

Unit-7 Contract of Indemnity and Guarantee

CONTRACT OF INDEMNITY

'Indemnity' literally means 'security against loss' or 'to make good the loss' or to compensate the party who has suffered some loss.

According to section 124 of the Indian Contract Act, 1872, 'Contract of Indemnity' is defined as "a contract by which one party promises to save the other from losses caused to him by the conduct of the ~~promisor~~ promisor himself, or by the conduct of any other person."

Parties :-

- (a) The party who promises to indemnify / save the other party from loss - 'indemnifier'.
- (b) Party who is promised to be saved against the loss - 'indemnity holder'.

Important Points :-

- Loss occasioned by an accident not caused by any person, or an act of God / natural event is not covered.
- As per English law, Indemnity means promise to save another harmless from the loss. Here it covers every loss whether due to negligence of promisee or by natural calamity or by accident.
- A contract of indemnity like any other contract may be express or implied.
- It must fulfill all the essentials of a valid contract.

RIGHTS OF INDEMNITY-HOLDER WHEN SUED (Section 125)

The promisee is entitled to recover from the promisor / indemnifier

- (a) all damages which he may be compelled to pay in any suit.

(b) all costs bringing / defending the suit.

(c) all sums paid under the terms of any compromise of suit.

• WHEN DOES THE LIABILITY OF AN INDEMNIFIER COMMENCE?

The liability of an indemnifier commences as soon as the liability of the indemnity holder becomes absolute and certain.

• CONTRACT OF GUARANTEE

A contract of guarantee is a contract to perform the promise made or discharge the liability of a third person in case of his default.

Parties :-

(1) Surety - person who gives the guarantee

(2) Principal debtor - person in respect of whose default the guarantee is given.

(3) Creditor - person to whom the guarantee is given

• CONTRACT OF GUARANTEE - TRIPARTITE AGREEMENT

A contract of guarantee is a tripartite agreement as there are, in effect three contracts -

(1) A principal contract between the principal debtor and the creditor.

(2) A secondary contract between the creditor and the surety.

(3) An implied contract between the surety and the principal debtor whereby principal debtor is under the obligation to indemnify the surety, if the surety is made to pay or perform.

• ESSENTIALS OF A GUARANTEE

(1) Purpose

- If there is no principal debt, there can be no valid guarantee.

(2) Consideration

- A guarantee without consideration is void, but there is no need for a direct consideration between the surety and the creditor.

- Consideration received by the principal debtor is sufficient consideration to the surety for giving the guarantee.

- * - Past consideration is no consideration for the contract of guarantee.
- Even if the principal debtor is incompetent to contract, the guarantee is valid. But if surety is incompetent to contract, the guarantee is void.

(3) Existence of a liability

- The liability must be legally enforceable and not time barred.

(4) No misrepresentation or concealment

- Any guarantee which has been obtained by the means of misrepresentation made by the creditor is invalid. (Sec 142)
- Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid. (Sec 143)

(5) Writing not necessary

- A guarantee may be either oral or written.

(6) Joining of the other co-sureties

- The guarantee by a surety is not valid if a condition is imposed by a surety that some other person must also join as a co-surety, but such other person does not join as a co-surety.

TYPES OF GUARANTEES

Specific guarantee

Continuing guarantee

(1) Specific guarantee

- A guarantee which extends to a single debt / specific transaction is called specific guarantee. The surety's liability comes to an end when the guaranteed debt is duly discharged or the promise is duly performed.

(2) Continuing Guarantee (Section 129)

- A guarantee which extends to a series of transactions is called a continuing guarantee. A surety's liability continues until the revocation of guarantee.

DISTINCTION BETWEEN A CONTRACT OF INDEMNITY AND A CONTRACT OF GUARANTEE

<u>Basis of difference</u>	<u>Contract of Indemnity</u>	<u>Contract of guarantee</u>
<u>No. of parties to the contract</u>	Two parties :- Indemnifier (promisor) Indemnified (promisee)	Three parties :- creditor, principal debtor, surety
<u>Nature of liability</u>	liability of indemnifier is primary and unconditional.	liability of surety is secondary and conditional as primary liability is that of the principal debtor.
<u>Time of liability</u>	The liability of the indemnifier arises only on the happening of a contingency.	The liability arises only on the non-performance of an existing promise or non-payment of an existing debt.
<u>Time to act</u>	The indemnifier need not act at the request of indemnity holder.	The surety acts at the request of principal debtor.
<u>Right to sue third party</u>	Indemnifier cannot sue a third party for loss in his own name as there is no privity of contract. Such a right would arise only if there is an assignment in his favour.	Surety can proceed against principal debtor in his own right because he gets all the rights of a creditor after discharging the debts.
<u>Purpose</u>	Reimbursement of loss.	For the security of the creditor.
<u>Competency of contract</u>	All parties must be competent to contract.	In the case of a contract of guarantee, where a minor is a principal debtor, the contract is still valid.

