

16 April, 2024 (1) Indemnity & Guarantee
From Sec. 124 to 147.

(1) Indemnity :- A contract of indemnity is a contract to compensate or indemnify for any loss caused in agreement.

Indemnifier
(Promisor)

Person who has provided.

Indemnified (Indemnity holder)
(Promisee).

Person who has the opportunity of getting compensated.

due to fault of Indemnifier. ← Loss Compensation → due to any third person.

Indemnifier → Indemnified.

That Indemnifier will compensate the loss if the loss is caused by him or any other person.
promisor

* Contract of Insurance → best example of Indemnity

↑
marine/fire/any other Insurance.
(But not life Insurance) - because in this case loss is certain)

NOTE :- Contract of Indemnity is a type of contingent contract as it depends on a collateral uncertain event.

Example :- Mr. X contracts with Govt. to return to India after completing his studies (which were funded by the Govt.) at University of Cambridge and to serve the Govt. for a period of 5 years. If Mr. X fails to return to India, he will have to reimburse the Govt. It is a contract of indemnity.

* The loss should be caused by

* The loss should be caused by action of promisor himself or any other person but not any natural calamity or accident which is an act of god.

Indemnity can be
→ express Contract
→ Implied Contract

ject of the indemnity contract \Rightarrow Should be lawful
 \downarrow
then only it can be enforced
in court.

★ Rights of Indemnifier holder under a suit. (Sec. 125)

- (i). to recover all costs of the suit.
- (ii). to recover all damages incurred under the suit.
- (iii). to recover any amt. paid under a settlement or compromise.

The liability of the Indemnifier arises on the liability of the Indemnified becoming absolute and certain
 \downarrow \downarrow \downarrow
1st hand + Possible

Part (ii) April 16, Contract of Guarantee

Contract of Guarantee \Rightarrow A contract of guarantee is a contract where a person discharges the debt of another party in case of default of the former.

Note :- Linkage

where the contract of guarantee is created the principal debtor and surety are under quasi obligation as the surety has \neq made the payment on behalf of the principal debtor, has the right to be compensated under section 69.

Essential of Guarantee Contract

Purpose - The contract of guarantee is a promise to discharge debt to the creditor by the surety.

Consideration \rightarrow Contract of guarantee requires consideration like any other contract.

\Rightarrow The guarantee of the surety to pay the debt of ~~promise~~ debtor is the consideration for the promise.

\Rightarrow Consideration given by the debtor to surety, in form of repayment of debt is valid consideration.

③. Existence of liability → The liability shall be valid and enforceable.

④. No Misrepresentation or suppression of fact → Guarantee given by surety is invalid if it is on grounds of material misrepresentation of facts.

★ Example: - A guarantees to C payment for iron to be supplied by him to B to the amt. of 2000 tons. B and C have privately agreed that B should pay rupee five per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

⑤. Not written. → The contract of guarantee can be oral or written.

⑥. Co-surety → A guarantee contract can contain joint sureties and each one is equally responsible to contribute to the debt, unless otherwise agreed upon.

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Types of Guarantee

Specific

→ The guarantee is limited only upto a series of transactions and not for other acts or activities.

Continuing

A guarantee is continuing in nature if it only comes to an end on revocation by the surety i.e. guarantee shall continue for all acts until it is revoked.

★ Distinction between a Contract of Indemnity and a Contract of Guarantee.

Basis

Contract of Indem.

Contract of Guarantee

No. of party / parties to the contract
There are only 2 parties namely the indemnifier [promisor] and the indemnified [promisee].

There are three parties - Creditor, principal debtor and surety.

Basis	Indemnity	Guarantee
Nature of liability	The liability of indemnifier is primary and unconditional	The liability of surety is secondary and conditional as the primary liability is that of principal debtor
Time of liability	The liability of indemnifier arises only on the happening of contingency	The liability arises only on the non-performance of an existing promise or non-payment of an existing debt
Time to Act	The indemnifier need not act at the request of indemnity holder	The surety acts at the request of principal debtor
Right to sue third party	Indemnifier can't sue a third party for loss in his own name as there is no privity of contract. Such a right would arise only if there is an assignment in his favour	Surety can proceed against principal debtor in his own right of a creditor after discharging the debt because he gets all rights of
Purpose	Reimbursement of loss	For security of creditor
Competency to contract...	All parties must be competent to contract	In case of a contract of guarantee, where a minor is principal debtor, the contract is still valid

★ ★ Nature and Extent of Surety liability

- ①. The liability of the surety is co-existent with that of Principal Debtor.
- ②. The liability of surety is secondary in relation to Principal Debtor.
- ③. The Creditor can directly proceed against the surety for recovery of debts.
- ④. The defect if any under the contract if discharges the principal debtor the surety is also discharged.

