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COMMENCEMENT OF LIABILITY IN INDEMNITY- (INDIAN AND UK APPROACH)

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TABLE OF CONTENTS

INTRODUCTION …………………………………………………………………………...
RESEARCH QUESTIONS ……………………………………………………….………
OBJECTIVES OF STUDY ……………………………………………………….………
SIGNIFICANCE OF STUDY ………………………………………………….………
SCOPE OF STUDY ……………………………………………………………………
RESEARCH METHODOLOGY ………………………………………………………

- RESEARCH DESIGN
- SOURCES OF DATA

CHAPTER 1 …………………………………………………………………………...
CONTRACT OF INDEMNITY UNDER INDIAN LAW
CHAPTER 2 ………………………………………………………………………..
CONTRACT OF INDEMNITY UNDER ENGLISH LAW
CHAPTER 3 ……………………………………………………………………….
COMMENCEMENT OF LIABILITY AND THE DIFFERENCE BETWEEN INDEMNITY AND DAMAGES
SUGGESTIONS AND CONCLUSION …………………………………………………..
BIBLIOGRAPHY …………………………………………………………………………
INDEX OF AUTHORITIES ………………………………………………………………

ISSN: 2582-6433

INTRODUCTION

Contract of indemnity is a special type of contract, means a compensation to be paid to the person who is victim of loss or any compensation to save him from the loss caused by different cause. A contract of indemnity is a contract by which a person promises to other that he will indemnify that from contingent loss. In the contract of indemnity, one party promises to save the other party from damages or loss caused to him in the conduct of the promisor or by the conduct of any other party.

According to the English law a contract of indemnity is a promise to save another harmless from the loss caused because of a transaction entered at the instance of the promisor English law in comparison to the Indian law is wider in relation to the definition of the term. In Indian contract act, the loss must be caused either by the conduct of the promisor or any other person if loss is caused by accident there would not be contract of indemnity. But according to English law seems wide than Indian law and covers the loss caused by accident or natural causes etc.,

RESEARCH QUESTION

- What is contract of indemnity under Indian law and English law?
- When does liability commence in the contract of indemnity?

OBJECTIVES OF STUDY

To find out the phase of commencement of liability by parties in the contract of indemnity

SIGNIFICANCE OF STUDY

- Clarity regarding the general and special principles of contract
- Having an idea as to how to ensure that the contract
- Identification of minute things involved in the commencement of the liability

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SCOPE OF STUDY

This study is limited to liability's commencement in contract of indemnity and does not give a detailed study on contract of indemnity but emphasize specific subject matter in the Indian and English law context.

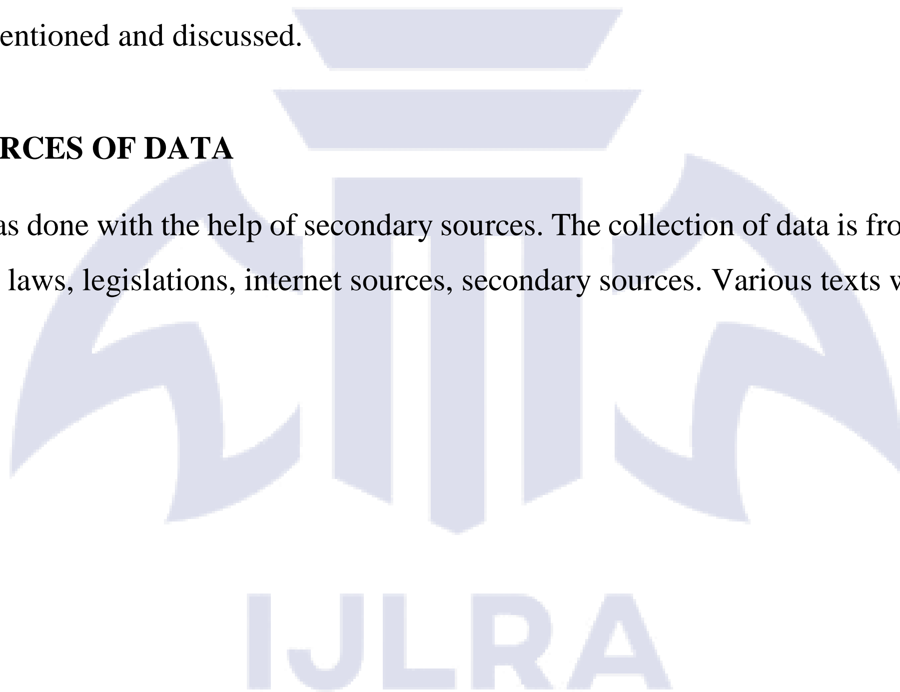
RESEARCH METHODOLOGY

- **RESEARCH DESIGN**

The following research is done in analytical and descriptive way, so as to provide a clarity with each topic mentioned and discussed.

