

## Unit-7 Indemnity & Guarantee

A Contract of Indemnity is a contract to compensate or indemnify for any loss caused in the agreement.

Indemnifier - Person who has promised to compensate for loss

Indemnified - Person who has the opportunity of getting compensated

Indemnity - Promise to compensate for loss.

due to fault of Indemnifier ↙ Loss Compensation ↘ due to any third person

Indemnifier —————> Indemnified (Indemnity holder)

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

Best example of Indemnity - Contract of Insurance

like Marine, fire, etc But NOT life Insurance becoz in this loss is certain.

Note: Contract of Indemnity is a type of Contingent Contract as it depends on a collateral uncertain event.

The loss should be caused by the action of promisor himself or any other person but NOT ANY natural calamity or accident which is act of God.

Indemnity can be express or Implied.

Object of Indemnity Contract - Should be lawful then only it can be enforced in court of law.

Right of Indemnity holder under a suit - (Section 125)

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

The liability of the indemnifier arises on the liability of the indemnified becoming absolute and certain (possible).

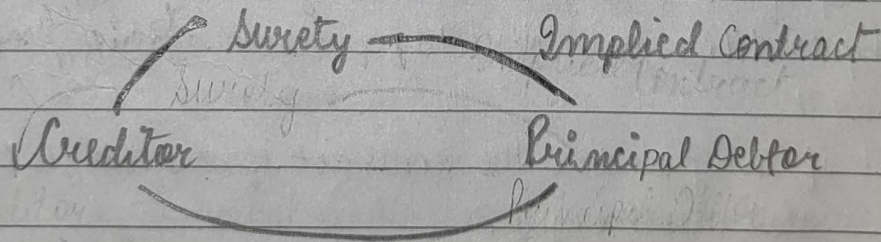
### Contract of Guarantee

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

Note: where the contract of guarantee is created the principal debtor and surety are under QUASI OBLIGATION as the surety has made the payment on behalf of the principal debtor, has the right to be compensated under Section 69.

### Parties Involved -

- 1) Surety - person who gives guarantee
- 2) Principal Debtor - person in respect of whose default the guarantee is given.
- 3) Creditor - person to whom guarantee is given



### Essentials of a Guarantee Contract -

- 1) Promise: The Contract of Guarantee is a promise to discharge a debt to the creditor by the surety.
- 2) Consideration: Contract of Guarantee requires consideration like any other contract.
  - The guarantee of the surety to pay the debt of the debtor is the consideration for the promise.

- Consideration given by the debtor to the surety in form of repayment of debt is valid consideration.
- 3) Existence of Liability - The liability shall be valid & enforceable.
  - 4) No Misrepresentation or suppression of fact - Guarantee given by the surety is invalid if it is on grounds of material representation of facts.
  - 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.

### Types of Guarantees

#### 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 ~~not~~ revoked.

### Nature & extent of surety's liability:

- i) The liability of the surety is co-existent with that of principal debtor.
- ii) The liability of the surety is secondary in relation to principal debtor.
- iii) The ~~surety~~ creditor can directly proceed against the surety for recovery debt.
- iv) The defect if any under the contract if discharges the principal debtor the surety is also discharged.

### Imp. Fact to know - (Sec-132)

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

## Discharge of surety:

### 1) Revocation of Continuing Guarantee

#### By Notice

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

#### By Death

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

#### By Novation

- Change of parties - If the surety is changed in the contract, the liability for future transactions extinguishes.
- Change of Contract between parties - If the contract b/w parties changes, the surety is discharged from the old terms of the contract for future transactions.

### 2) By Conduct of the Creditor

i) where there is any variance in terms of contract between principal debtor and principal creditor without any permission of surety, the surety stands discharged.

ii) The surety is discharged, if

Principal creditor and principal debtor enter into a new contract

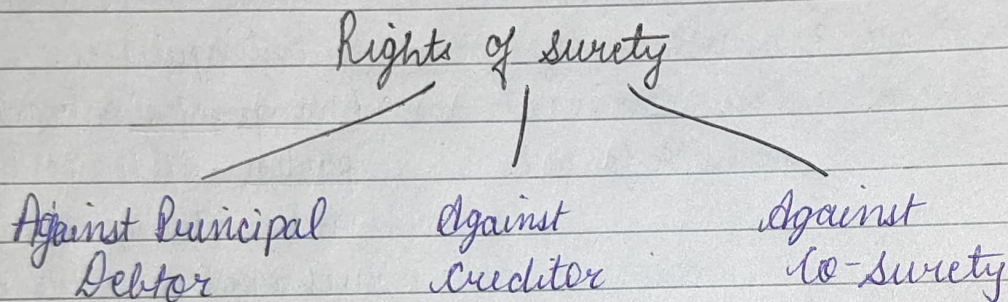
Principal creditor does any act or omission which has the effect of discharging the surety.

iii) where the principal debtor and the creditor enter into any:

- Composition agreement
- an agreement to provide more time to principal debtor without consent of surety
- an agreement entered with principal debtor & creditor not to sue him in the event of any default and only to sue the surety.

