



COMPARATIVE ANALYSIS OF CONTRACT OF INDEMNITY UNDER INDIAN LAW AND ENGLISH LAW

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ABSTRACT

As per the Indian Contract Act 1872 regarding contract of indemnity there is no specific provisions for rights of indemnifier, commencement of indemnifier's liability and implied contract of indemnity. In India law of indemnity has a narrower scope in comparison to English law. As per the definition of indemnity under section 124 of Indian contract Act 1872, indemnity has a limited scope since indemnity holder is only compensated in case loss occurred due to human agency. It does not include any other event or accident for the same.

In this research I have endeavoured to provide some insights and developments in English law and to suggest tentatively how these might inform and influence Indian case law and any future amendments to the Act.

Keywords : CONTRACT OF INDEMNITY, INDIAN LAW AND ENGLISH LAW, GUARANTEE

INTRODUCTION

Contract of Indemnity means doing good to the person who has suffered loss or putting the person back into the same position as if no loss has occurred. The word indemnity has been derived from the Latin word 'indemnitas' which means unharmed or undamaged. The term indemnity literally means "security against loss". The objective of entering into contract of indemnity is to protect the promisee against unanticipated losses. Contract of indemnity is really a kind of contingent contract.

Sec 124 of the Indian Contract Act 1872 defines Contract of Indemnity as a contract by which one party promises to save the other person from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. Contract of indemnity must fulfil all essential elements of a valid contract such as consideration, lawful object, competent parties, etc., Indemnity is a contractual agreement between two parties. In this arrangement, one party agrees to pay for potential losses or damages caused by another person. The party who gives the indemnity is called as indemnifier and the party to whose protection it is given is called as indemnity holder. There are two types of contract in contract of indemnity that is express contract of indemnity and another one is implied contract of indemnity. Indian Contract Act is silent regarding implied contract of indemnity and it is covered by the decision of the court. Sec 125 of the Indian Contract Act, 1872 comes into play when the indemnity holder is sued under a specific situation. The indemnity holder is entitled to recover all damages, all costs and all sums that he have paid under the terms of the compromise of any suit from the indemnifier. But the rights of indemnifier have not been mentioned expressly in the Act. The purpose of inserting the

indemnity clause in contract is to shift the risk or cost from one party to another.

According to English Law indemnity means a promise to save a person harmless from the consequences of an act. English law of indemnity is wider than the Indian law. The English law of indemnity covers losses caused not merely by human agency but also those caused by accident or act of god.

ORIGIN AND DEVELOPMENT OF CONTRACT OF INDEMNITY UNDER INDIAN LAW

In India, the contract of indemnity originated in the case

Osman Jamal & Sons Ltd v/s Gopal Purshotam. These are the facts of the case:

Osman Jamal & Sons Ltd v/s Gopal Purshotam

Facts

In this case, the plaintiff is a company which is working as a commission agent for a defendant firm. The defendant firm was engaged in buying and selling of Hessian and Gummies, where the defendant firm promised with the plaintiff firm that in case of any loss the defendant firm will be indemnified. The plaintiff firm bought Hessian from Maliram Ramjets, but the defendant company is not able to make payment and take delivery of Hessians. So Maliram Ramjets sold the same to other people at a lower price. Maliram Ramjets sued the plaintiff for the loss, but the plaintiff company was winding up and asked the defendant to indemnified for the same. But the defendant refused to pay the damages and claimed that because of the plaintiff he was not able to do the payment.

Held

The court held that the defendant is liable to indemnify the plaintiff because he promised for the same.

As we discussed above there is the case of an express contract of indemnity which was introduced in the year 1929, after this a new case was introduced in the year 1938, which was the case of an implied contract of indemnity, *Secretary of State vs. Bank of India Ltd.*

• *Secretary of State vs. Bank of India Ltd*

Facts

In this case, an agent was in possession of a government promissory note which was endorsed by the agent to the bank with forged endorsement. The agent presented the promissory note to the bank with the mala fide intention but the bank within good faith uses that promissory note for a redeveloped and issued from "public debt office". In the meantime, the real owner of the promissory note sued the secretary of state for the conversion of the promissory note. Subsequently, the secretary of state sued the bank on the basis of implied indemnity.

