

## **Contract of Guarantee: Definition, Essentials and Distinction from Contract of indemnity**

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**Definition [S.126]:-** In a contract of guarantee one person promises to pay the amount due from another person in case the other person does not pay within a fixed time. S. 126 provides 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". A guarantee may be either oral or written.

Thus a contract of guarantee is a contract in which-

- (i) one person has promised to perform or discharge the liability of a third person; case
- (ii) In case a third person will find to discharge his own liability.

Parties: There are following 3 parties in a contract of guarantee.

- 1. Principal debtor-** The person who takes loan or on whose behalf the guarantee is given.
- 2. Creator –** The person who gives loan or to whom the guarantee is given.
- 3. Surely-** The person who promises to discharge the liability of a third person or who gives the guarantee.

**Example-** Mohan takes loan of Rs. 5 lakh from the UCO Bank of Lucknow University Branch. Sohan promises to UCO Bank that if Mohan fails to repay the loan timely then he Mohan will pay. This is a contract of guarantee and Mohan is Principal debtor UCO Bank is creator and Sohan is surety.

**Essentials-**

- (i) There must be all essential of valid contract mentioned in S. 10 of contract Act;
- (ii) Surety and creditor must be completed;
- (iii) There must be consideration [S.127]
- (iv) There must be primary liability of some one;
- (v) Should be no concealment of facts or misrepresentation [S.142 and 143]
- (vi) Contract of guarantee may be either in writing or oral C.

**Distinction Between contract of indemnity and Contract of guarantee**

Distinction Between contract of indemnity and contract of guarantee areas follow:

- 1. Number of parties** – In a contract of indemnity there are two parties namely indemnifier and indemnity holder whereas in a contract of guarantee there are 3 parties namely surety, principal debtor and creditor.
- 2. Regarding Number of contract-** There is only one contract between indemnifier and indemnity holder in contract of guarantee whereas in a contract of guarantee there are 3 contracts. (1) contract between principal debtor and creditor (2) contract between creditor and surety and (3) Principal contract between surety and principal debtor.
- 3. Regarding nature of liability:** In contract of indemnity the liability of indemnifier is of primary. Whereas in of guarantee the liability of surety is secondary.
- 4. Regarding arising of liability-** In a contract of indemnity the liability of indemnifier arises when some .....happens where as in a contract of guarantee the liability of surety arises when principal debtor fails to perform his promise.
- 5. Relating to request-** In a contract of indemnity generally Indemnifier does not promise to the request of indemnity holder where as in contract of guarantee guarantee is given by the surety at the request.

**6. Regarding to file a suit-** In a contract of indemnify the indemnifier has no power to file a suit against that part for loss. Where as in contract of guarantee after discharging the liability of principal Debtor the surely can file a case against Principal debtor.