- **SOURCES OF DATA**

The study was done with the help of secondary sources. The collection of data is from the relevant articles, case laws, legislations, internet sources, secondary sources. Various texts were also used



ISSN: 2582-6433

CHAPTER 1

CONTRACT OF INDEMNITY UNDER INDIAN LAW

WHAT IS CONTRACT OF INDEMNITY?

The contract of indemnity is specific type of contract. The specific provision relation to this contract is contained in section 124 to section 147 of the Indian contract act, 1872. According to the section 124 of the Indian contract act "A contract by which one party promises to save the other from the loss caused to him by the conduct of the promisor himself or by the conduct of any person is called a contract of Indemnity[1]". The term indemnity literally means "security against loss". The person who promises to make good the loss is called the indemnifier and the person whose loss is to be made good is called indemnity-holder.

The contract of indemnity is a direct engagement between two parties whereby one promises to save the other from the harm. The definition provided by the Indian contract act confines itself to the losses occasioned due to the act of the promisor or due to the act of any other person. This gave a very bad broad scope to the meaning of indemnity, and it included promise of indemnity due to the loss caused by any cause whatsoever. Thus, any type of insurance except life insurance was a contract of indemnity. However, the Indian contract act makes the scope narrower by defining the contract of indemnity.

A contract of indemnity is a direct engagement between two parties thereby one promises to save the other from harm it does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend on the conduct of indemnifier or any other person[2]. Under a contract of indemnity, the liability of the promisor arises from loss caused to the promisee by the conduct of the promisor himself or by the conduct of another person[3]. Every contract of insurance other than life insurance is a contract of indemnity. The definition is restricted to cases where loss has been caused by some human agency.[4]

[1] AVATAR SINGH, CONTRACT AND SPECIFIC RELIEF, pg. 592
[2] New India assurance company v. Kusumanchi Rameshwar Rao & ors, 28 November 1996
[3] Punjab national bank v. Vikram cotton mills, 1970 AIR 1973 SCR (2) 462
[4] Gajanan Moreshwar v. Moreshwar Madan , 1942 44 BOMLR 703

ISSN: 2582-6433

Nature of Contract of Indemnity –

A contract of indemnity may be express or implied depending upon the circumstances of the case, though section 124 of the Indian contract act does not seem to cover the case of implied indemnity. A broker in possession of a government promissory note endorsed it to a bank with forged endorsement. The bank acting in good faith applied for and got a renewed promissory note from the public debt office. Meanwhile the true owner sued the secretary of state for conversion who in turn sued the bank on an implied indemnity. It was held that it is general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of another doing it and such act turns to be injurious to the rights of a third person, the person doing it is entitled to an indemnity from him who requested that it should be done[5].

Essential element

The following are the essentials of the contract of indemnity.

1. There must be a loss
2. The loss must be caused either by the promisor or by any other person
3. Indemnifier is liable only for the loss.

Right of the indemnity holder

Section 125 of Indian contract act talks about right of the indemnity holder. An indemnity holder acting withing the scope of his authority is entitled with following rights.

- Indemnity holder is entitled to recover all damages which he might have been compelled to pay in any suit in respect of any matter covered by the contract.
- Indemnity holder is entitled to recover all costs incidental to the institution and defending of the suit.
- Indemnity holder is entitled to recover all amounts which he had paid under the terms of the compromise of such suit. However, the compensation must not be against the directions of the indemnifier. It must be prudent and authorized by indemnifier.
- Indemnity holder is entitled to sue for specific performance if he has incurred absolute liability and the contract covers such liability. The promisee in in a contract of indemnity acting within the scope of his authority is entitled to recover from the promisor

[5] The secretary of state v. the bank of India limited, 1938 40 BOMLR 868

ISSN: 2582-6433

- All the damages that he is compelled to pay in a suit in respect of any matter to which the promise of indemnity applies.
- All the costs that he is compels to pay in such suit if in bringing or defending it he did not contravene the orders of the promisor and has acted as it would have been prudent for him to act in the absence of the contract of indemnity or if the promisor authorize him in bringing or defending the suit
- All the sums which he may have paid under the terms of a compromise in any suite if the compromise was not contrary to the orders of the promisor and was one which would have been prudent for the promisee to make in the absence of the contract of indemnity.

