ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

(JUDICIAL DEPARTMENT)

WP no. 2480/2022

Higher Education Commission
versus
Dr. Nousheen Iram, and others

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
8	28.02.2024	Mr.Binyamin Abbasi, advocate for the petitioner.

The petitioner, Higher Education Commission (HEC), is aggrieved by the order dated 18.04.2022, whereby the learned trial Court ordered abatement of the suit against defendant no.2 due to his death.

2 HEC had filed a suit for recovery of the scholarship funds extended to defendant no.1 scholar, claiming breach of the scholarship agreement signed in 2007, when the defendant scholar did not serve in Pakistan for 5 years in terms of the scholarship agreement after completion of her Ph.D degree in March 2013.

3 In her written statement, defendant no.1 scholar pleaded that defendant no.2, who stood as a guarantor for defendant no.1, died in 2011. The learned trial Court heard submissions on the question of abatement of proceedings against defendant no.2 guarantor due to his death and held vide the impugned order dated 18.04.2022 that the proceedings were to abate against him. The impugned order erroneously records that the guarantor passed away while the suit was pending.[1] However, this error does not in any manner affect the merits of the impugned order due to the reasons that appear hereinafter.

4 The scholarship agreement was signed in 2007. Defendant no.1 scholar completed her Ph.D in March 2013. On 29.09.2016, the plaintiff HEC sent legal notices of demand to both the defendants claiming breach of contract and demanding return of the scholarship funds with 25% penalty thereon. The suit was filed on 16.12.2016. Defendant no.1 filed her written statement in September, 2021, and in para 6 recorded that the guarantor was her father and had passed away in January 2011, i.e., before the suit was filed.

[1] This may have happened because of an identical order passed in a similar suit on or about the same time.

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5 Learned counsel for the petitioner contended that the guarantee bound the legal heirs and the suit could continue with defendant no.2's legal heirs impleaded. For this he referred to the language in the surety bond executed jointly by the two defendants which contains the following language:

> …we hereby bind ourselves, each of us, our and each of our heirs, executors administrators jointly and severally.

6 Before we turn to the purport of the language reproduced above, we need to clarify that this language appeared in an instrument titled "surety bond", which in a strict sense is not the same thing as an instrument of guarantee. The instrument of guarantee executed by defendant no.2 is expressly titled 'Guarantee' in which no language binding his heirs or successors appears. The instrument in which the aforesaid language appears is titled 'surety bond' and, by executing two separate instruments in the same transaction with different titles, it cannot be said that both the instruments were guarantee instruments. The expression 'bond' is not defined in the Contract Act, 1872, while the expression 'guarantee' is. The expression 'bond' does appear in other statutes such as in the *Limitation Act, 1908,* which defines bond as follows:

> (3) "bond" includes any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

The Stamp Act, 1899, also defines bond in section 2(5) as follows:

> (5) "bond" includes-
>
> (a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
>
> (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
>
> (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;

The expression 'bond' entails a personal liability and in the ordinary course does not apply to the estate of a person. Reference may also may be made to section 514(6) CrPC, whereby the death of a surety to a bond dying before the bond's forfeiture leads to his estate being discharged from all liability in respect of the bond. A bond generally is given for the performance by the giver of a personal obligation and not for the performance of a contractual promise of a third

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person.[2] Therefore, a much higher threshold has to be met where the argument for survival of liability beyond death relates to a bond.

7 However, proceeding on the assumption that the surety bond in question was nonetheless intended as a guarantee, the question arises whether the language therein was effective to bind the legal heirs of the guarantor for them to be impleaded in his stead and for the suit to continue against them.

8 In response to the question of law posed in the order dated 30.06.2022, learned counsel has cited *National Bank of Pakistan v. Muhammad Raies Ahmad and others*[3] to contend, by only referring to the headnote, that a guarantor's liability subsists beyond his death and binds his heirs if the terms of the guarantee so provide. He says so in the context of the language in the surety bond which is expressed to bind the guarantor and each of his heirs, executors and administrators, jointly and severally. However, a closer look at the National Bank case shows that the guarantor there had created a charge on his property in connection with the guarantee extended to the bank for the loan extended to the borrower and a lien in this respect had also been entered in the revenue record. That made it a case of enforcement of a charge against property, and the fact that the charge was in connection with a guarantee obligation is only secondary because the charge travels with the property irrespective of whose hands it lands in, including the heirs. Accordingly, the case does not appear to be an apt citation for the question under consideration.

