entitled to a consideration unless there is an agreement to such effect between the concerned parties.

6. **Guarantee (Sec.127):** A contract of guarantee is made without consideration.
7. **Remission (Sec.63):** No consideration is required for an agreement to receive less than what is due. This is called remission in law.
8. **When the promise is for a gift or donation:** Such a promise does not entail a consideration. Therefore, a promisor of a gift or donation is not liable to keep his promise and cannot be enforced to do so.

1.10 SPECIAL CONTRACT

Special contracts are a species of general contract itself; as such the principles of general contract are applicable to them. Special contracts include contract of indemnity and guarantee, bailment, pledge and agency. The special principles relating to them are contained in Chapter VIII (Sections 124 to 147), Chapter IX (Sections 148 to 181) and Chapter X (Sections 182 to 238).

1.11 INDEMNITY AND GUARANTEE

The contract of indemnity and contract of guarantee are specific types of contracts. The provisions relating to these contracts are contained in Sections 124 to 147 (Chapter VIII) of the Indian Contract Act, 1872.

1.11.1 Meaning and Definition of Contract of Indemnity

Ordinarily, the term indemnity means to make good any loss or to compensate any person who has suffered some loss. According to Section 124 of the Indian Contract Act, "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, is called a contract of indemnity". The person who makes the promise to make good the loss is called the indemnifier. The person whose loss is to be made good is called indemnity holder.

A contract of indemnity refers to a promise made by one person to make good any loss or damage another has incurred or may occur by acting at his request or for his benefit. As such, a contract of indemnity is a type of contingent contract. The performance of the contract is dependent on happening or non-happening of a contingency, which may cause losses to another party. A contract of indemnity may be express or implied.

1.11.2 Essentials of the Contract of Indemnity

The definition of a contract of indemnity in Section 124 of the Indian Contract Act makes it clear that, besides having the basic elements of a valid contract, a contract of indemnity must have the following two elements:

a) The indemnifier expressly promises to indemnify the indemnity holder.
b) The promise is to protect the indemnity holder against loss that could be the result of an act on the part of the promisor (i.e., the indemnifier) or a third party.

1.11.3 Rights of Indemnity Holder (Section 125)

Section 125 enumerates the rights of an indemnity holder in a contract of indemnity. According to this section, an indemnity holder (or indemnified) is entitled to recover the following from the promisor:

1. **Right to Damages:** An indemnity holder is entitled to recover the amount of damage that he has been compelled to pay the other party in a suit to which the contract of indemnity is applicable.
2. **Right to Costs:** An indemnity holder is also entitled to claim all the costs which he has incurred for defending himself in a suit to which the promise of indemnity is applicable. Such costs may include all incidental charges and legal expenses paid in that suit.
3. **Sums paid under the conditions of compromise:** The indemnity holder is entitled to recover all sums which he may have paid under the terms of any compromise of any such suit, provided such compromise is not contrary to the orders of the promisor and was one which it would have been prudent for the indemnity holder to make.

1.11.4 Rights of the Indemnifier

When the indemnifier indemnifies an indemnity-holder, he has some rights on the indemnified. The Indian Contract Act is silent on the rights of the indemnifier but, as per the provisions of Section 141 and various court verdicts, the rights of the indemnifier are analogous to the rights of a surety, which are as under:

1. An indemnifier, after he has paid the damages under an indemnity, regains the rights he had delegated to the indemnified. But he gets these rights only after he has paid the damage, and not before.

2. If the indemnifier has indemnified the indemnity holder, he gets the right to sue third parties on behalf of the indemnified.
3. If the indemnified suffers any damages which are not covered by the contract of indemnity, the indemnifier is not bound by law to pay such damages.
4. The indemnifier is entitled to sue third parties only to the extent of the damages he has paid to the indemnified.

1.11.5 Definition of Contract of Guarantee

Section 126 of the Indian Contract Act defines a contract of guarantee as a contract to perform the promise, or discharge the liability, of a third person in case of his default. The contract of guarantee is made to ensure performance of a contract or discharge of obligation by the promisor. In case he fails to do so, the person giving assurance or guarantee becomes liable for such performance or discharge.