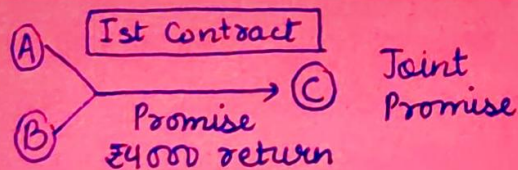
• NATURE AND EXTENT OF SURETY'S LIABILITY (Section 128)

- (i) The liability of the surety is co-extensive with that of that principal debtor unless it is otherwise provided by the contract.
- (ii) Liability of surety is of secondary nature and he is liable only on default of principal debtor.
- (iii) When a debtor cannot be held liable on account of any defect in the document, the liability of the surety also ceases.
- (iv) A creditor may choose to proceed against a surety first, unless there is an agreement to the contrary.

• LIABILITY OF TWO PERSONS, PRIMARILY LIABLE, NOT AFFECTED BY ARRANGEMENT BETWEEN THEM THAT ONE SHALL BE SURETY ON

OTHER'S DEFAULT (Section 132)

When two persons contract with a third person to undertake a certain liability and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.



A & B → 2nd Contract

- A will pay ₹4000 to C.
- If A defaults, then B will pay ₹4000 to C.

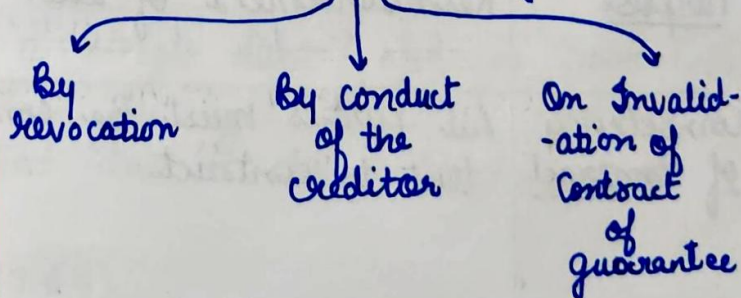
{ Mr. C is not a party to contract }
 { in 2nd Contract }

* liability of A & B to C under 1st contract is not affected by existence of 2nd contract, although C was aware of it.

• DISCHARGE OF A SURETY

A surety is said to be discharged when his liability as surety comes to an end.

Modes of discharge



BY REVOCATION OF THE CONTRACT OF GUARANTEE:-

(a) Revocation of Continuing Guarantee by notice (Section 130)

- The continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditors.
- A specific guarantee can be revoked only if liability to principal debtor has not accrued.

(b) Revocation of continuing guarantee by surety's death (Sec 131)

- The death of surety operates as a revocation of a continuing guarantee as to the future transactions, taking place after the death of surety. However, the surety's estate remains liable for the past transactions.

(c) By novation (Section 62)

- The surety under original contract is discharged if a fresh contract is entered into either between the same parties or between the other parties, the consideration being the mutual discharge of the old contract.

BY CONDUCT OF THE CREDITOR

(a) By variance in terms of contract (Section 133)

- Where there is any variance in the terms of contract between the principal debtor and creditor without surety's consent, it would discharge the surety in respect of all transactions taking place subsequent to such variance.

(b) By release or discharge of principal debtor (Section 134)

- enters into a fresh / new contract with principal debtor, by which the principal debtor is released, or
- does any act or omission, the legal consequence of which is the discharge of the principal debtor.

(c) Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor (Section 135)

- Composition :- If the creditor makes a composition with the principal debtor, without consulting the surety, the latter is discharged. Composition inevitably involves variation of the original contract, and, therefore, the surety is discharged.

(ii) Promise to give time :- When the time for payment of the guaranteed debt comes, the surety has the right to require the principal debtor to pay off the debt. Accordingly, it is one of the duties of the creditor towards the surety not to allow the principal debtor more time for payment.

(iii) Promise not to sue :- If the creditor under an agreement with the principal debtor promises not to sue him, the surety is discharged.

Cases where surety not discharged

i) Surety not discharged when agreement made with third person to give time to principal debtor (Section 136)

Where 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.

ii) Creditor's forbearance to sue does not discharge surety (Section 137)

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.

(d) Discharge of surety by creditor's act or omission impairing surety's eventual remedy (Section 139)

- 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 to the surety himself against the principal debtor is thereby impaired, the surety is discharged.

BY THE INVALIDATION OF THE CONTRACT OF GUARANTEE

(a) Guarantee obtained by misrepresentation (Section 142)

(b) Guarantee obtained by concealment (Section 143)

(c) Guarantee on contract that creditor shall not act on it until co-surety joins (Section 144)

RIGHTS OF A SURETY

Right against
the
creditor

Right against
the
principal debtor

Right against
co-sureties

RIGHT AGAINST THE PRINCIPAL DEBTOR

(a) Rights of subrogation (Section 140)

→ means that on payment of the guaranteed debt or performance of the guaranteed duty, the surety steps into the shoes of the creditor.

