case. This suit for (*inter alia*) specific performance has been filed without any clear-cut admission from any of the Creditor that deceased Principal Debtor's borrowing have been satisfactorily settled by the Plaintiffs. Not only so, in fact no tripartite agreements have been attached with the suit, except one dated 18.06.2016 (pages 57-61) where only name of the Plaintiff No.1 appears, however Bank has not signed the said agreement. At this juncture it would not be out of place to distinguish a surety from a guarantee. The primary difference between these is "the time at which a creditor can collect from each." With the concern of suretyship, the creditor can look to the surety for an immediate payment upon the occurrence of a default payment by a debtor. However, whereas a guarantor is an individual, the creditor first asks to collect the debt from the principal debtor before demanding the performance from the guarantor. Guarantor stands alone or independent for any underlying obligation by the principal debtor to a creditor (does not have in writing) whereas surety can exist only for a valid agreement between the principal debtor, creditor, and surety, a person binding himself on behalf of the debtor. There is a greater risk for the guarantor than a surety (credit risk on the principle of exercising his right recourse) whereas the guarantor of a surety is not subrogated on the creditor's right upon payment, which increases the risk for him. A surety is favored by law

as such surety liability is a "favored debtor" as "the liability of the surety is contingent and secondary." It is also a common practice that surety would be asked for paying debt only after the action on the principal debtor has been taken by the creditor. In the case of Davies v. London Provincial, Marine Insurance (1878 - 8 CHD 469) it was held that "a contract of guarantee is not a contract *uberrimae fides* or one of absolute good faith."

20. Also, question posed by the learned counsel for the Defendant is vital where he has stated that the Defendants were kept in dark as to any payments made by the Plaintiffs to any of the sureties. On this point, there is a global understanding that surety settling with a creditor without knowledge or will of principal debtor does not bind the principal debtor. Exactly on this premise, certain country's[1] civil code is built which provides that "Whoever pays on behalf of the debtor without the knowledge or against the will of the latter, cannot compel the creditor to subrogate him in his rights, such as those arising from a mortgage, guaranty, or penalty."

21. What Plaintiffs are claiming in pure legal terms is that after settling borrowings of the deceased Principal Debtor they have subrogated themselves in creditors eyes. There is no cavil to the fact that law permits a person to be substituted in place of another so as to have all rights and obligations pertaining to a lawful claim, demand, or right against a third party under right of subrogation. A person can satisfy his loss that is created by the wrongful act or omission of another person by stepping into the shoes of another and recovering on the claim from the wrongdoer, however, subrogation is not free from judicial control. In statutory or legal subrogation (the case at hand) it is an established position that the right of subrogation is not applicable to "volunteers" who pays the debt of another at the back of the debtor. When a person pays the debt of another he is called a "volunteer" and when a person pays the debts of another by

[1] Philippines Civil Code's Article 1237

mistake, he is in the same position as that of a volunteer. A person claiming to be equitably subrogated to the rights of a secured creditor must satisfy following prerequisites or conditions:

i. Payment must be made by the subrogee to protect his own interest;
ii. The subrogee must not have acted as a volunteer;
iii. The debt paid must be one for which the subrogee was not primarily liable;
iv. The entire debt must have been paid; and
v. Subrogation must not work any injustice to the rights of others.

22. A volunteer or intermeddler is one who thrusts himself into a situation on his own initiative. Subrogation and Volunteer Rule takes it inception from the Roman Law dating back 1673AD where one of the equities according to surety was the right to have all the claims and securities held by the creditor transferred to him upon payment. This rule is also known as the *beneficium cedendarum actionum* which over the centuries has been refined inasmuch as the said doctrine of subrogation is held to not apply to volunteer who has paid the debt of another in isolation. Courts have also held that a volunteer making payment has no right or interest of his own to protect and he cannot invoke the aid of subrogation since such a person cannot establish equity. A volunteer is also defined to include a person who makes payment upon request or as a surety, or under some compulsion, however such a person cannot invoke the rule of subrogation successfully without a contract of subrogation, unless fraud, mistake or some other consideration is evident. In relation to mortgages, when a subsequent mortgagee substitutes a prior mortgage by a subsequent mortgage, courts are manded to apply equitable subrogation only after determining the following factors:

i. the subrogee made payment to protect his/her own interest,
ii. the subrogee did not act as volunteer,
iii. the subrogee was not primarily liable for the debt paid,
iv. the subrogee paid off the entire encumbrance, and
v. subrogation would not work any injustice to the rights of a junior mortgage holder.

23. In the case at hand, even if contents of the agreement dated 30 May 2016 are admitted, it clearly does not provide that the grieving family consented to their subrogation by the Plaintiffs. In above discussion one must also keep sight on the principle of *beneficium ordinis seu excussionis* which means that the benefit protects the surety by compelling the creditor to first proceed against the principal debtor. This legal principle ensures that a creditor must first of all should obtain all that's possible from a debtor's estate before proceeding against the surety.

24. No coming to the issue of death of parties of a tripartite agreement (while such an agreement doesn't even exit, however to further the legal discussion, one can observe so). Effect of death of surety is covered by Section 131 of the Contract Act titled 'Revocation of continuing guarantee by surety's death' which provides 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 future transactions". Hence from a bare reading of Section 131, it can be inferred that the death of the surety will lead to a discharge of the surety and surety will be discharged from the future transactions which are entered into (between the creditor and principal debtor), however, legal heirs of surety will continue to have the obligation towards the transactions, for which the surety has given the guarantee, in case the transactions have already been entered into, but will only be liable to the extent of the property that they have inherited, and they are not made personally liable for the obligations of the surety. It

seems that no such provisions exist for the legal heirs of a principal debtor in the Contract Act.