In a contract of guarantee, there are three parties, the creditor, the surety and the principal debtor. 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**. The contract can be oral or written; but English law stipulates it to be in writing. It may be expressed or implied and may even be inferred from the course of conduct of the parties concerned. For example, A advances loan of Rs. 50,000 to B and C promises to P that if B does not repay the loan, C will do so. This is a contract of guarantee. Here B is the principal debtor, C is the surety and A, the creditor.

A contract of guarantee is a tripartite agreement which contemplates the principal debtor, the creditor and the surety in it. There is a triangular relationship in which the following three collateral contracts may be distinguished:

i) As between creditor and principal debtor, there is a contract out of which the guaranteed debt arises.
ii) As between surety and creditor, there is a contract by which surety guarantees to pay to creditor, principal debtor’s debt in case of his default.
iii) As between surety and principal debtor, there is a contract that principal debtor shall indemnify surety in case surety pays in the event of a default by principal debtor. This contract, if it is not expressed between the parties, is always implied.

1.11.6 Purpose of Contract of Guarantee

Normally, the purpose of a contract of guarantee can be one of the following:

i) For the security of a loan given to a party,

ii) For the assurance of good conduct and honesty of an employee in service contracts and

iii) For indemnity of a third party from loss resulting from the non-payment of a debt**.**

1.11.7 Essential Features of a Contract of Guarantee

Like in a contract of indemnity, a contract of guarantee also must have all the essential elements of a valid contract. According to Section 126, the following are the essential features of a contract of guarantee —

1. **Existence of a Principal Debt:** A contract of guarantee pre-supposes the existence of a liability enforceable at law. If no such liability exists, there can be no contract of guarantee. The surety undertakes to be liable only if principal debtor fails to discharge his obligation.
2. **Benefit to principal debtor is sufficient consideration:** Section 127 clearly provides that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. Thus, any benefit received by the debtor is adequate consideration to bind the surety. There must be a fresh consideration moving from the creditor. Past consideration is no consideration for contract of guarantee.
3. **Consent of surety not obtained by misrepresentation or concealment:** A contract of guarantee is not a contract of uberrimaefidei i.e., one requiring complete disclosure of all the material facts by the principal debtor or the creditor to the surety before the contract is entered into by him. Thus, when a guarantee is given to a bank, it is not bound to inform the surety of matters affecting the credit of the debtor, or of any circumstances connected with the transaction which may render the position of the surety more onerous. The contract of guarantee is invalid in case of misrepresentation, concealment or when co-surety does not join.
4. A contract of guarantee may be either oral or written. It may be expressed or implied from the conduct of the parties.
5. Surety can be proceeded without proceeding against the principal debtor first.
6. A contract of guarantee can only be between at least three parties — surety, principal debtor and creditor.
7. Free consent of all parties is essential for a contract to be valid.

1.11.8 Distinction between Contracts of Indemnity and Guarantee

In both the contracts, the motive is to insure a person against the probable loss out of the deal. But there are many points of distinction between the two which are listed below:

1. **Function:** In a contract of indemnity, the indemnifier promises to protect the indemnified against the consequences of the conduct of the indemnity – holder or a third party whereas in a contract of guarantee, the surety promises to perform the obligation or promise of a third party.
2. **Parties to the Contract:** In a contract of indemnity, there are only two parties to the contract — the indemnifier and the indemnity – holder whereas in a contract of guarantee, there are three parties to the contract — the principal debtor, creditor and the surety.
3. **Object:** The purpose of contract of indemnity is a safety from an uncertain future event whereas the purpose of contract of guarantee is to assure the other party of the performance of an obligation.
4. **Liability:** In a contract of indemnity, the liability of the indemnifier is primary while in a contract of guarantee, the liability of the surety is secondary and arises only on the default of the principal debtor.
5. **Time of Occurrence:** Ina contract of indemnity, the liability of the indemnifier arises only on the happening of a contingency whereas in the case of a contract of guarantee, there is an existing debt or duty the performance of which is guaranteed by the surety.
6. **Scope:** In a contract of indemnity, the scope is limited and does not include contracts of guarantee whereas in a contract of guarantee, the scope is wide and includes the contracts of indemnity.
7. **Nature:** In a contract of indemnity, the contract is a security against loss whereas in a contract of guarantee, the contract is an assurance to the creditor.
8. **Purpose:** A contract of indemnity is for the reimbursement of a loss while a contract of guarantee is for the security of the creditor.
9. **Consideration:** In a contract of indemnity, the indemnifier receives a consideration from the indemnity-holder at the beginning of the contract, whereas in a contract of guarantee, the surety does not receive any consideration. The only consideration for the surety is the expected gain of the principal debtor.
10. **Right to Sue:** In a contract of indemnity, the indemnifier cannot sue a third party for loss in his own name, but must bring the suit on behalf of the indemnified. But in a contract of

guarantee, the surety, on discharging a debt payable by the principal debtor to the creditor, can sue the principal debtor in his own right.