(b) Implied promise to indemnify surety (Section 145)

→ In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety.

RIGHT AGAINST THE CREDITOR

(a) surety's right to benefit of creditor's securities (Section 141)

- A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

(b) Right to set off

- If the creditor sues the surety, for payment of principal debtor's liability, the surety may have the benefit of the set off, if any, that the principal debtor had against the creditor.

(c) Right to share reduction

- The surety has right to claim proportionate reduction in his liability if the principal debtor becomes insolvent.

RIGHT AGAINST CO-SURETIES

(a) Co-sureties liable to contribute equally

(b) liability of co-sureties bound in different sums

Unit - 8 Bailment and Pledge

• WHAT IS BAILMENT? (Sec 148)

Bailment is the delivery of goods by one person to another for some purpose, upon a contract, that the good shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

Parties to Bailment :-

- (a) Bailor - The person delivering the goods.
- (b) Bailee - The person to whom goods are delivered.

• ESSENTIAL ELEMENTS

- (a) Contract - No consideration is necessary to create a valid contract of bailment.
- (b) Delivery of goods - It involves the delivery of goods from one person to another for some purposes.
 - i) Actual delivery - When goods are physically handed over to the bailee by the bailor. Eg:- delivery of a car for repair to workshop.
 - ii) Constructive delivery - Where delivery is made by doing anything that has the effect of putting goods in the possession of the bailee or of any person authorized to hold them on his behalf. Eg:- delivery of the key of car to a workshop dealer for repair of the car.
- (c) Purpose - The purpose may be express or implied.
- (d) Possession - The change of possession does not lead to change of ownership. In bailment, bailor continues to be the owner of goods. Where a person is in custody without possession he does not become a bailee.
- (e) Return of goods - Bailee is obliged to return the goods in the same form as given or may be altered as per bailor's direction. Exchange of goods should not be allowed. The bailee cannot deliver some other goods, even not those of higher value.

• TYPES OF BAILMENT

- (1) On the basis of benefit, bailment can be classified into three types:-
- For the exclusive benefit of bailor
 - For the exclusive benefit of bailee
 - For mutual benefit of bailor and bailee
- (2) On the basis of reward, bailment can be classified into two types:-
- Gratuitous Bailment :- when the provider of service does it gratuitously i.e free of charge. such bailment would be either for the exclusive benefits of bailor or bailee.
 - Non-gratuitous Bailment :- means where both the parties get some benefit i.e bailment for the benefit of both bailor and bailee.

• DUTIES OF A BAILOR

- (i) Bailor's duty to disclose faults in goods bailed (Section 150)
- (a) In case of gratuitous bailment
- The bailor is bound to disclose to the bailee faults in the goods, of which the bailee is aware and which materially interfere with the use of them, or expose the bailee to extraordinary risks and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.
- (b) In case of non-gratuitous bailment
- If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Case law :- Hyman & Wife v. Nye & Sons (1881)

- (ii) Duty to pay necessary expenses (Section 158)

- (a) In case of gratuitous bailment

→ Where the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of the bailment.

- (b) In case of non-gratuitous bailment

→ the bailor is liable to pay the extraordinary expenses incurred by bailee.

(iii) Duty to indemnify the Bailee for premature termination (Section 159):-

→ The bailor must compensate the bailee for the loss or damage suffered by the bailee that is in excess of the benefit received, where he had lent the goods gratuitously and decides to terminate the bailment before the expiry of the period of bailment.

(iv) Bailor's responsibility to bailee (Section 164)

(a) Indemnify for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment.

(b) If the bailor refuses to take delivery of goods when it is offered at the proper time the bailee can claim compensation for all necessary expenses incurred for the safe custody.

• DUTIES OF A BAILEE

(1) Take reasonable care of the goods (Section 151 & 152)

In all cases of bailment, the bailee is bound to take care of the goods as a man of ordinary prudence would, take care of his own goods.

- Exception:- Bailee when not liable for loss etc of thing bailed - Bailee, in absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken reasonable care as required under Sec. 151.

(2) Not to make inconsistent use of goods (Section 153 & 154)

- If the bailee makes any use of the goods bailed, which is not according to the terms and conditions of the bailment, he is liable to compensate the bailor for any loss or destruction of goods.

- a contract of bailment is voidable at the option of the bailor, if the bailee does not use the goods according to the terms and conditions of bailment.

(3) Not to mix the goods (Section 155, 156 & 157)

i) If the bailee, mixes the goods with his own goods, with the consent of the bailor, both the parties shall have an interest in proportion to their respective shares in the mixture thus produced.

