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## DISCHARGE OF SURETY

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### INTRODUCTION

Contract of indemnity and contract of guarantee, both are specific contracts and motive of these both is to protect the plaintiff or any other person from loss. In indemnity, indemnifier himself or any third party will recover the loss there is no obligations; but in guarantee, surety should have obligations to recover loss. The main function in the guarantee is to recover the loss or payment of debt etc; will be paid by surety to the creditor, which should have been given by principal debtor. This duty of the surety can also be discharged. Discharge of the surety means discharging of the surety from his obligations, when by any variance made without the surety consent, in terms of the contract between principal debtor and the creditor. Not only that but there are many other ways to discharge the surety which is mentioned in Indian contract act, 1872 from section 133 – 139.

### RESEARCH OBJECTIVES

1. The main objective of this research is to gain knowledge about this topic, which help not in building career but also in career.
2. For better understanding of Indian contract act, 1872; and also, understanding of law and legal language.
3. To increase analytical skills and researching skill.

### RESEARCH QUESTIONS

1. What is contract of guarantee?
2. What is discharge of surety?
3. Who is surety, principal debtor and principal creditor?
4. How can surety be discharged?

### MAIN BODY

#### 1. Contract of guarantee:

A contract of guarantee is a special contract, where in this contract three persons will be included in a single contract. Normally two persons will make contract and if one of the party's fails to do his/her part of performance then, a third party will do perform on his behalf with some consideration. For example; X, Y and Z makes contract that X will give loan to Y and if he doesn't repay the amount then Z will pay the

amount. According to section 126 of the Indian contract act, "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 guarantee is called surety; the person in respect of whose default the guarantee is called the principal debtor and the person to whom the guarantee is given is called the creditor. A guarantee may be oral or written". In above example 'Z' is surety; 'Y' is principal debtor; 'X' is creditor. The main function of the contract of guarantee is to help the people get loans, credits and etc. This contract was established through a case called; Birkmyr v. Darnell: where one person buys goods from a shop and another person promises to pay for the goods if the buyer does not pay.

Consideration is very important of this contract and that consideration from surety; the consideration may also be like if the contract they make will benefit for the principal debtor, then it is also considered as consideration.

#### 2. Surety's liability:

The contract of guarantee is mostly depended on surety's liability, even surety's liability which

makes contract of guarantee possible. The liability of surety is as same as principal debtor, that means surety is liable as much as principal debtor. Section 128 defines surety's liability as "the liability of surety is co – extensive with of the principal debtor, unless it is otherwise provided by the contract", the word co – extensive means surety is liable for whole amount of principal debtor including interest and principal debtor is no more liable. For example, "A is surety of the B's debt to C and now A is liable to pay B debt with interest in case of B doesn't not pay". If any debts or liability which are not mention in guarantee then surety is not liable for such liability. According to the case National Provincial Bank of England v. Brackenbury, if any condition is there in contract of guarantee and only when this condition filled then only surety is liable. Not every time surety will be liable but, it is on creditor discretion to whom to make liable or sue. The creditor has choice to sue whom ever he wants either principal debtor or surety or both. Surety has right to limit he liability or make it conditional, and this must be made at the time of the contract of guarantee; it means, if surety make condition at the time of contract that, he won't pay amount if liability is beyond some sort of amount, then he won't be liable, if liability not as per condition. It was same held in case Yarlagadda Bapanna v. Devata China Yerkayya. A contract should be performed as just a benefit or duty but; the performance by the party should also fill the condition.

### 3. Discharge of surety:

As we know, the surety plays a key role in contract of guarantee; surety has an advantage that he can discharge his liability in middle of contract in certain circumstances which are define in from section 133 to 139.

- S – 133. Discharge of surety by variance in terms of contract: "any variance, made without surety's consent, in the terms of the contract between the principal debtor and creditor, discharges surety as to transactions subsequent to the variance". It means any change made without the consent of surety in

contract then surety can discharge his liability in middle of the contract. In a case called Maharaja of Benares v. Har Narain Singh, the plaintiff granted a lease to a lessee, with the defendant standing as a surety for the due performance of the lease conditions. Subsequently, the terms of the lease were altered by the principal parties without obtaining the surety's consent. The variation in the terms increased the risk for the surety. Later, the lessee defaulted, and the plaintiff sought to enforce the surety's liability; here surety can discharge his liability. Even if the condition of the contract of the contract changed without consent of the surety, then also it will discharge the liability.

- S – 134. Discharge of surety by release or Discharge of principal debtor:

"The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor". This means when principal debtor is released by act or omission of creditor then liability of surety is also released; it will happen in two ways in first place, if the creditor makes any contract with principal debtor, the surety is like wis released. It means any release of the principal debtor is release of the surety also; through this we get doubt that if liability of the debtor reduced then liability of surety is also reduced; as in section 128 says surety's liability is coextensive with principal debtor so surety's liability is also reduced. For example, in a case called State of Madhya Pradesh v. Kaluram: A contractor (principal debtor) entered into a contract with the State of Madhya Pradesh for certain construction work. The defendant (Kaluram) stood as a surety for the due performance of the contract. Later, the State of Madhya Pradesh entered into a settlement with the contractor and accepted lesser performance than originally agreed upon. This effectively released the principal debtor from his original obligation. The government then sought to enforce the surety's liability. And it

was held that the principal debtor had been released from liability, so the surety was also discharged from liability.