11. **Number of Contracts:** in a contract of indemnity, there is only one original and independent contract between the indemnifier and the indemnity holder whereas in a contract of guarantee, there are three contracts — between the principal debtor and the creditor, between the creditor and the surety and an implied contract between the principal debtor and the surety.
12. **Competency to Contract:** All parties in a contract of indemnity must be competent to contract. As a special case, when a minor is a principal debtor, the contract of guarantee is still valid.
13. In the case of a contract of indemnity, it is not necessary for the indemnifier to act at the request of the indemnified, whereas in the case of a contract of guarantee, it is necessary that the surety should give the guarantee at the request of the debtor.

1.11.9 Kinds of Guarantee

The function of a contract of guarantee is to enable a person to get a loan, or goods on credit, or an employment. A guarantee may therefore be given for a) the repayment of debt, or b) the payment of the price of the goods sold on credit, or c) the good conduct or honesty of a person employed in a particular office. In the last case, the guarantee is called a 'fidelity' guarantee.

A guarantee may be one of various kinds, such as —

a) . **Absolute and conditional guarantee:** An absolute guarantee is one by which the guarantor unconditionally promises payment or performance of the contract on default of the principal debtor. A conditional guarantee is one which is not enforceable immediately on the default of the principal debtor, but some contingency other than such default must happen.

b) **General and special guarantee:** A general guarantee is one for acceptance by the public generally. It is a general promise to any one accepting it to be answerable for a debt in case of the failure of another person. A special guarantee is one which is addressed to a particular person who alone can take advantage of it and to whom alone the guarantor can be held responsible.

c) **Limited and unlimited guarantee:** A limited guarantee is ordinarily one restricted to a single transaction and in this sense it is different from a continuing guarantee. An unlimited guarantee is one which is unlimited either as to time or amount.

d) **Retrospective and prospective guarantee:** A guarantee given for an existing debtor obligation is called a retrospective guarantee. A guarantee given for future debt or obligation is called a prospective guarantee. A prospective guarantee is of two types—
specific guarantee and continuing guarantee

i) **Specific guarantee:** When a guarantee extends to a single transaction or debt, it is a specific guarantee. Such guarantee comes to an end with the discharge of a debt or the performance of a promise.

ii) **Continuing guarantee:** It means a guarantee which extends to a series of transactions. It is not limited to a single transaction but it is generally for an indefinite time or until revoked. It is prospective in its operation. The essence of a continuing guarantee is that it applies not to a specific number of transactions, but to any number of them and makes the surety liable for the unpaid balance at the end of the guarantee (Sec.129).

The **salient features** of a continuing guarantee are:

i) Such guarantee is valid for a series of continuing transactions provided the transactions are within the limits of the guarantee in terms of amount and time period.
ii) Such guarantee is only applicable to specific amount of money.
iii) The surety reserves the right to be kept informed about the probable future transactions.
iv) In the absence of an agreement to the contrary, the continuing guarantee terminates in the event of death of the guarantor.

Revocation of a continuing guarantee

A continuing guarantee is revoked as to future transactions in the following ways:

1. **By notice:** A continuing guarantee may at any time be revoked by the surety as to future transactions, by notice to the creditor (Sec. 130). In the event of revocation, the surety is not responsible to the creditor for any future transactions, but continues to be responsible for all such transactions that have been done till the notice of revocation of guarantee is received by the creditor.
2. **By surety's death:** According to Section 131, the death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions. The liability of the surety for the previous transactions, however, remains.
3. **By other modes:** A continuing guarantee is also revoked —

a) **By Novation** (Sec. 62): When the parties agree to substitute a new contract for the old contract or rescind or alter the old contract of guarantee, it will amount to revocation.