- ii) If the bailee, without the consent of the bailor, mixes the goods bailed with his own goods and the goods can be separated, the bailee is bound to bear the expense of separation or division and any damage arising from the mixture.
- iii) It is impossible to separate the goods bailed from the other goods and to deliver them back, the bailor is entitled to be compensated by the bailee for loss of the goods.

(4) Return the goods (Section 160, 161)

- It is the duty of the bailee to return the goods bailed without demand, as soon as the time for which they were bailed, has expired or the purpose for which they were bailed has been accomplished.
- If, by the default of the bailee, the goods are not returned, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

(5) Return an accretion from the goods (Section 163)

- The bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

(6) Not to set up adverse title

Bailee must not set up a title adverse to that of the bailor. He cannot deny the title of the bailor.

• RIGHTS OF A BAILOR

(1) Right to terminate the bailment

A contract of bailment is voidable, if the bailee does any act inconsistent with the conditions of the bailment.

(2) Right to demand back the goods

When the goods are lent gratuitously, the bailor can demand back the goods at any time even before the expiry of the time fixed or the achievement of the object.

(3) Right to file a suit against a wrong doer

(4) Right to sue the Bailee

The bailor has a right to sue the bailee for enforcing all the liabilities and duties of him.

(5) Right to compensation

- If any damage is caused to the goods bailed because of the unauthorized use of the goods or unauthorized mixing of the goods, the bailor has a right to claim compensation for the same.

• RIGHTS OF A BAILEE

(1) Right to deliver the goods to any one of the joint bailors
If several joint owners bailed the goods, the bailee has a right to deliver them to any one of the joint owners unless there was a contract to the contrary.

(2) Right to indemnity

Bailee is entitled to be indemnified by the bailor for any loss arising to him by reasons that the bailor was not entitled to make the bailment or to receive back the goods or to give directions in respect to them.

(3) Right to claim compensation in case of faulty goods

A bailee is entitled to receive compensation from the bailor or any loss caused to him due to the failure of the bailor to disclose any faults in the goods known to him. If the bailment is for hire, the bailor will be liable to compensate even though he was not aware of the existence of such faults.

(4) Right to claim necessary expenses

In case of gratuitous bailment, the bailor shall repay to the bailee the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of the bailment.

(5) Right to apply to Court to decide the Title to the goods

If the goods bailed are claimed by the person other than the bailor, the bailee may apply to the Court to stop its delivery and to decide the title to the goods.

(6) Right of particular lien for payment of services

(7) Right of general lien.

• RIGHTS OF BAILOR & BAILEE AGAINST ANY WRONG DOER (THIRD PARTY)

→ Suit by bailor & bailee against wrong doers (Section 180)
If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against third person for such deprivation or injury.

→ Apportionment of relief or compensation obtained by such suits

Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

• TERMINATION OF BAILMENT

(1) On expiry of stipulated period

→ If the goods were given for a stipulated period, the contract of bailment shall terminate after the expiry of such period.

(2) On fulfillment of the purpose

→ If the goods were delivered for a specific purpose, a bailment shall terminate on the fulfillment of that purpose.

(3) By notice

→ The bailee acts in a manner which is inconsistent with the terms of the bailment, the bailor can always terminate the contract of bailment by giving a notice.

→ A gratuitous bailment can be terminated by the bailor at any time by giving a notice to the bailee.

(4) By death

→ A gratuitous bailment terminates upon the death of either the bailor or the bailee.

(5) Destruction of the subject matter

→ A bailment is terminated if the subject matter of the bailment is destroyed or there is a change in the nature of goods which makes it impossible to be used for the purpose of bailment.

FINDER OF LOST GOODS

Right of finder of lost goods - may sue for specific reward offered (Section 168)

→ The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him.

→ He has a right to retain the goods against the owner until he receives such compensation.

→ Where the owner has offered a specific reward, finder may sue the owner for such reward, and may retain the goods until then.

When finder of thing, commonly on sale may sell it (Section 169)

→ ~~Sale~~ If the owner cannot with reasonable diligence be found, or if he refuses to pay the lawful charges, the finder may sell it -

1) when the thing is in danger of perishing or of losing the greater part of its value,

2) lawful charges of the finder in respect of the thing found amount to two-thirds of its value.

RIGHT OF LIEN

Lien is the right of a person

- to retain the goods belonging to another
- until his claim is satisfied or
- some debt due to him is repaid.

Types of Lien

Particular lien

General lien

→ Particular lien

- Right to retain only the particular goods in respect of which the claim is due.
- Where the bailee has rendered any service involving labour or skill, he has a right to retain such goods until he receives due remuneration for the service.

→ General lien

- It is a right to retain the goods for a general balance of account in favour of certain persons.
- This right is available to bankers, factors, wharfingers, policy brokers and attorneys of law.
- Under the right of general lien the goods cannot be sold but can only be retained for dues. The right of lien can be waived through a contract.