25. Last but not least, a few words about '*presumed undue influence*' principle. As the nomenclature suggests, this form of undue influence arises out of a relationship between two persons where one has acquired over another a measure of influence or ascendancy, of which the ascendent person then takes advantage without any specific overt acts of persuasion. Typically, this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. Research did not show any cases from our courts, however of relevance is the leading English case of Royal Bank of Scotland v. Etridge [2001] UKHL 44 which dealt with English contract law and enumerated circumstances under which actual and presumed undue influence can be argued to vitiate consent to a contract. In these eight joined appeals, homeowners had mortgaged their property to a bank. In all cases, the mortgage was securing a loan that was used by a husband for his business, while his wife had not directly benefited. The businesses had failed, and the wife had alleged that she had been under undue influence to sign the security agreement. Therefore, it was contended that the security should be void over her share of the home's equity and that because of this, the house could not be repossessed. The House of Lords held that *for banks to have a valid security they must ensure that their customers have independent legal advice if they are in a couple where the loan will, based on constructive or actual knowledge (either suffices), be used solely for the benefit of one person*. A bank is "put on inquiry" (fixed with constructive knowledge) that there may be the risk of undue influence or misrepresentation, if they transact for security over a domestic home, where the loan will only benefit one person and not the other. Plaintiff's case is that the Defendant No. 1 widowed on 26th May signed an agreement on May 30th May (within 4 days of her husband's death i.e. during period of

her *iddat*) handing out power to the Plaitiffs to settle matters with the creditors. First of all Rules of *Iddat* require a widow to not to leave house till the completion of *Iddat* period unless there is some emergency like requirement of basic needs or medical illness to such extent that it is not possible to arrange for a house-call by a physician[2] hence imagining that she would be out of distress while signing the agreement is highly unlikely. While the research conducted on the question of "Legal Value of Agreements signed During *Iddat* Period of Muslim Women" did not show that any agreement signed in these days would be invalid, however sanctity to such agreements in my humble view could not be given flawlessly. Application of presumed undue influence principle cannot be ruled out as both the ingredients for presumption of undue influence being (a) a relationship of trust and confidence in relation to the management of a subservient party's affairs; and (b) a transaction which by its nature called for an explanation[3] existed in the case at hand and application of the principles set up by Royal Bank of Scotland v. Etridge (*Supra*) cannot be ruled out.

26. Residual effect of the above discussion is that while surety is blessed with certain statutory sanctions, but these only come into play on the happenings of either a guaranteed debt becoming due, or the principal debtor having defaulted in performing a guaranteed duty, it is only upon happening of any of these two pre-requisites that Section 140 permits surety to make payment or perform all that he was liable for, and upon such payment/performance surety is only "invested with" all the rights which the creditor had against the principal debtor, not only so, language of Section 145 is also couched in similar restrictive manner, where first of all it makes it a responsibility of the principal debtor to fulfil its implied promise of indemnifying the surety, and if such an implied promise is not

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[2] *Iddat* under Muslim Personal Law by Anubhav Pandey

[3] Birmingham City Council v (1) Janet Beech (sued as Janet Howell) (2) Michael Beech [2014] EWCA Civ 830

performed and Surety upon payment or performance of all that he was liable for is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully; and in my humble view no such suit for specific performance could be entertained in the absence of the key player "creditor" who are missing in the case at hand, and whilst Plaintiff's claim to have settled obligations of the deceased with creditors, Bank Al-Falah Limited has already commenced litigation against the Defendants for the financial facilities provided to late Kamran, and where no tripartite agreements have been attached with the suit, except one dated 18.06.2016 (pages 57-61) where name of one of the Plaintiff No.1 appears, however Bank has not signed the said agreement; and having observed that a contract of guarantee is not a contract *uberrimae fides* or one of absolute good faith; and where an international position exists that whoever pays on behalf of the debtor without the knowledge of the latter, cannot compel the creditor to subrogate him in his rights, such as those arising from a mortgage, guaranty, or penalty, and where rights of a secured creditor can only be granted if the subrogee must not have acted as a volunteer, and where the principle of *beneficium ordinis seu excussionis* requires that creditor to first proceed against the principal debtor, and whereas it appears that Rules of *Iddat* require a widow to not to leave house till the completion of *Iddat* period, imagining that she would be out of distress while signing the agreement is highly unlikely, the present application for seeking a moratorium on access of the grieving family to the assets of their father/husband is not only against injunctions of Islam, it also offends the provisions of the Succession Act which enables the legal heir to administer assets of the deceased, and if the Plaintiffs had any objections, they could have joined the proceedings as objectors. This court sees acts of the plaintiffs aimed to throttle livelihood of the deceased's legal heirs and put them to the caprice of the Plaintiffs, an act offensive to dignity of human

thus the Family Agreement sought to upkeep family's honour in fact is nothing but a sophisticated form of honor killing, tossing the widow (alongside her children) to the dust of injustice. For what has been reduced in the foregoing, I do not see any prima facie case of plaintiffs, neither balance of convenience in their favour, nor they would suffer any irreparable losses as their claim is only for money. The application is hence dismissed.

Karachi: 14.12.2021 J U D G E