In case of ***Mohit Kumar saha v. new India assurance co***[6]**.** it was held that the indemnifier must pay the full amount of the value of the vehicle lost to theft as given by the surveyor. Any settlement at the lesser value is arbitrary and unfair and violates article 14 of the constitution. All sums which he may have paid under the terms of any compromise of any such suit, if compromise was not, it is important to note here that the right to indemnity cannot be claimed of dishonesty, lack of good faith and contravention of the promisor's request. However, the right cannot be negatived in case of oversight.[7]

Right of indemnifier

Section 125 of Indian contract act only talks about the right of indemnifier and is quite silent of the rights of indemnifier as if indemnifier has no rights but only liability towards the indemnified. In the logical state of things if we read section 141 which deals with rights of surety, we can easily conclude that the indemnifier's right would also be same as that of surety. Where one person has agreed to indemnify the other, he will on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss[8]. Principle of subrogation is applicable because it is an essential part of law of indemnity and is based on equity and the contract contains no provision in contravention with.[9]

[6] 1997 ACJ !!&), AIR 1997 Cal 179
[7] Yeung v. HSBC, 1981 AC 787 A
[8] Simpson v. Thomson, 1877, 3 App Cas 279
[9] Maharaja shri jarvat Singhji v secretary of state for India, 1890, 14 Bom. 299:

ISSN: 2582-6433

Commencement of liability

An important question in this connection is when does the indemnifier become liable to pay, or when is the indemnity-holder entitled to recover his indemnity? The original English rule was that indemnity was payable only after the indemnity-holder had suffered actual loss by paying off the claim[10]. The maxim of law was: "you must be dignified before you can claim to be indemnified." But the law is now different. The process of transformation is well-explained by Chagla J of the Bombay High Court in Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri-P "It is true that under the English common law no action could be maintained until the actual loss had been incurred. It was very soon realized that an indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. If a suit was filed against him, he had to wait till a judgment was pronounced and it was only after he had satisfied the judgment that he could sue on his indemnity. This might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be able to satisfy the judgment and yet he could not avail himself of 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 expounded in Richardson, where Buckley LJ 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 its well-known decision in Osman Jamal & Sons Ltd v Gopal Purshttam followed this principle. A company was acting as the commission agents of the defendant firm and in that capacity bought certain goods for the defendants which they failed to take. The supplier became entitled to recover from the company certain sum of money as damages for breach. The company went into liquidation before paying the claim. It was held that the Official Liquidator could recover the amount even though the company had not actually paid the vendor. The court, however, 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 all expressed their concurrence in the principle that as soon as the liability of the

[10] https://www.legalserviceindia.com/legal/article-4039-contract-of-indemnity-and-guarantee.html#:~:text=The%20Indemnifier%20shall%20not%20be,case%20of%20Gajanan%20Moreshwar%20vs.

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. Where an authorized agent of the insurance company collected the premium amount from the assured against proper receipt, the liability of the insurer began from that moment though the agent deposited the collection with the company after the occurrence.

ISSN: 2582-6433

CHAPTER 2

CONTRACT OF INDEMNITY UNDER ENGLISH LAW

The contract of indemnity originated under English law in the landmark judgement of Adamson v. Jarvis[11]. In this case, Adamson, plaintiff by profession was an auctioneer to whom Jarvis, ho was not the real owner of the cattle, gave the cattle and this was sold at an auction. The plaintiff followed the respective instruction 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. In this case the court held that the plaintiff followed the instruction 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. From this case I came to a point that there is a promise to save the person from the loss, but the party must follow all the instruction of the other party that is indemnified in order to claim indemnity. After this case, the law further changed by the case Dugdale v. lowering[12]. This is the case it was shown that the promise may be expresses 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. 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.

- Indemnifier will compensate indemnity holder inly when indemnity holder incurs any loss.
- If the indemnity holder follows the instructions of the indemnifier.

[11] Adamson v. Jarvis, 1827 4 BING 66:22 RR 503
[12] Dugdale v. Levering, 1875 32 LT 155

- 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 to give some relief and removed the principle that in order to get indemnity first you incurred some loss. Then indemnifier is liable for the promise. But now the situation has changed and now indemnifiers are liable also when the actual loss not happened.in another 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 that loss had occurred. The indemnity shall therefore lose its significance if the indemnity holder is called to pay the loss and the after reimbursing the amount from the indemnifier.