• DIFFERENCE BETWEEN BAILEE'S GENERAL AND PARTICULAR LIEN

Basis	General lien	Particular lien
<u>Section</u>	Section 171 of the Indian Contract Act, 1872 confer on bailee the right of general lien.	Section 170 of the Indian Contract Act, 1872 confers on the bailee, the right of particular lien.
<u>Right</u>	It alludes to the right to keep possession of goods belonging to other against general balance of account.	Particular lien implies a right of the bailee to retain specific goods bailed for non-payment of amount.
<u>Automatic</u>	A general lien is not automatic but is recognized through an agreement. It is exercised by the bailee only by name.	It is automatic.
<u>When exercised?</u>	It can be exercised against goods even without involvement of labor or skill.	It comes into play only when some labor or skill is involved has been expended on the goods, resulting in an increase in the value of goods.
<u>Persons entitled to lien</u>	Only such persons as are specified under section 171 e.g. Bankers, factors, wharfingers, policy brokers etc are entitled to general lien.	Bailee, finder of lost goods, pledgee, unpaid seller, agent, partner etc entitled to particular lien.

• PLEDGE (Sec 172)

The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor is in this case called the 'pawnee'. The bailee is called the 'pawnee'.

• ESSENTIALS OF CONTRACT OF PLEDGE

Pledge is a special kind of bailment, therefore all the essentials of bailment are also the essentials of the pledge.

• RIGHTS OF A PAWNEE / PLEDGEE

(a) Right to retain the pledged goods

The pawnee may retain goods pledged, not only for payment of the debt but for the interest and all necessary expenses.

(b) Right to retention of subsequent debts

It can be exercised only when it has been provided for in a contract to this effect.

(c) Pawnee's right to extraordinary expenses incurred.

The pawnee is entitled to receive from the pawnee extraordinary expenses. However, he does not have the right to retain the goods, but he can sue the pawnee for such expenses.

(d) Pawnee's right where pawnee makes default

If the pawnee makes default in payment, he has the following rights:-

i) the pawnee may bring a suit and retain the goods pledged or

ii) he may sell the thing pledged.

→ If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnee is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnee.

• RIGHTS OF A PAWNEE

(all the rights of a bailor)

Right to redeem (Section 177):- Pawnee makes default in payment, if he may redeem the goods pledged at any subsequent time before the actual sale of them, but he must pay, in addition any expenses which have arisen from his default.

• DUTIES OF THE PAWNEE

- 1) Duty to take reasonable care of the pledged goods.
- 2) Duty not to make unauthorized use of pledged goods.
- 3) Duty to return the goods when the debt has been repaid or the promise has been performed.
- 4) Duty not to mix his own goods with pledged goods.
- 5) Duty not to do any act which is inconsistent with the terms of the pledge.
- 6) Duty to return accretion to the goods, if any.

• DUTIES OF A PAWNOR

- 1) The pawnor is liable to pay the debt or perform the promise as the case maybe.
- 2) It is the duty of the pawnor to compensate the pawnee for any extraordinary expenses incurred by him for preserving the goods pawned.
- 3) It is the duty of the pawnor to disclose all the faults which may put the pawnee under extraordinary risks.
- 4) If loss occurs to the pawnee due to defect in pawnor's title to the goods, the pawnor must indemnify the pawnee.
- 5) If the pawnee sells the good due to default by the pawnor, the pawnor must pay the deficit.

• PLEDGE BY NON-OWNERS

(a) Pledge by mercantile agent

A mercantile agent can pledge them while acting in the ordinary course of business as mercantile agent. Such pledge shall be valid.

(b) Pledge by person in possession under voidable contract

When the pawnor has obtained possession of the goods pledged by him under a contract voidable, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods.

(c) Pledge where pawnor has only a limited interest

Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

(d) Pledge by a co-owner in possession

Co-owner may make a valid pledge of the goods in his possession.

(e) Pledge by Buyer or seller in possession

A seller, in whose possession, the goods have been left after sale or a buyer who with the consent of the seller, obtains possession of the goods, before sale, can make a valid pledge.

DISTINCTION BETWEEN BAILMENT AND PLEDGE

Basis	Bailment	Pledge
<u>Meaning</u>	Transfer of goods by one person to another for some specific purpose is known as bailment.	Transfer of goods from one person to another as security for repayment of debt is known as pledge.
<u>Parties</u>	'Bailor' - person delivering the goods under contract of bailment 'Bailee' - to whom the goods are delivered.	'Pawner' - person who delivers the goods as security 'Pawnee' - person to whom the goods are delivered as security
<u>Purpose</u>	Bailment may be made for any purpose (as specified in the contract of bailment, eg. for safe custody, for repairs etc).	It is made for the purpose of delivering the goods as security for payment of a debt, or performance of a promise.
<u>Consideration</u>	The bailment may be made for consideration or without consideration.	Pledge is always made for a consideration.
<u>Right to sell the goods</u>	The bailee has no right to sell the goods even if the charges of bailment are not paid to him. The bailee's rights are limited to suing the bailor for his dues or to	The pawnee has right to sell the goods if the pawner fails to redeem the goods.