9 The second case cited by the learned counsel is *Mst. Ameer Begum v. Abid Hussain*[4], which is not quite apt to the question under consideration because there was an admission in evidence on behalf of the surety that the surety had pledged his other property for the satisfaction of the claim, which was construed in the specific circumstances of that case by the Court as tantamount to a charge on the surety's property.

10 Learned counsel then referred to Section 131 of the Contract Act to submit that the guarantee was a 'continuing guarantee' in that several installments of scholarship funds were paid and, by virtue of section 131, the revocation of a continuing guarantee is expressed subject to a contract to the

[2] e.g. bail bond, indemnity bond, bottomry bond, etc., through a performance bond or bid bond may be exceptions to this general rule.
[3] 2020 CLD 784
[4] PLD 2011 Lahore 284

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contrary, and that the language purporting to bind the legal heirs was to be taken to be a contract to the contrary. I am afraid that interpretation does not follow because section 129 of the Contract Act defines a continuing guarantee as one which extends to a series of transactions, whereas, in the instant case, the transaction was only one, namely, the funding of the scholarship. Learned counsel's argument would have carried substance if the guarantee spanned various scholarships from time to time, but there was only one scholarship for one course of study and the mere fact that the scholarship funds were released in installments to correlate with the fee payment schedule of the University does not make it a continuing guarantee for that reason alone.

11 Even assuming that the surety bond in question was a continuing guarantee, the language on which HEC relies is ineffective to bind the legal heirs. This point was addressed emphatically in a detailed judgment by his Lordship Hon'ble Mr. Justice Muhammad Ali Mazhar (when at the Sindh High Court) in *Meezan Bank Limited versus M*essrs *Focus Apparels (Private) Limited and others*[5] wherein, after a detailed discussion of the case law, his Lordship observed at para 8 of the judgment as follows:

> Mere mentioning a word in the guarantee that this would be binding on the successor-in-interest will have no significance and the legal heirs could not be held responsible unless they agreed to the covenant made in the guarantee by their predecessor-in-interest in their absence. The condition mentioned under section 131 that "in the absence of any contract to the contrary" does not mean to hold responsible the legal heirs of the deceased guarantor as there is no contract with the legal heirs.

The aforesaid paragraph clearly explains that the expression 'contract to the contrary' cannot be applied to a person who was never a party to that contract. As noted above, the National Bank case on which learned counsel placed much reliance was a case where a charge was created in respect of the property[6] of the guarantor which is not the case here. The submission that section 128 of the Contract Act makes the liability of the surety coextensive with that of the principal debtor is of no avail because no liability whatsoever was determined against the principal debtor by the time the guarantor died in this case.

12 HEC's learned counsel's reference to the declaration of assets of the guarantor accompanying the surety bond to argue that the guarantor's property

[5] 2013 CLD 2138
[6] See sidebar C at page 788 of the law report.

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was subject to a charge and was burdened with the obligation under the guarantee is not supported by the language of that declaration. Applying the settled principle that an instrument of guarantee is to be strictly construed[7], there should have been express language in the surety bond or in the declaration of assets if such assets were to be charged with the obligation under the surety bond for the liability to travel with the assets irrespective of their ownership by the guarantor or his legal heirs. For a charge to be inferred, some express language to that effect must appear in the instrument itself. Section 100 of *the Transfer of Property Act, 1882*, reads as follows:

> **100. Charges**.-- Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property…

On its proper construction, the instrument of declaration of assets is only one furnished to demonstrate that the guarantor was a man of means capable of satisfying the obligation under the bond, but a declaration of sufficiency of assets does not *per se* entail that those assets have been secured for the purposes of discharge of an obligation under an instrument of guarantee or bond.

13 Resultantly, the impugned order was correct to conclude that the suit to the extent of defendant no.2 guarantor was to abate on his death. This petition is **dismissed**.

(Sardar Ejaz Ishaq Khan)
Judge

Rana.M.Ifz

Approved for reporting.

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[7] *Muslim Commercial Bank v. East and Exports Private Limited and others* (2007 CLD 1205)