1. PROVISIONS AND ENFORCEABILITY IN INDIA ON 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. Unlike UK India does not have a specific provision for enforceability of the contract of indemnity. There have been conflicting judgments regarding the same. But now the opinion of the equity courts is being followed. The first Indian case to provide indemnity before payment was Osman jamal and sons ltd. V Gopal purshottam[13]. In this case, the plaintiff company was a commission agent for the defendant firm for buying and selling of hessian and gunnies and the defendant will also indemnify in case of any loss. Plaintiff bought hessian from one maliram ramjidas. Defendant failed to make payment or take delivery of the same and later maliram ramjidas sold the same to another at a lesser price. Maliram ramjidas sued plaintiff for damages for the loss occurred. Plaintiff was winding up and asked the defendant to indemnify the same to which the defendant refused to state that the plaintiff at the foremost

[13] Osaman Jamal and sons Ltd v. Gopal purshottam, 1928, AIR 1929 Cal 208

ISSN: 2582-6433

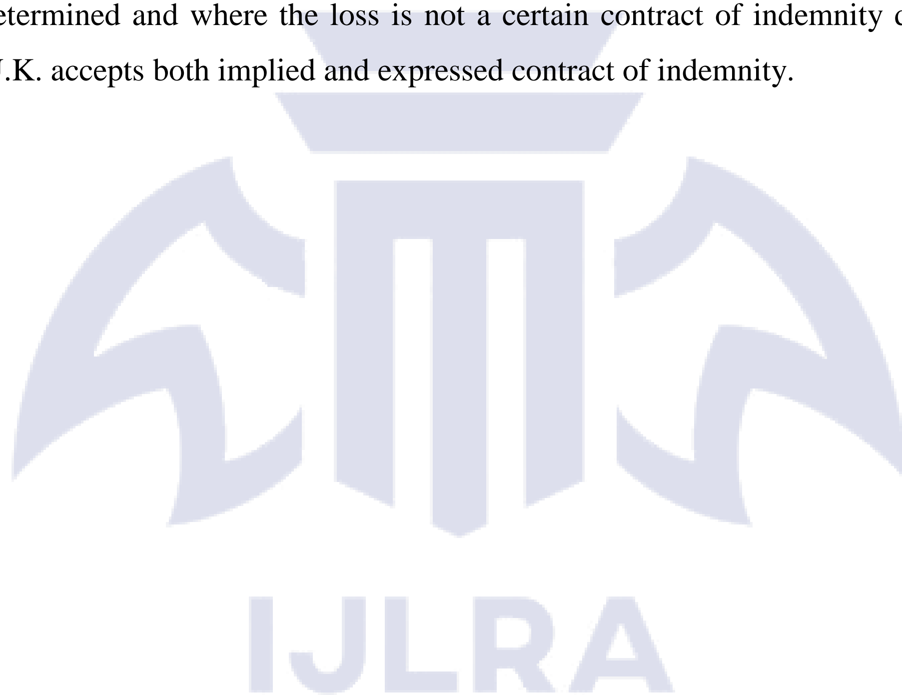
defaulted in making payment. But the court held that the defendant was liable to indemnify the plaintiff. Also, in the case of the new India assurance company ltd v. the state trading corporation of India ltd and anr. The Gujarat high court upheld the view of Gajanan Moreshwar v Moreshwar Madan by stating that indemnifier is liable to pay in case of breach of promise irrespective of actual loss. Indemnity does not mean reimbursing the amount, but it means to protect the indemnifier from the liability. There is no specific mention of an implied contract of indemnity in Indian contract act, 1872. But the privy council has given recognition to an implied contract of indemnity as well. In the 13th report of law commission of india,1958, it has recommended two amendments in Indian contract act,1872 regarding loss to compensated from both caused by human conduct as well as any event or accident. Moreover, it has also demanded the inclusion of implied contracts of indemnity. Indian law only covers express contract of indemnity whereas implied contracts are left at the mercy of judicial decisions. The basic difference between English law and Indian law is that losses are compensated against both human conduct and events in English law whereas in Indian law it is limited only to the extent of human conduct.