~~extends~~ exercise lien on the goods bailed.

Right to use the goods

Bailee can use the goods only for a purpose specified in the contract of bailment and not otherwise.

Pledgee or pawnee cannot use the goods pledged.

unit-9 Agency

WHAT IS AGENCY?

- Agent means a person employed to do any act for another or to represent another in dealing with the third persons and
- The principal means a person for whom such act is done or who is so represented.

Test of agency

- (a) Whether the person has the capacity to bind the principal.
- (b) Whether he can establish privity of contract between the principal and third parties.

If the answer to these questions is yes, then there is a relationship of agency.

Rule of agency is based on 'Qui Facit Per alium, facit per se' i.e. he who acts through an agent is himself acting.

APPOINTMENT AND AUTHORITY OF AGENTS

Who may employ an agent →

Any person who has attained majority and who is of sound mind, may employ an agent.

Who may be an agent →

Any person may become an agent i.e. even a minor or a person of unsound mind may become an agent.

Consideration not necessary →

No consideration is necessary to create an agency.

• CREATION OF AGENCY

(1) Express authority

An authority is said to be express when it is given by words, oral or written.

(2) Implied authority

It is implied when it is to be inferred from the circumstances of the case, conduct of the parties.

Implied agency includes :-

(a) Agency by estoppel - An agency by estoppel may be created when the following essentials are fulfilled :-

1. the principal must have made a representation
2. the representation may be express or implied.
3. the representation must state that the agent has an authority to do certain act although really he has no authority.
4. the principal must have ~~induced~~ induced the third party by such representation, and
5. the third person must have believed the representation and made the contract on the belief of such representation.

(b) Agency by necessity - An agency of necessity arises due to some emergent circumstances. Where an agent is authorized to do certain act, and while doing such an act, an emergency arises, he acquires an extraordinary or special authority to prevent his principal from loss.

(3) Agency by operation of law

When law treats one person as agent of other.

(4) Right of person as to acts done for him without his authority, effect of Ratification

'Ratification' means approving a previous act or transaction.

Essentials of a valid ratification :-

(a) Ratification may be expressed or implied - Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

- (b) Knowledge requisite for valid ratification :- No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.
- (c) The whole transaction must be ratified :- The principal cannot ratify a part of the transaction which is beneficial to him and reject the rest.
- (d) Ratification cannot injure third party - When the interest of third parties is affected, the principle of ratification does not apply.
- (e) Ratification within reasonable time
- (f) Communication of ratification - Ratification must be communicated to the third party.
- (g) Act to be ratified must be valid - It should not be void or illegal.

• EXTENT OF AGENT'S AUTHORITY

- (a) Agent's authority in normal circumstances
An agent having an authority to do every lawful thing which is necessary in order to do such act.
- (b) Agent's authority in an emergency
To constitute a valid agency in an emergency, following conditions must be satisfied:-
- (i) Agent should not be in a position or have any opportunity to communicate with his principal within the time available.
 - (ii) There should have been actual and definite commercial necessity for the agent to act promptly.
 - (iii) The agent should have acted bonafide and for the benefit of the principal.
 - (iv) the agent should have adopted the most reasonable and practicable course under the circumstances and.
 - (v) the agent must have been in possession of the goods belonging to his principal and which are the subject of contract.

SUB - AGENT

When agent cannot delegate (Section 190)

→ An agent cannot lawfully employ another, unless by the ordinary custom of trade a sub-agent, may be employed.

'Sub-agent' defined (Section 191)

→ A 'sub agent' is a person employed by, and acting under the control of, the original agent in the business of the agency.

Analysis:

- The appointment of sub agent is not lawful.
- A delegatee cannot further delegate
- Based on the Latin principle 'delegatus non potest delegare'.

Exception where an agent can appoint sub-agent:-

- (1) The appointment of a sub-agent would be valid if the terms of appointment originally contemplated it.
- (2) Sometimes customs of the trade may provide for appointment of sub-agents.
- (3) When in the course of the agent's employment, unforeseen emergency arise making it necessary for him to delegate the authority that was given to him by the principal.

Representation of principal by sub-agent properly appointed:-

Where a sub-agent is properly appointed,

- (1) Principal is liable to third parties for the acts of the sub-agent.
- (2) Agent's responsibility for sub-agents :- The agent is responsible to the principal for the acts of the sub-agent.
- (3) Sub-agents liability to principal :- The sub-agent is responsible for his acts to the agent, but not to the principal.