### 3 > By Invalidation of Contract of Guarantee:

- i) By misrepresentation - If the facts of the contract are highly Misrepresented in material sense contract of surety is discharged.
- ii) By concealment - when important facts of the agreement are highly mistated or concealed by principal debtor or creditor, the surety ~~is~~ is invalid.
- iii) where the creditor require Co-surety to join under the contract, the contract is discharged, if such co-surety do not join.



#### 1 Against Principal Debtor:-

- (i) Right of Subrogation - where the surety discharges the debt due of the principal debtor towards the principal creditor, the surety gets all rights of the principal creditor in relation to the principal debtor. This is the right of subrogation. (Substitution).
- (ii) Implied promise of Repayment - In every contract there is an implied promise on the end of the principal debtor to repay the surety in the event of surety paying off the liability due to the creditor.

#### 2 Against Creditor:-

- (i) 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 security under the contract whether or not known to the surety, shall be given to him until the principal debtor repays the surety.
- (ii) Right to set-off claim - The principal debtor any previous claim from the principal creditor can be set-off with the debt being paid by the surety when the liability of the surety arises.

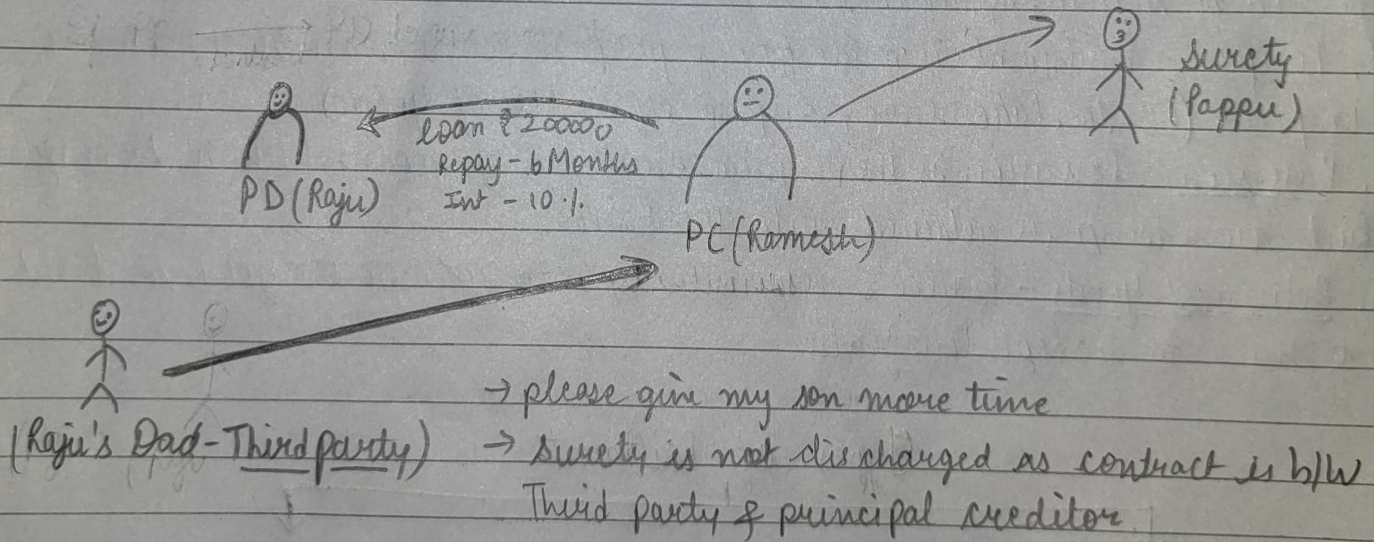
iii) Right to share Reduction - The right of surety to benefit out of the insolvency of the principal debtor.

### 3 Against Co-sureties :- (Important)

- i) Right to Contribute Equally - Unless otherwise agreed upon each surety shall contribute equally towards payment of debt to creditor.
- ii) Right to Contribute subject to Maximum limit - The surety's contribution which shall be made equally can be subject to maximum limit set under the Contract.

### Cases Under which Surety is not Discharged

1. Creditor if enters into a contract with a third party to allow more time to principal debtor then surety is not discharged.



2. Creditor's forbearance (i.e. abstinence) to sue the principal debtor does not discharge the surety.