2. PROVISIONS AND ENFORCEABILITY IN INDIA ON INDEMNITY

In order to define the contract of indemnity in U.K., the English Law uses a maxim "you must be damnified before you can claim to be indemnified". By this, we mean that until and unless promisee has not undergone any injury, he cannot claim indemnity. The injury is one of the main essential of indemnity under English law. The English rule of indemnity is that the indemnifier will compensate to indemnity holder only after the later has faced any loss or has worked as per the instructions of indemnifier or has incurred cost during suit proceedings or has paid any amount in compromise. In the absence of loss, contract of indemnity cannot be invoked by indemnity holder. Earlier the indemnity was enforceable once the losses were paid by the indemnity holder. After paying of losses, he could seek relief of indemnity from indemnifier. But such provisions were causing trouble to the indemnity holder where he cannot pay the claim from his pockets. The Court of Equity in order to sort relief removed the principle of being damnified in order to be indemnified. The indemnifier in such a situation is liable to indemnify for the promise made without the happening of actual loss. Later the enforceability of indemnity shifted with the judgment of Buckley LJ in the case Richardson Re, ex parte The Governors of St. Thomas Hospital where he stated, "Indemnity is not necessarily given by repayment after payment. Indemnity

ISSN: 2582-6433

requires that the party to be indemnified in the first occurrence shall never be called upon to pay". In another landmark judgement of Re Law Guarantee & Accidental case it was rightly observed by Kennedy LJ "that indemnity does not merely mean to reimburse in respect of the money paid, but to save from the loss in respect of the liability against which the indemnity has been given because otherwise, indemnity may be worth very little if the indemnity-holder is not able to pay in the first instance". The contract of indemnity in U.K. has a much wider scope than Indian Law since the loss may be due to the conduct of an individual or it can also arise from some event or accident, like in case of fire. But in India, only the former condition applies. In U.K., life insurance is not considered as the contract of indemnity. This is because the value of an individual's life cannot be determined and where the loss is not a certain contract of indemnity does not arise. Moreover, U.K. accepts both implied and expressed contract of indemnity.



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CHAPTER 3

COMMENCEMENT OF LIABILITY AND THE DIFFERENCE BETWEEN INDEMNITY AND DAMAGES

According to the Indian law of indemnity, suffering loss is elementary for a promisee to activate a contract of indemnity. On some levels, this beats the entire point of the risk shifting aspect of the indemnity contract. The following is an illustration to explain the same. AJ and JT are the two parties in a contract of indemnity where, AJ is the promisee and JT is the promisor where, JT has agreed to indemnify AJ for all the losses he will sustain in AJ legal suit against AD. Now, AJ needs to sustain losses before he can claim the indemnity promised by JT, If AJ does not have any money to begin with, He would not have adequate amount to pay for the losses he sustains as well. Moreover, even if he wins/loses the case he needs to be patient enough for the court to come to a conclusion which could take months or even years. Thus, it beats the point of being indemnified by JT.

The above is elaborated in the case of Gajanan Moreshwar Parelkar vs Moreshwar Madan Mantri. The following is the brief analysis of the case. For simplicity, the plaintiff will be referred to as G and the defendant will be referred to as R

Facts

G and a certain relevant government authority made a deal with each in which, G got the possession of a certain land in Bombay for a period that extended to almost a millennium. G is not the possessor of the land R asked G to transfer all the titles stating the title of the contract between G and the government Authority. Hereafter, R, started the work of confecting a property on the said land. R asked G to mortgage the said land to a dealer who supplied the materials used for the property. work and the amount were more than five thousand rupees with interest. G complied and fulfilled his obligation. R was even responsible to pay another sum of the same amount with same interest and asked G to mortgage another bit of the land to the dealer. G obliged. Later on, R contracted with G, and this was an expressed contract in which he proposed that G should transfer the property to the name of R and on doing so, R will contract with the dealer and form another

ISSN: 2582-6433

contract of mortgage, liberating G of any liabilities attached to G with respect to the said property. G agreed R failed to perform his obligation when G asked him to indemnify him. G issued a writ against R for the same in the Bombay High Court. Here, the main issue at hand was about the liability of R is making good the loss of G before G even suffered from any loss. The argument made by the counsel representing R was that the law as mentioned in the Section 124 to 125 of the Indian Contract Act, 1872, clearly states that the risk does not shift from the promisee to the promiser unless and until the promisee has suffered from the liabilities arised. The counsel pointed out to the judgement passed by Calcutta High Court in the case of Shankhar Nimbaji v. Laxman Supdu, in which it was held that: The contract being one of indemnity the plaintiffs' claim against defendant No.2 must be held to be premature. It is clear from Section s 124 and 125 of the Indian Contract Act and Article 83 of the Indian Limitation Act that under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered, and a suit brought before the actual loss had accrued must be thrown out as premature. The plaintiffs cannot sue the appellant. The bench, to be brief, stated that, No Loss= No compensation from the promisor due the prematurity of the Contract.