Held

The court held that when a person does any act on the request of any third person and such act violates the right of the third person then the person who commits an act entitled to claim indemnity from that person who is requested to do that act.

This was the case where we saw the implied contract of indemnity. The law was further amended where the original rule under English law was that if the indemnity holder suffers any kind of loss then he will be able to claim indemnity from the indemnifier. But this principle was also changed in England which was discussed above with the reference of some cases. Exactly in India Justice Chagla explained the process of transformation in the landmark judgment of *Gajanan Moreswar vs. Moreswar Madan Mantri*.

• *Gajanan Moreswar vs. Moreswar Madan Mantri*

Facts

In this case, Gajanan Mores was having land in Bombay but at a lease for a long period. Gajanan Moreswar was transferred to Moreswar Madan Mantri but for a limited period. M Madan started construction over the plot and ordered some material from K D Mohandas, when K D Mohandas asked for the payment of the material, M Madan refused to pay the amount and requested G Moreswar to prepare a mortgage deed in favour of K D Mohandas. The interest rate was decided and G Moreswar put a charge over his possession. According to the deed, a date was decided for the return of the principal amount. But M Madan decides that he will pay the principal amount along with the interest in order to release from a mortgage deed, and decides a particular date for the same. On the predefined date M Madan did not pay anything to K D Mohandas, and G Moreswar had to pay some amount of interest to K D Mohandas. After many requests, M Madan did not pay anything, so G Moreswar decided to sue M Madan for the same.

Held

In this matter, the court held that if indemnity holder has raised any responsibility and the nature of that responsibility is absolute then indemnity holder can ask the indemnifier to fulfil that responsibility or pay the amount. It is not necessary that a promise should pay the loss incurred.

Case analysis

According to my understanding, the court took the correct decision because here the indemnifier is willing to compensate the indemnity holder if any responsibility arises so the

indemnifier should pay the debt directly. Because if the indemnity holder does some act which leads to arise the liability so he should pay the same because indemnifiers promise the indemnity holder to restore him in the original situation.

ORIGIN AND DEVELOPMENT OF CONTRACT OF INDEMNITY UNDER ENGLISH LAW

The principle of contract of indemnity originated under English law in the landmark judgment of *Adamson v/s Jarvis*.

• *Adamson v/s Jarvis*

Facts

In this case, Adamson was plaintiff and Jarvis was defendant. The plaintiff by profession was an auctioneer to whom Jarvis, who was not the real owner of the cattle, gave the cattle and this was sold at an auction. The plaintiff followed the respective instructions which was given by Jarvis and sold the cattle. The real owner of the cattle sued Adamson for conversion, and he was successful in it and Adamson had to pay the damages for the same, subsequently Adamson sued Jarvis to be indemnified for the loss that he incurred to pay the damages to the owner.

Held

The court held that the plaintiff followed the instructions of the defendant, so this is presumed that anything went wrong as per the instructions, so the defendant will be liable to pay the damages so at the end Jarvis had to pay the damages to Adamson.

After reading this case I analyzed that there is a promise to save the person from the loss but the party has to follow all the instructions of the other party that is indemnified in order to claim indemnity. After this case, the law further changed by the case *Dugdale vs. Lowering*. This is the case it was shown that the promise may be expressed and implied.

Basically, contract of indemnity is a wider concept in English law as compared to Indian law, because in English law all the matters are looked upon which are related not only because of the acts of some individual but also arises from some event or accident in case of fire or act of God.