Agent's responsibility for sub-agent appointed without authority:-

Where an agent, without having authority to do so, has appointed a person to act as a sub-agent,

- (1) agent is responsible for his acts both to the principal and to third persons,

- (2) principal is not responsible for the acts of the sub-agent.
 (3) sub-agent is not responsible to the principal at all. He is answerable only to the agent.

SUBSTITUTED AGENT

→ substituted agents are not sub agents. They are agents of the principal.

Relation between principal and persons duly appointed by agent to act in business of agency (Section 194)

Where an agent, holding authority to name another person to act for the principal has named another person accordingly, such person is not a sub-agent, but an agent of the principal.

Agent's duty in naming such persons (Section 195)

In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case, he is not responsible to the principal for the acts or negligence of the agent so selected.

DIFFERENCE BETWEEN A SUB-AGENT AND A SUBSTITUTED AGENT

S.No	Sub-agent	Substituted agent
1.	A sub-agent does his work under the control and directions of agent.	A substitute agent works under the instructions of the principal.
2.	The agent not only appoints a sub-agent but also delegates to him a part of his own duties.	The agent does not delegate any part of his task to a substituted agent.
3.	There is no privity of contract between the principal and the sub-agent.	Privity of contract is established between a principal and a substituted agent.
4.	The sub agent is responsible to the agent alone and is not generally responsible to the principal.	A substituted agent is responsible to the principal and not to the original agent who appointed him.
5.	The agent is responsible to the principal for the acts of the sub.	The agent is not responsible to the principal for the acts of the

agent.

substituted agent.

6. The sub-agent has no right of action against the principal for remuneration due to him.

The substituted agent can sue the principal for remuneration due to him.

7. Sub-agents may be improperly appointed.

Substituted agents can never be improperly appointed.

8. The agent remains liable for the acts of the sub-agent as long as the sub-agency continues.

The agent's duty ends once he has named the substituted agent.

DUTIES AND OBLIGATIONS OF AN AGENT

(i) Duty to follow instructions or customs

- An agent is bound to conduct the business of his principal according to the direction given by the principal.
- In absence of any such directions, customs which prevails in doing business of the same kind at the place where the agent conducts such business.
- When the agent acts otherwise, he must indemnify him, and, if any profit accrues, he must account for it.

(ii) Duty of reasonable care and skill

- An agent is bound to conduct the business of the principal with skill generally possessed by person engaged in similar business.
- The agent is always bound to act with reasonable diligence, and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct.

(iii) Duty to render proper accounts

- An agent is bound to render proper accounts to his principal on demand supported by vouchers.

(iv) Agent's duty to communicate with principal

- Duty of agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal to obtain his instructions.

(v) Duty not to deal with on his own account

- Agent should not deal on his own account without first obtaining the consent of the principal, otherwise the principal may -

1) repudiate the transaction

2) claim from the agent any benefit which may have resulted to him from the transaction.

(vi) Duty not to make secret profits

- It is the duty of an agent not to make any secret profit in the business of agency.

- Secret profit means any advantage obtained by the agent over and above his agreed remuneration and which he would not have been able to make out for his position as an agent.

(vii) Duty not to delegate

- An agent cannot lawfully employ to perform acts unless by the ordinary custom of trade a sub-agent may, or, from the nature of agency, a sub agent, must be employed.

(viii) Agent's duty to pay sums received for principal

- Agent is bound to pay to his principal all sums received on his account.

(ix) Duty not to use any confidential information received in the course of agency against the principal.

• RIGHTS OF AN AGENT

(i) Right of retain out of sums received on principal's account

- Agent retain out of any sums received on account of the principal for the following payments :-

a) all moneys due to himself

b) expenses properly incurred by him in conducting such business

c) remuneration as may be payable to him for acting as agent.

(ii) Right to remuneration

The agent is entitled for remuneration as per the contract. In the absence of any agreed amount of remuneration, he is entitled for usual remuneration which is customary in the business.

(iii) Agent's lien on principal's property

- An agent is entitled to retain the goods, papers and other property of the principal received by him, until the amount due to himself has been paid.

- The conditions of this right are :-

- Agent should be lawfully entitled to receive from the principal a sum of money by way of commission earned.
- Property over which the lien is to be exercised should belong to the principal and it should have been received by the agent in his capacity.

- The agent's right to lien is lost in the following cases :-

- When the possession of the property is lost.
- When the agent waives his right. Waiver may arise out of agreement express or implied.
- The agent's lien is subject to a contract to the contrary.