Important fact to know

where 2 parties enter into contract with a third person where one of them is in fact a surety for another but the same has not been expressed. So the third party is aware of such existence does not give him any right against the surety.

Discharge of Surety

Revocation of Continuing Guarantee

Notice

In case of continuing guarantee, it is revoked from future transaction from date of notice however past events are still liable to surety.

Death

On death of surety revocation occurs by operation of law for future transaction only legal representative is responsible for past.

Novation

Change of parties

If the surety is changed in the contract, the liability transaction extinguishes.

Change of Contract b/w parties

If the contract b/w parties changes, the surety is discharged from old terms of contract for future transactions.

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By Conduct of the Creditor

- Where there is any variance in terms of the contract between PD and PC without permission of surety the surety stands discharged.
- The surety is discharged if
 - PC and PD enter in a new contract or.
 - PC doesn't act or omission which has the effect of discharging the surety!
- Where the PD and PC enter into any composition
 - ~~agreement~~ or Composition Agreement or
 - An agreement to provide more time to PD without consent of PC or.
 - An agreement entered with PD and PC not to sue him in the event of any default and only to sue the surety.

- By invalidation of contract of guarantee.
- (a). By Misrepresentation → If the fact of the contract are highly misrepresented in material sense contract of surety is discharged.
- (b). By concealment → when important facts of the agreement are highly mistaken, mistated or concealed by PC or PD, the surety is discharged.
- (c). Where the principal creditor requires co-surety to join under the contract, the contract is discharged if such co-surety do not join.

Surety Rights

Principal Debtor

Principal Creditor

Co-surety

→ Right against the principal debtor

- (a). Rights of subrogation → where the surety discharge the debt due of the PD towards the PC, the surety get all rights of the principal creditor in relation to the principal debtor. This is the right of subrogation (substitution do not write in exam)

- (b). Implied Promise of Repayment → In every contract there is an implied promise on the end of the principal debtor to repay the surety in event of surety paying off the liability due to the creditor.

→ Right against the Principal Creditor

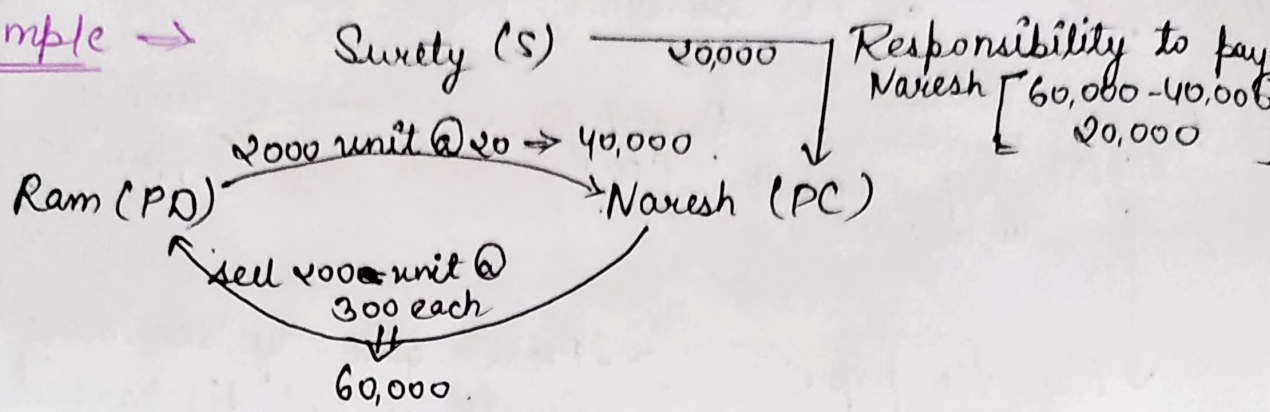
- (a) Right of surety to enjoy benefit of securities of Creditor :-

→ Where the surety is called upon to discharge the debt of the principal debtor all the securities under the contract whether or not known to the surety, shall be given to him until the PD rep the surety

(ii). Right to claim set off →

The Principal Debtor's any previous claim from the Principal Creditor can be set off with the debt being paid by the surety when the liability of surety arises.