- S – 135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor: “A contract between the creditor and the principal debtor, by which the creditor makes a composition with or promises to give time to, or not to sue principal debtor, discharges the surety, unless the surety assents to such contract”. This section provides three modes of discharge from liability that is;

- Composition: This mode kind of section 133 as, in it if debtor and creditor make a variance in contract without consent of surety; then it discharges surety from liability. Here also, if the creditor makes a composition with the principal debtor, without consent of surety and if surety doesn't involve in this newly formed contract, then surety will be discharged from his liability.

- Promise to give time: if the creditor gives more time to principal debtor, then also it will discharge the liability; as given time to repay the amount is also a condition in the contract and if it changes then surety's liability is discharged.

- Promise not to sue the principal debtor: if creditor promise to debtor to not sue then it will release the principal debtor from his liability, then it will automatically discharge's surety's liability; as liability of surety and principal debtor is co – extensive.

- S – 136. Surety not discharges when agreement made with third person to give time to principal debtor: “were a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged”. This section says about in which situation surety will not be discharged. In a case called National Provincial Bank of England v. Brackenbury, it was held that; A bank provided a loan to a borrower (principal debtor), and the defendant stood as a surety. Later, the bank entered into an agreement with a third party (not the principal debtor) to extend the time for the borrower's

repayment. The surety argued that he was discharged from liability because time was given. The bank, however, contended that the agreement was not directly with the principal debtor, and thus, the surety remained liable.

- S – 137. Creditors forbearance to sue does not discharge surety: “Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety”. As said above mere forbearance doesn't discharge the surety but what if that forbearance continues till expiry period and according section 134 creditor is guilty of an act or omission then it will discharge the principal debtor and surety from liability. Thus, omission to sue principal debtor with in time discharges surety. In case called Maan Singh v. U Ba Yi, the conflict between Section 134 and Section 137 of the Indian Contract Act, 1872 was addressed as; Maan Singh was a surety for U Ba Yi, the principal debtor, in a loan agreement. The creditor (the party to whom the loan was owed) made an agreement with U Ba Yi to extend the time for repayment of the loan. However, the creditor did not inform Maan Singh (the surety) about the modification or extension. Maan Singh claimed that because of the modification of the contract, he should be discharged from his liability as a surety. court made decision as Section 137 prevails in this context. Even though the creditor modified the contract, the surety's liability was not discharged because the changes did not affect the nature of the agreement in a way that would significantly harm the surety's position. The modification was not considered to release the surety because it did not constitute a material alteration to the contract. Section 137 was found to be more relevant to the issue of discharge of the surety.

- S – 138. Release of one co – surety does not discharge others: “where there are co – sureties, a release by the creditor of one them does not discharging the others, neither does it free the surety so released from his responsibility other sureties”. In a case named as Lachhman

Singh v. Purshotam Haridas and it was held that; Lachhman Singh and Purshotam Haridas were co-sureties for a loan that was taken by the principal debtor from the creditor. The creditor agreed to release one co-surety (Purshotam Haridas) from the liability on the loan by entering into a separate arrangement with him. The remaining co-surety (Lachhman Singh) argued that, since one co-surety had been released, he too should be discharged from the liability. The court ruled that Lachhman Singh (the remaining co-surety) was still liable despite the release of Purshotam Haridas. This case reaffirmed the principle that the liability of co-sureties remains independent of the release of any one of them, unless the terms of the contract state otherwise.

- S – 139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy: "if the creditor does not act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged". Here it's a duty of a creditor to not to do something inconsistent with surety's right. If the act or omission deprives the surety of the benefit of this remedy, the surety is discharged. In a case called Kaliaperumal Pillai v. Visalakshmi Achi it was held that; Kaliaperumal Pillai stood as the surety for a loan taken by Visalakshmi Achi. The creditor agreed to release certain securities held against the loan, which were intended to protect the surety's potential liability in case the principal debtor failed to repay. The surety argued that the creditor's act of releasing the security had impaired his remedy to recover from the principal debtor. The court held that the surety was discharged from liability because the creditor's act of releasing security had impaired the surety's remedy to recover from the principal debtor. The surety's eventual remedy was impaired, and under Section 139, the surety was no longer liable.

## CONCLUSION

The contract of guarantee plays an essential role in commercial and financial transactions by promoting trust and credit availability. It operates on the foundation of three parties the creditor, the principal debtor, and the surety where the surety's obligation ensures performance and repayment in case of default. The liability of the surety, being co-extensive with that of the principal debtor as per Section 128 of the Indian Contract Act, 1872, underscores the legal and moral responsibility the surety undertakes in such arrangements. However, the law also provides adequate safeguards for the surety through Sections 133 to 139, which clearly outline circumstances under which the surety can be discharged from liability.

These provisions aim to maintain fairness and balance in contractual relationships. A surety cannot be held liable if the terms of the agreement are varied without consent, if the creditor releases or compounds with the debtor, or if the creditor's acts impair the surety's rights. Judicial interpretations from *Maharaja of Benares v. Har Narain Singh* to *Kaliaperumal Pillai v. Visalakshmi Achi* have consistently reinforced these statutory protections, emphasizing that any alteration in contract terms must not prejudice the surety.

In essence, the discharge of surety safeguards the principle of free consent and ensures that the surety's liability arises only within the agreed limits. By upholding these provisions, the Indian Contract Act, 1872 strikes a balance between protecting creditors' interests and preventing unfair burden on sureties. Thus, the doctrine of discharge of surety remains a cornerstone in ensuring justice, equity, and good faith in contractual obligations.

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