(iv) Right to indemnity

a) Right of indemnification for lawful acts

The principal is bound to indemnify the agent against all consequences of lawful acts done in exercise of his authority.

b) Right of indemnification against acts done in good faith
Where the agent acts in good faith on the instruction of principal, agent is entitled for indemnification of any loss or damage from the principal.

c) Non-liability of employer of agent to do a criminal act
Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

(v) Right to compensation for injury caused by principal's neglect
Principal must compensate his agent in respect of injury caused to such agent due to principal's neglect or want of skill.

• PRINCIPAL'S LIABILITY TO THIRD PARTIES

- An agent does all acts on behalf of the principal but incurs no personal liability.
- An agent also cannot personally enforce contracts entered into by him on behalf of the principal.

(i) Principal's liability for the Acts of the Agent

Principal liable for the acts of agents which are within the scope of his authority.

(ii) Principal's liability when agent exceeds authority

When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as ~~is~~ is within his authority is binding as between him and his principal.

Principal not bound when excess of agent's authority is not separable :-

Where an agent does more than he is authorized to do, and what he does ~~is~~ beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

(iii) Consequences of notice given to agent

Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall as between the principal and third parties, have the same legal consequence as if ~~it~~ it had been given to or obtained by the principal.

(iv) Principal's liability for the agent's fraud, misrepresentation or torts

Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentation or frauds had been made, or committed, by the principals, but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

PERSONAL LIABILITY OF AGENT TO THIRD PARTIES

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal (Section 230)

- An agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Exceptions :-

(1) Merchant resident abroad / foreign principal

When an agent has entered into a contract for the sale or purchase of goods on behalf of a principal resident abroad, the presumption is that the agent undertakes to be personally liable for the performances of such contract.

(2) Agent does not disclose the name of his principal or undisclosed principal

When the agent does not disclose the name of the principal then there arises a presumption that he himself undertakes to be personally liable.

(3) Non-existent or incompetent principal

Where the principal, though disclosed, cannot be sued, the agent is presumed to be personally liable.

(4) Pretended agent

If the agent pretends but is not an actual agent, and the principal does not apply to rectify the act but disowns it, the pretended agent will be himself liable.

(5) When agent exceeds authority

When the agent exceeds his authority, misleads the third person in believing that the agent he has the requisite authority in doing the act, then the agent can be made liable personally for the breach of warranty of authority.

RIGHTS OF THIRD PARTIES

(1) Rights of parties to a contract made by undisclosed agent

- If an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, his principal may require the performance of the contract, but the

other contracting party has, as against the principal, the same right as he would have had as against the agent if the agent had been the principal.

- If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

(2) Performance of contract with agent supposed to be principal when agent does not disclose that he is acting as an agent and the principal requires the performance of the contract then the principal can obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

(3) Option to third person - sue the agent or the principal:

a. Right of person dealing with agent personally liable -
In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

b. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable -
When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

• REVOCATION OF AUTHORITY

Termination of agency (Section 201)

a. Revocation :- An agency may be terminated by the principal revoking the authority of the agent. The principal cannot revoke the authority given to his agent after the authority has been

partly exercised so far as regards such acts and obligations as arise for acts already done in the agency.

→ Compensation for revocation by principal (Section 205)

If there is premature revocation of agency without sufficient cause, the principal must compensate the agent, for such revocation.

→ Notice of revocation (Section 206)

If when the principal, having justification to do so, revokes the authority, he must give reasonable notice of such revocation to the agent, otherwise, he can liable to pay compensation for any damage caused to the agent.

→ Revocation and renunciation may be expressed or implied (Section 207)

Revocation of agency may be expressed or implied in the conduct of the principal.

b. Renunciation by agent (Section 206)

- An agent may renounce the business of agency in the same manner in which the principal has the right of revocation. In the first place, if the agency is for fixed period, the agent would have to compensate the principal for any premature renunciation without sufficient cause.

- Secondly, a reasonable notice of renunciation is necessary. Length of notice (time period of notice) is to be determined by the same principals which apply to revocation by the principal. If the agent renounces without proper notice, he shall have to make good any damage thereby resulting to the principal. (Section 206)

c. Completion of business

An agency is automatically and by operation of law terminated when its business is completed. Thus, for example, the authority on the death of an agent appointed to sell goods ceases to be exercisable when the sale is completed.

d. Death or insanity

An agency is determined automatically on the death or insanity of the principal or the agent.

e. Principal's insolvency

An agency is determined automatically on the death or insanity of the principal or the agent.

f. On expiry of time

Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of agency has been accomplished or not. An agency comes to an automatic end on expiry of its term.

• When the agency is irrevocable?

When the agent is personally interested in the subject matter of agency, the agency becomes irrevocable.

• Effects of Termination (Section 208)

→ When termination of agent's authority takes effect as to agent, and as to third persons (Section 208)

The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons before it becomes known to them.

→ Agent's duty on termination of agency by principal's death or insanity (Section 209)

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

• Termination of sub-agent's authority (Section 210)

The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.