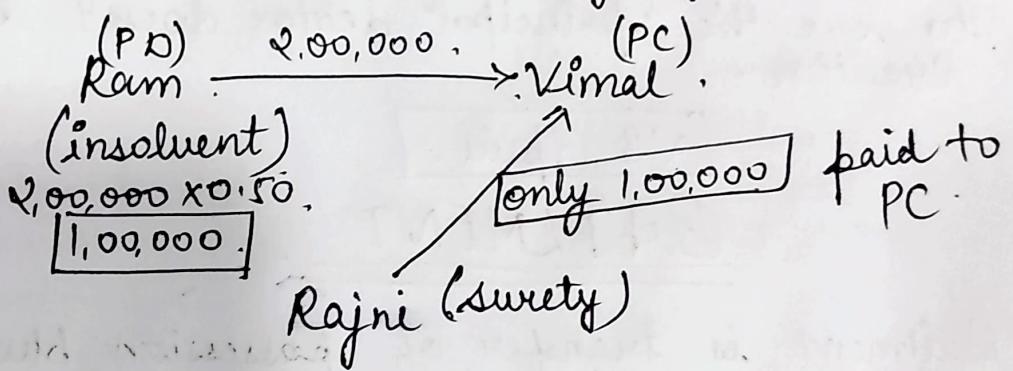
Example →



(iii). Right to share Reduction ⇒ The right of surety to benefit out of the insolvency of Principal debtor

Example →

Court }
50 paise
per rupee
ability to
be paid



Right of co-sureties

1. Right to contribute equally ⇒ Unless otherwise agreed upon each surety shall contribute equally towards payment of debt to principal creditor.

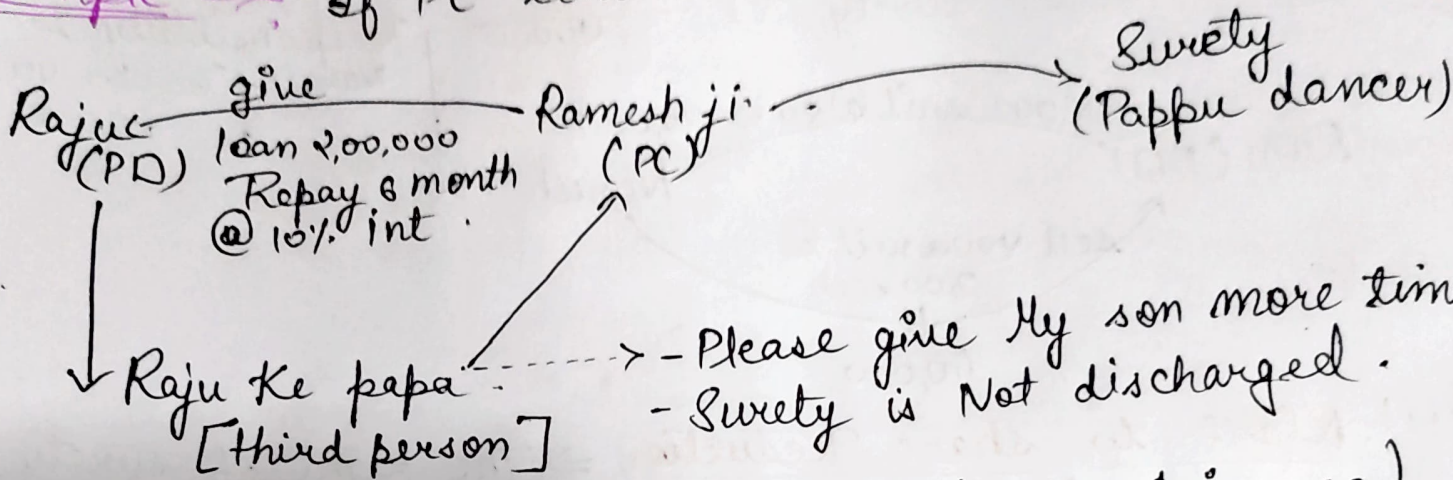
1. Right to contribute subject to maximum limit - The surety's contribution which shall be made equally can be subject to ~~minimum~~ maximum limit set under the contract

Cases Under Which Surety is Not Discharged.

- (i). Creditor if enters into a contract with a third Party to allow more time to principal debtor. then surety is not discharged.

Example →

If PC contract PD to give more time.



- (ii). Creditor's ~~performance~~ forbearance (i.e. abstinence) to sue the principal debtor doesn't discharge the creditor.