CONTRACT OF INDEMNITY

A Contract of indemnity is a direct engagement between two parties whereby one promises to save another from harm. A contract of indemnity means, "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."

DEFINITION: - As provisions made in **section 124** of the Indian Contract Act-1872 says that, "whenever 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 is called a Contract of Indemnity."

Ex. A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of Rs.200. This is a contract of indemnity.

A and B goes into a shop. B says to the shopkeeper, "let him (A) have the goods, I will see you paid". This is a contract of indemnity.

ESSENTIAL ELEMENTS:-A contract of indemnity is a species of the general contract. As such it must have all the essential elements of a valid contract. The following are the essentials specific to the Contract of Indemnity:-

1. There must be a loss.
2. The loss must be caused either by the promisor or by any other person.
3. Indemnifier is liable only for the loss.

Thus it is clear that this contract is contingent in nature and is enforceable only when the loss occurs. A contract of indemnity may be express or implied.

RIGHTS OF INDEMNITY HOLDER WHEN SUED

The promisee in a contract of indemnity acting within the scope of his authority is entitled to recover from the promisor so under **Section 125** of the Act defines the rights of an indemnity holder which are as under:-

1. **Right of recovering Damages**: - All the damages that he is compelled to pay in a suit in respect of any matter to which the promise of indemnity applies.
2. **Right of recovering Costs**: - All the costs that he is compelled to pay in such suit if in bringing or defending it he did not contravene the orders of the promisor and has acted as it would have been prudent for him to act in the absence of the contract of indemnity or if the promisor authorised him in bringing or defending the suit.
3. **Right of recovering sums**:- All the sums which he may have paid under the terms of a compromise in any such suite if the compromise was not contrary to the orders of the promisor and was one which would have been prudent for the promisee to make in the absence of the contract of indemnity.

In another case of Mohit Kumar saha v/s New India Assurance Co.-1997 It was held that the indemnifier must pay the full amount of the value of the vehicle lost to theft as given by the Surveyor. Any settlement at the lesser value is arbitrary and unfair and violates art.14 of the constitution.

CONTRACT OF GUARANTEE

The contract of guarantee may be an ordinary or some different type of guarantee which is different from an ordinary guarantee. Guarantee may be either oral or written. Basically it means that a contract to perform the promise or discharge the liability of third person in case of his default and such type of contracts are formed mainly to facilitate borrowing and lending money.

DEFINITION: - "A contract of guarantee is a contract to perform the promise or to discharge the liabilities of a third person in case of his default.

i) The person who gives the guarantee is "Surety".

ii) The person in respect of whose default the guarantee is given is "Principal debtor"

iii) The person to whom the guarantee is given is "Creditor".

Ex. S promises to a shopkeeper C that S will pay for the items being bought by P if P does not pay this is a contract of guarantee. In case if P fails to pay, C can sue S to recover the balance. (**Birkmyr v/s Darnell-1704).**

ESSENTIALS: - The following are the essential elements of Guarantee:-

1. **Existence of Creditor, Surety, and Principal debtor: -** Existence of all the three parties are required.
2. **Concurrence:-** A contract of guarantee requires the concurrence of all the three parties viz. the principal debtor, the creditor and the surety.
3. **Distinct Promise of Surety: -** There must be distinct promise by the surety to be answerable for the liability of the Principal debtor.
4. **Liability must be legally enforceable: -** Only if the liability of the principal debtor is legally enforceable, the surety can be made liable. For example a surety cannot be made liable for a debt barred by Statute of Limitation.
5. **Essentials of a valid contract:-** A contract of guarantee must have all the essential elements of a valid contract. But

   i) All the parties must be capable of entering into a valid contract, though the principal debtor may be a person suffering from incapacity to contract. In such a case, the surety is regarded as the principal debtor and is liable to pay personally even though the principal debtor (ex., a minor) is not liable to pay

   ii) Consideration received by the principal debtor is sufficient for the surety, and it is not necessary that it must necessarily result in some benefit to the surety himself. The consideration in such contract is nothing but anything done or the promise to do something for the benefit of the principal debtor. The section 127 of the Act clarify as under :-

   "Anything done or any promise made for the benefit of principal debtor is sufficient consideration to the surety for giving the guarantee."

   Ex. A agrees to sell to B certain goods if C guarantees for payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver goods to B. This is sufficient consideration for C's promise.
6. **Writing not necessary: -** A guarantee may be either oral or written (sec.126). It may be either express or implied
7. **It should be without misrepresentation or concealment:** - Section 142 of the Act specifies that a guarantee obtained by misrepresenting facts that are material to the agreement is invalid, and section 143 specifies that a guarantee obtained by concealing a material fact is invalid as well.

Ex. 1. A appoints B for collecting bills to account for some of the bills. A asks B to get a guarantor for further employment. C guarantees B's conduct but C is not made aware of B's previous miss-accounting by A. B afterwards defaults. C cannot be held liable.

Ex. 2- A promise to sell Iron to B if C guarantees payment. C guarantees payment however, C is not made aware of the fact that A and B had contracted that B will pay Rs.5/- higher that the market price. B defaults. C cannot be held liable.

DIFFERENCE BETWEEN INDEMNITY & GUARANTEE

INDEMNITY	GUARANTEE
1. In indemnity there are two, one who is indemnified and the other indemnifier.	There are three parties, Principal debtor, surety and the Creditor.
2. It consists of only one contract under which indemnifier promises to pay in the event of certain loss.	There are three contracts between surety, principal debtor and creditor.
3. The contract of indemnity is made to protect the promise against some likely loss.	The object of contract of guarantee is the security of the creditor.
4. The liability of the indemnifier in a contract of indemnity is a primary one.	In guarantee the liability of surety is only a secondary, when principal debtor default.

NATURE, RIGHTS AND LIABILITIES OF A SURETY

The surety who is entitled to be reimbursed by the principal debtor for the amount paid by him on his behalf. The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract under **section 128.**