In order to define the contract of indemnity under English it is very important to relate with the legal maxim called "you must be damnified before you can claim for indemnified" which means if promisor is not incur any loss then he will not claim indemnity, this shows that injury is the most essential element for claiming indemnity under English law

The general rule of the contract of indemnity under English law is as follows:

- 1) Indemnifier will compensate indemnity holder only when indemnity holder incurs any loss.
- 2) If the indemnity holder follows the instructions of the indemnifier.
- 3) If the indemnity holder incurs any cost during suit proceeding or pays any amount in compromise.

These rules prove that without injury indemnity holders cannot claim indemnity. But these provisions were creating a problem in those conditions when the indemnifier is not able to pay the claim, so courts of equity in order to give some relief and removed the principle that in order to get indemnity first you incurred some loss. Then indemnifier is liable for indemnity for the promise. But now the situation has changed and now indemnifiers are liable also when the actual loss has not happened.

In another landmark judgment of *Re Law Guarantee and Accidental case*, the court was of the view that the contract of indemnity should not only be limited to reimburse the person for any loss of the money. A contract of indemnity seeks to ensure that the indemnity holder stands in the same position as he was before the loss had occurred. The indemnity shall, therefore, lose its significance if the indemnity holder is called to pay the loss and thereafter reimburse the amount from the indemnifier.

RIGHTS OF INDEMNITY HOLDER AND INDEMNIFIER

Section 125 of the Indian Contract Act, talks about the Rights of Indemnity Holder when sued. It says that "The promisee in a contract of indemnity acting within the scope of authority is entitled to recover from the promisor-

All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

All costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit".

Rights Of Indemnifier

The rights of the indemnifier have not been mentioned expressly anywhere in the Act. In the case of *Jaswant Singh vs Section Of State*, 14 Bom 299, it was held that the rights of the indemnifier are similar to the rights of a surety under Sec. 141 of the Indian Contract Act, 1872, Where he becomes entitled to all the securities that a creditor has against the principal debtor whether he was aware of them or not. Where a person agrees to indemnify, he will, upon such indemnification, be entitled to succeed to all the ways and means by which the person originally Indemnified might have protected himself from any loss or set up a compensation for that loss.

COMMENCEMENT OF INDEMNIFIER LIABILITY

An important question arises when does the indemnifier become liable to pay or when is the indemnity-holder is entitled to recover his indemnity.

In English law, indemnity was payable only after the indemnity-holder had suffered actual loss by paying off the claim. The maxim of law was: "You must be damnified, before you can claim to be Indemnified" But the law now is different. The process of transformation of law is well explained by Justice CHAGLA of the Bombay High Court in the case of

Gajanan Moreshwar Parelkar vs Moreshwar Madan Mantri (1942), he says that it is true that under the English common law no action could be maintained until the actual loss has been incurred. It was very soon realised that an indemnity might be worth little indeed, but the Indemnified could not enforce his indemnity till the judgement was pronounced, and it was only after he had satisfied the judgement that he could sue on his Indemnity. It is clear that this might under certain

circumstances throw on intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgement and yet he could not avail himself on his indemnity till he had done so.

Therefore, the court of equity stepped in and mitigated the rigor of the common law. The court of equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into court sufficient money which would constitute a fund for paying off the claim whenever it was made.

This principle was founded in the *Richardson Re case*, where Buckley J observed: "Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay.

The High Court Of Calcutta in it's well known decision of, *Osman Jamal & Sons Ltd vs Gopal Purushottam case* followed this principle.

Facts

In this case, A company was acting as the commission agents of the defendant's firm and in that capacity brought certain goods for the defendants which they failed to take. The suppliers became entitled to recover from the company a certain sum of money as damages for breach of contract. The company went into liquidation before paying the claim.

Judgement

It was held that the official liquidation could recover the amount even though the company had not actually paid the vendor. The court directed that the amount should be set apart so that it is used in full payment of the vendor in respect of whose contract the company had incurred liability.