Although, most of the Indian law of indemnity which has been analyzed in the previous chapters is based on the English law. There are a few points of distinguishment between the English Law of Indemnity and the Indian Law. It can be said that the English Law is a universal set, and the Indian Law of Indemnity is its sub-set. A certain maxim used in the English law gives an overview of what it actually means according to the English law. You Must Be Damnified Before You Can Claim to Be, Indemnified So it is therefore derived from the above that the English law mainly focused on the loss rather than focusing on covering the loss. It can be said that unless and until you have broken a bone, you cannot expect the doctor to fix it, this analogy best explains the English law aspect of indemnity. According to English Law, an indemnity is a promise to save a person harmless from the consequences of an act. Such a promise can be express or implied from the circumstances of the case. The illustration of indemnity according to the Indian Law would be as follows:

Norkel, visits a library in which he keeps his bicycle in the cycle zone, where the keeper allots a place for his cycle in d-12 and gives Norkel a token which he is supposed to return while claiming his cycle back. After completing his work at the library Norkel comes to claim his cycle back and

ISSN: 2582-6433

tries finding the token for his cycle, he tells the keeper that he has misplaced the token. The keeper asks him to sign a contract of indemnity, in which if someone else claims the cycle Norkel has claimed and the cycle zone suffers any sort of losses, Norkel will have to indemnify the cycle zone of any such losses[14].

According to the English law, unless and until, the cycle zone does not suffer any loses on someone claiming the cycle Norkel claimed, be it legal costs, damages etc. Even so, the court has not come to a conclusion and the cycle zone still are at the same place as before, which is before Norkel claimed the cycle, then, Norkel is not liable to pay/indemnify for any losses which the cycle zone may have to suffer from.

The above explained aspect and interpretation indemnity by the English Law resulted in a dilemma for the judges and the courts to give a verdict which is fair in the cases where the promisee was incapable of handling the losses which he was promised by the indemnifier to not worry about as it was his responsibility to take care of. Later on, along with development of new law by the Equity judicature, the maxim did not mean much, and the tables were turned in the favor of a promisee who no longer had to experience any loss firsthand. Buckley, L.J, in the case of Richardson Re, ex parte The Governors of St. Thomas Hospital has said the following:
Suppose A has a claim upon B, but in respect of that claim, B has a right of indemnity from C.B. goes bankrupt. Is Bs' trustee in bankruptcy in a position in which he can force to pay the amount of the claim to him and then can use the money so obtained for distribution amongst the creditors generally, whereas he only pays a dividend upon the claim which A has against the bankrupt? Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay. Buckley L.J even reasoned the above as, if such sum were distributed among the creditors generally, the creditor whose claim the debtor was indemnified against would only get a dividend and would have the right to a further dividend if further assets came in; against this claim, the debtor would have no right of indemnity left, and, therefore, his indemnity against such creditor would not be complete, as it had been intended to be. Kennedy LJ, in the case of Liverpool Mortgage Insurance Co Re has stated the following, that

[14] https://www.legalserviceindia.com/legal/article-5725-indian-law-of-indemnity-and-english-law-of-indemnity-an-analysis.html

ISSN: 2582-6433

indemnity does not merely mean to reimburse in respect of the moneys paid, but to save from the loss in respect of the liability against which the indemnity has been given because otherwise indemnity may be worth very little if the indemnity-holder is not able to pay in the first instance. This basically means that indemnity loses its original meaning if the indemnified must go through the loss which he was promised to be saved from.