b) **By variance in the terms of contract** (Sec. 133): If any variation has been made in the terms of contract of guarantee between the creditor and the principal debtor without the knowledge or concurrence of the surety, the contract of guarantee is revoked..

c) **By release or discharge of the principal debtor** (Sec.134): When a creditor discharges principal debtor from the liability, the surety also gets discharged.

d) **By compounding with the principal debtor** (Sec. 135).

e) **By creditor's act or omission impairing surety's eventual remedy** (Sec. 139): Any act or omission by the creditor which repairs the eventual remedy of the surety against the debtor amounts to revocation of the contract of guarantee.

f) **By loss of security** (Sec. 141): When a creditor loses security under the contract, the surety gets discharged to the extent of the value of that security.

e) **Invalid guarantee:** If the guarantee is not covered by the contracts of absolute faith, the surety is not absolved of his obligation merely by proving that he was unaware of the contract between the principal debtor and the creditor. But the surety has the right to be kept informed by the party for whom he is giving the guarantee about the duration and amount of the guarantee. A guarantee becomes valid in the following situations:

i) **Guarantee obtained by misrepresentation** (Sec. 142): Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

ii) **Guarantee obtained by concealment** (Sec. 143): Any guarantee which the creditor has obtained by means of keeping silence as to the material circumstances is invalid.

iii) **Guarantee on the condition of joining co-sureties** (Sec.144): Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join. This means if the surety agrees to be only one of several co-sureties, he will not be liable unless the other execute the guarantee.

1.11.10 Liability of Surety

Section 128 of the Contract Act defines the nature and extent of surety's liability.

1. **Liability of surety is of secondary nature**: Ina contract of guarantee, the principal debtor is primarily liable to pay or discharge liability. It is only at his default, the liability of the surety arises and he may be called upon to discharge it. The creditor is not required to give any notice to this effect to the surety.
2. **Liability of the surety is contingent**: In a contract of guarantee, the liability of the surety is contingent or conditional in nature. It may or may not arise when the principal debtor commits default. And it is not certain that he will default. In practice, generally he discharges his liability to the satisfaction of the creditor.
3. **Liability of the surety is immediate in nature**: Once the principal debtor commits default, immediately the creditor may proceed against the surety. It is not necessary that he should first exhaust his remedies against the principal debtor. Thus, on default by the principal debtor, the creditor instead of suing the principal debtor can file a suit against the surety.
4. **Liability of surety is 'co-extensive':**In a contract of guarantee, the liability of the surety is co-extensive with that of the principal debtor. He is liable for those sums that the principal debtor is liable. His liability cannot be more than that of the principal debtor. In case the principal debtor is scaled down or extinguished by the creditor or by the operation of the law, either in whole or in part, the liability of the surety would also be reduced or extinguished to the same extent.
5. **Surety may limit his liability**: Though the liability of the surety is co-extensive with that of principal debtor, he has a right to limit his liability. He can do this by declaring it expressly at the time of making the contract. In such an instance, the liability of the surety will not go beyond the limit as declared by him.
6. **Liability in continuing guarantee**: In the case of continuing guarantee, the liability of the surety extends to a series of transaction over a period of time and not to a specific number of series but to any number of them. It makes the surety liable for unpaid balance at the end of guarantee.
7. **Liability of the surety where the original contract between the principal debtor and the creditor is void or voidable**: In a contract of guarantee, there are two independent contracts, one between the principal debtor and the creditor and another between the

creditor and the surety. Since the law does not treat the principal debtor and the creditor is void, the surety will be liable as if he were the principal debtor.

1.11.11 Discharge of Surety from Liability

A surety is said to be discharged when his liability comes to an end.The liability of a surety comes to an end under the following circumstances:

1. **Revocation by notice** (Section 130): In case of continuing guarantee, a surety is discharged from liability when he gives due notice to the creditor in respect of any future transactions. In such a case, the surety would not be responsible for future transactions which may be made by the principal debtor after the surety has revoked the contract of guarantee.
2. **Discharge by variation in terms of contract** (Section 133): If a variation is made in the terms of the contract between the principal debtor and the creditor, without the surety's consent, the surety is discharged from liability as to transactions made after the variance. But the variation must be such as materially affects the position of the surety.
3. **Revocation by death** (Section 131): The death of the surety operates as a revocation of the continuing guarantee, in the absence of a contract to the contrary, so far as regards future transactions. But such revocation does not affect transactions which were executed prior to the death of the surety.
4. **Release or discharge of principal debtor** (Section 134): This section provides for two kinds of discharge from liability.
   a) If the creditor makes any contract with the principal debtor by which the latter is released, the surety is discharged. But if the principal debtor is discharged in insolvency, this will not operate as a discharge of the surety.
   b) The surety is also discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.
5. **Discharge of surety on composition or extension of time or promise not to sue** (Sec. 135): This section provides three modes of discharge from liability, namely —
   a) **Composition with principal debtor:** The liability of the surety will be discharged where a creditor in composition with his principal debtor accepts a lesser amount in full satisfaction of his claim.
   b) **Promise to give time:** A contract between the creditor and the principal debtor by which the creditor promises to give time to the principal debtor discharges the surety

c) **Promise not to sue:** Where the creditor under an agreement with the principal debtor promises not to sue him, the surety is discharged.

6. **By creditor's act or omission impairing surety's eventual remedy** (Sec.139)**:** A surety is discharged if the creditor does any act which is inconsistent with the rights 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. It is the duty of the creditor not to do anything which is inconsistent with the rights of the surety.
7. **By the creditor losing his security** (Section 141)**:** Where the creditor loses or parts with the securities without the consent of the surety, the surety is discharged to the extent of the value of securities.
8. **By concealment or misrepresentation** (Section 142 and 143)**:** Where a surety is induced to enter into a contract of guarantee by a misrepresentation or concealment on the part of the creditor concerning a material part of the transaction, such misrepresentation or concealment operates to discharge the surety from his liability on the guarantee. Sections 142 & 143 will not apply if the misrepresentation or concealment is by debtor and creditor has no knowledge of it.
9. **By the failure on the part of some person or persons to join the surety** (Sec.144): Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

1.11.12 Rights of Surety

Under the Indian Contract Act, a surety has the following rights against the principal debtor, the creditor and the co-sureties:

A. **Rights against principal debtor:** The surety can exercise the following two rights against the principal debtor:

   a) Right of subrogation (Sec. 140): When the principal debtor has committed the default and the surety pays the debt to the creditor, the surety will stand in the shoes of the creditor and will be invested with all the rights which the creditor had against the debtor.

   b) Right to claim indemnity (Sec. 145): in every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to recover from the principal debtor all payments properly made. After the surety makes

payment under the guarantee, he becomes a creditor of the principal debtor and can recover from the latter the amount paid, he can recover that damage also.

B. Rights against the creditor

Section 141 provides the following rights to a surety against the creditor —

a) A surety is entitled to the benefit of every security which the creditor has at the time when the contract of suretyship is entered into irrespective of whether the surety knows of the existence of such security or not; and

b) If the creditor loses or without the consent of the surety parts with such security, the security is discharged to the extent of the value of the security.

c) The surety has a right any time before the guaranteed debt has become due and before he is called upon to pay, to require the creditor to sue the principal debtor. However, the surety will have to indemnify the creditor for any expenses or loss resulting there from.

d) The surety is entitled, on being sued by the creditor, to rely on any set off or counter-claim which the debtor might possess against the creditor.

C. Rights against co-sureties

Right of contribution: When a debt is guaranteed by two or more sureties, they are called co-sureties. The co-sureties are liable to contribute, as agreed, towards the payment of the guaranteed debt. When one of the co-sureties makes payment to the creditor, he has a right to claim contribution from the other co-surety or co-sureties. The doctrine of contribution applicable here is not founded on contract but on equity i.e., there is equality of burden and benefit as between co-sureties. This rule is contained in Secs. 146 and 147.

a) Co-sureties liable to contribute equally (Sec. 146): Where there are two or more co-sureties for the same debt or duty and the principal debtor makes a default, the co-sureties, in the absence of any contract to the contrary are liable to contribute equally to the extent of the default. This principle will apply whether their liability is joint oe several, and whether their liability arises under the same or different contracts, and whether with or without the knowledge of each other.

b) Liability of co-sureties bound in different sums (Sec.147): Where the co-sureties have agreed to guarantee different sums, they have to contribute equally subject to the maximum amount guaranteed by each one. The fact that the sureties are liable jointly or