The High Courts of Allahabad, Madras and Patna have expressed their concurrence in the principal that as soon as the liability of the indemnity holder to pay becomes clear and certain, he should have the right to require the indemnifier to put him in a position to meet the claim. But contrary views have also been expressed.

MAJOR RESEARCH WORK REVIEWED

Gautam Kumar Swain (2017) The article authored by him is 'Law Related to indemnity in India'. This article deals with essentials elements of contract of indemnity under Indian law.

Rishabh Aggarwal (2019) The article authored by him is 'Rights of indemnity holder'. He addressed the indemnity holder's rights under sec 125 of Indian Contract Act, 1872 and also discussed about indemnity under Indian law.

Shivani Sharma (2021) The article authored by her is 'Contract of indemnity under English law and Indian law'. The article contributes the understanding of contract of indemnity, rights of indemnity holder and how far it is different from English law.

Singh,jigisha (2017) – The researcher in his paper addressed the concept of consideration in contracts. His study with reference to law of indemnity and guarantee. He discussed the necessity of consideration for forming contract of indemnity and guarantee in his research paper.

Pramit Bhattacharya (2016) The article authored by him is 'Concept of Indemnity'. In this article he focused his study towards the essentials of contract of indemnity, rights of indemnity holder and indemnifier.

Sagnik sarkar (2019) The article authored by him is 'Insurance Contract and Indemnity in India'. In this article he

expressed about contract of insurance and contract of indemnity. He discussed the similarities and differences between contract of indemnity and contract of insurance.

S. S. Rana (2018) The article authored by him is 'Indemnity and damages'. In this article he expressed the meaning and enforcement of indemnity in a contract. Under his article he compared the remedies on breach of contract of indemnity and remedies under section 74 of Indian Contract Act, 1872.

Hemant (2020) The article written by hemant deals with meaning of indemnity and essential features of contract of indemnity. He expressed his simple view about the contract of indemnity.

Sakshi Agarwal (2018) the article authored by her is 'Contract of Indemnity in India and U.K'. In this article she addressed the difference and enforcement of contract of indemnity in India and U.K. She discussed the position about the commencement of indemnifiers liability and definition of contract of indemnity under India and U.K.

Amber Raaj The article authored by him is 'Contract of Indemnity and Insurance'. In this article he addressed essential features of contract of indemnity and contract of insurance. The article contributes the understanding of judicial enactments of contract of indemnity under Indian and English law.

Praveenkumar (2021) in his article addressed how much indemnity could be given in an insurance claim and what is the basic difference between law relating to indemnity and to insurance in India.

OBJECTIVES OF THE PROPOSED STUDY

- To study whether the contract of indemnity under Indian law is exhaustive one or not.
- To examine whether the contract of insurance is a contract of indemnity under English law and what is the position under Indian law.
- To analyse the amendments in Indian contract Act 1872, regarding contract of indemnity.
- To evaluate the rights of indemnifier and commencement of indemnifier's liability
- To analyse the comparative study of contract of indemnity under English law and Indian law.
- To examine the difference between contract of indemnity, contract of insurance and contract of guarantee.
- To study about the implied contract of indemnity.

CONCLUSION

Indemnity under Indian law is well developed although it lacks in some aspects where the legislature stated in the Indian Contract Act, 1872 has many gaps with respect to the indemnity's characteristics.

Section 124 of the Indian Contract Act, 1872, which defines what indemnity means under the Indian law only focuses on one sort of indemnity and fails to direct what the judiciary should focus on in cases where the other types of indemnities such as the one's arising from the conduct of phenomenon such as thunder giving rise to a fire or earthquakes etc and fails to include the implied form of indemnity which the High Court later clarified in its decision in the case of Secretary of State vs. The Bank of India. The above is the reason why insurance contracts are not included under contract of indemnities.

In the English law however, the definition and the legislature include all sorts of indemnities and implied indemnities as well. However, In the English law, Life insurances are not treated as indemnities

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