The other peculiar characteristic of indemnity under English law is that it facilitates the claims of indemnity on the basis of damage done by phenomenon other than people as stated in the act. Thus in, English law, the contract of indemnity is a universal set of contracts of insurance where the Ven Diagram used to display the above would be a circle in another larger circle of indemnity. The phenomenon involves damages done by thunder bolt leading to fire, a fire in general, or unnatural accidents, etc. However, In the case of Regional Manager Oriental Fire and General Insurance Company Madras Vs. Savoy Solvent Oil Extractions Ltd[15], it was held that Life insurance contract is, however not a contract of indemnity because in such a contract, different considerations apply. A contract of life insurance, for instance, may provide the payment of a certain sum of money either on the death of a person, or on the expiry of a stipulated period of time. In such a case, the question of amount of loss suffered by the assured, or indemnity for the same does not arise. Moreover, even if a certain sum is payable in the event of death, since, unlike property, the life of a person cannot be valued, the whole of the amount assured becomes payable. For that reason, too, it is not a contract of indemnity. Ever since the enactment of the Indian Contract,1872 the jurisprudence has changed and there is a shift in the expertise and problems of the lawyers as one asset was only considered to be land before and the solution to every hurdle was approached with the same mindset. Justice was not elementary for the advocates, but since the last 100 years, the mindset has changed and with the changing times the jurisprudence too shall change. The main aim of this report was to trace the Indian Contract Act since its origins and along with it the improvisations and other aim was the revision of the Act along with the Contract of Indemnity.

The Law Commission is of the view that the Indian Law of Indemnity as defined in Section 124 of the Indian Contract Act is not adequate as it does not define the multiple aspects of indemnity

[15] 1996 (2) ALT 1005

ISSN: 2582-6433

and the same was viewed over Section 125 of The Act, where the Indian Law again, lacks in addressing the rights of the promisee. The courts, quite often must rely on the common law of India which in this respect, is identical with the law of England. The Commission is of the view that, indemnity as explained in the English law as a promise to save the promisee from loss caused by events or accidents which do not or may not depend on the conduct of any person, or from liability arising from something done by the promisee at the request of the promisor. A right to Indemnity may be created by express contract or by implied contract. Which basically widens the scope of implied contracts in indemnity where the conduct of a person on the demand of another harms a 3rd person, the one who demands shall indemnify the one who complies.

The commission later cites the case of Sheffield Corporation v. Barclay in which Lord Davey states the following, .Where a person invested with a statutory or common law duty of a ministerial character, is called upon to exercise that duty on the request, direction or demand of another, (it does not seem to me to matter which word you use), and without any default on his part acts in a manner which is apparently legal but is, in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence, have discovered it. The Commission is of the view that the contracts with such characteristics need to be called quasi-contractual and then referred to the statement made by a certain jurist which said, The redress was given not only upon express promise of indemnity by the debtor, but also upon implied obligation which would nowadays be classified as quasi contractual. This gave rise to the commission in suggesting the addition of a Section- 72(A) under the ICA, 1872. The commission further states that Section 125 of The Act is incomplete as the rights of a promisee as mentioned in this Section are not inclusive of the many rights, the promisee possesses. The view that the promisee can exercise his right to indemnity and be relieved of all the liabilities by the promisor even bore he has suffered any actual loss has been supported by a few courts and judicature whereas some have opposed the same. However, the Law Commission supports the said view. The courts that supported the view have followed the English Law of Indemnity and the Commission with the intention of further explaining the concept has cited the following.

ISSN: 2582-6433

In equity, the rules of which now prevail in all Courts, even in the absence of such a special agreement, the person entitled to the indemnity may enforce his right as soon as his liability to the third party has arisen, and, therefore, he may obtain relief before he has suffered loss. He may, therefore, in an appropriate case, obtain an order compelling the promisor to set aside a fund out of which the liability may be met or to pay the amount due directly to the third party, even, when the promisor is under no liability to the third party, as is the case in contracts of mere indemnity, to the promisee himself. Nor is the party indemnified precluded from obtain Ing relief by the fact that his liability to the third party cannot be effectively enforced against him. The Additions Suggested by The Law Commission. The Commission is of the view that the definition as stated in Section 124 of The Indian Contract, act must be improvised and altered in such a way that includes the other sort of indemnity where the even damages caused by natural phenomenon, accidents, etc. and includes implied indemnity as a concept.

The following is the suggested addition to Section 124
A Contract by which one party promises, expressly or impliedly, to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person or by any event not depending on such conduct, is called a Contract of Indemnity. As stated above, addition of completely new section called Section 72 A. When Contract of Indemnity may be implied. When an act is done by one person at the request of another, and the act, not being manifestly tortious to the knowledge of the person doing it, turns out to be injurious to the rights of a third party, then, in the absence of express agreement to the contrary, the person doing it is entitled to be indemnified by the person at whose request it is done With the View of the Law Commission on the rights stated in Section 125 of The Act, the following is suggested:

125A Rights of Indemnity-holder.

The promisee in a Contract of Indemnity acting within the scope of his authority may, where a liability has arisen against him in favor of a third party, obtain against the promisor, in an appropriate case, a decree compelling the promisor to set apart a fund out of which the promise may meet such liability or directing the promisor to discharge such liability himself.

ISSN: 2582-6433

The promisee may institute a suit under this section even where no such suit as is referred to in section 125 has been instituted, and irrespective of whether any actual loss has been sustained by the promise or not. Explanation – The promisee is not precluded from obtaining relief under this section merely on the ground that the promisee"s liability to the third party cannot be effectively enforced against him.

CONCLUSION

Indemnity under Indemnity 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 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 judicature should focus on. In the English law however, the definition and the legislature include all sorts of indemnities and implied indemnities as well. The Indian Law of indemnity while defining and allotting the rights to the promisee lacks in such a way that it beats the entire point of indemnity as one cannot claim the indemnity till one has not suffered from any loss stated in the contract. This is a major dilemma for the courts and state of helplessness for the promisee who cannot possibly pay for the losses in his/her own capacity. This has been rooted from the English Law which is again the same when it comes to rights of the promisee and follows the maxim stating damnification before indemnification. However, it was later cleared by the equity courts in England and even in the Indian Law, but not as a change in the statute but only, in the form of a case law of Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri. The Law Commission of India has recognized both the above-mentioned problems in its 13th report and elaborated the same before suggesting an amendment to the Indian Contract Act, 1872. The Commission Suggests that In the Section 124 which defines indemnity should consist of the words that states both the expressed and implied nature of Indemnity .Finally, it suggests the amendment of Section 125 to include the necessary language as to state the liability of the promisor which not only arises when the promisee suffers from loss. Even Though the Indian law and English law are different than each other but they are similar in some aspects. Although, not enough to call them the two sides of a same coin. Both have gaps in their statutes about the true nature of indemnity. However, the along with the jurisprudence and the hearings in the courts, these gaps are being filled according

ISSN: 2582-6433

to the needs. The reports such as the Law Commission Report are important for contributing to the development of the concepts of law and the improvisation of the current ones. The Indian Courts should enforce the English Law and its provisions but not so much as to be completely influenced by the same.

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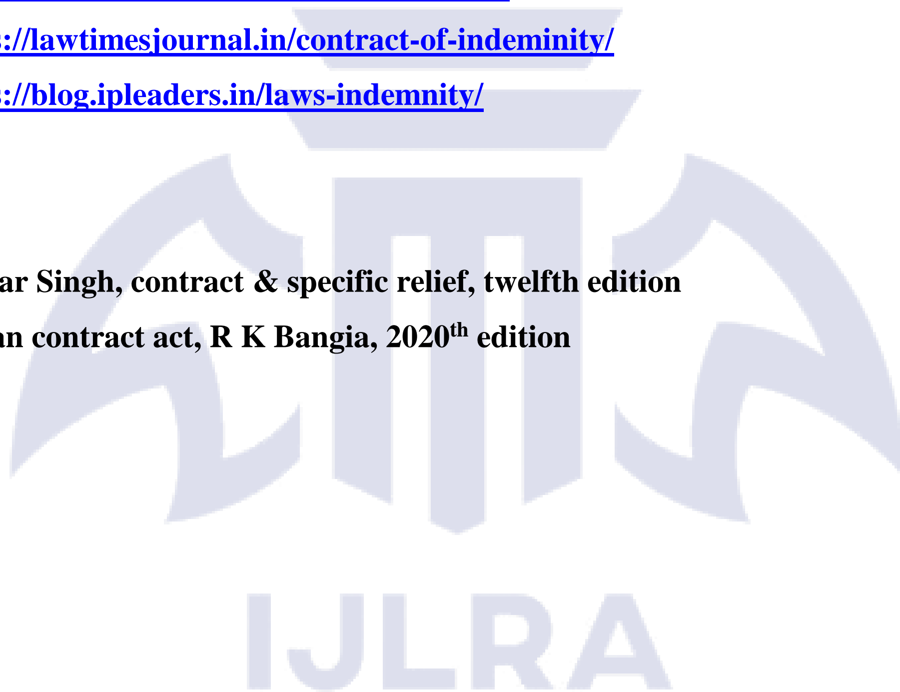

ISSN: 2582-6433

INDEX OF AUTHORTIES

1. **STATUES:**

Indian contract act, 1872

2. **CASE LAWS:**

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- Sheffield Corporation v. Barclay
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