Page 1963 - 1970 **DOI:** *https://doij.org/10.10000/IJLMH.113274*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 3

2022

Identifying The Gaps, Issues and Shortcomings in Section 124 and Section 125 of the Indian Contract Act, 1872 and Recommending Solutions to Fill the Gaps and Shortcomings

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ABSTRACT

A contract of indemnification can be considered in the same way as the promise of indemnity, which is one element of a contract with a considerably broader subject matter. When it comes to defining what an indemnity implies under Indian law, Section 124 of the 1872 Indian Contract Act only focuses on one sort of reimbursement and utterly refuses to coordinate what the judge should focus on circumstances where diverse types of indemnities, such as those originating from events, such as disasters, fail to contain the implicit form of indemnity. According to Indian law, the promisee cannot claim indemnification until he or she has not suffered any of the damages specified. This is contrary to the essential assumption of indemnification, which is that the promisee can only seek indemnification once the contract has been breached. An inability to reimburse for losses on one's own creates an enormous difficulty for the judiciary, as well as for the promisee, who is unable to do so on his or her own. This has led to confusion in the legal system, because of the disparity between the contract for indemnification and the promise to indemnify.

Keywords: *Contract, Indemnity, Promise, Agreement, Damages.*

I. INTRODUCTION

In English contexts, the term 'contract of indemnification' is often used in a more particular sense to indicate an agreement in which one party's only, or only major, executory obligation is to reimburse another. The basic point of contention here is not the contract of indemnity; rather it is the promise involve in the contract of indemnity. In a concrete sense as indicated earlier, a contract of indemnity can be held along similar lines along with the promise of indemnity which is one of the various components of a contract of a much larger subject matter[2]. Therefore, as a result, the discrepancy between the contract of indemnity and the

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[2] Sakshi Agarwal, *Contract of Indemnity in India & UK*, LAW TIMES JOURNAL, (2018)

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promise of indemnity has till date confounded the Indian judicial system. Indeed, the terms 'promisor' and 'promisee' appear in Sections 124 and 125, respectively, and Section 125(1) alludes to the 'promise to indemnify. In other jurisdictions, the same mixed use might be found.

The term 'indemnity' has a broad definition and can be used to a variety of situations any agreement in which one side is guaranteed not to lose money[3]. There has to be a differentiation made. There are two types of 'indemnity' contracts: first wherein

the indemnifier primary goal is to safeguard the promisee from any threats, second; in which the promisee is adequately compensated for the loss but that is not the sole purpose of the contract. The prior arrangements are the subject of this article, as well as Sections 124 and 125. Despite this, the use of the term "indemnity" in the latter is extremely widespread[4].

II. THE PROBLEMS, ISSUES AND SHORTCOMINGS PERTAINING TO SECTION 124 AND SECTION 125 OF THE INDIAN CONTRACT ACT, 1872

In a constrained perspective, the interpretation of indemnity as explained in Section 124 of the Indian Contract Act is considerably narrow than the interpretation of indemnity done by the English Common Law[5].When read in tandem alongside Section 125, which deals with obligations to protect against third-party lawsuits or liabilities, the primary concern was where the actions taken against the indemnified party. This was taken into context of the history of indemnification, thus is maybe not unexpected.

Even in the late 1800s, the majority of published English cases addressed indemnities in this broad sense or, more precisely, indemnities caused due to a promisor's breach of contract which thereby resulted in a claim made by a third party against the promisee[6].

Given below are the loopholes that exist in Sections 124 and 125 of the Indian Contract Act, 1872. The Indian Contract Act of 1872, which has just two parts, does not specifically address certain crucial concerns. Furthermore, legal interpretation and the growth of the law of indemnification give us the sense that the legislative wording employed in these two parts has not changed much. In view of the aforementioned research issue, the following issues might be considered gaps in the present indemnity contract provision:

[3] A. Krishnaswami Iyer v. Thatha Raghaviah Chetti, AIR 1928
[4]Atul Chandra Patra, *HISTORICAL BACKGROUND OF THE INDIAN CONTRACT ACT, 1872*, 4(3) JOURNAL OF THE INDIAN LAW INSTITUTE
[5] The Indian Contract Act, 1872, Section 124, Acts of Parliament, 1872 (India)
[6] Harburg India Rubber Comb Co. v. Martin, (1902) 1 KB 778

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Section 124

1. As per the definition the contract of Indemnity is a contractual obligation for one party to compensate the other party for damages or losses that have occurred or might occur as a consequence of his or third party's acts. "A contract in which one party pledges to rescue the other party from damage caused by the guarantor's own activity or the action of any other person," says Section 124 of the Indian Contract Act, 1872. Nevertheless, the current meaning suggests that Section 124's interpretation is, in some respects, incomplete[7]. Although a contract is bidirectional in nature, the terminology only accounts for the duties of one party, that too, only for a specific type of responsibility. The phrase "contract of indemnity" is frequently common English courts to refer to a contract wherein one party's sole or principal responsibility is to indemnify another.

2. If the accidents caused or influenced by the carelessness of the owner's workers, if the indemnity agreements cover the owner. Any indemnification agreement must offer compensation if the losses are primarily the consequence of the contractor's negligence or recklessness, according to the law. In most nations that have a common law, right to indemnification applies even if there is no specific indemnification agreement in place, if the owner is held liable as a result of the accident. "It is apparent from the preceding common law standards that one who is without blame and is compelled by law to defend himself against the act of another is entitled to indemnity.[8]"

3. It's strange that the promisee's authority to enforce the indemnity isn't mentioned in the Act. The Act was passed long before England's legal and equitable systems were unified. An indemnified party's ability to claim the indemnification under English law at the time was decided by the nature of the loss. It may be stated that, in common law, contract enforcement was frequently performed by a claim for damages for breach of contract. The contract would only be broken if the indemnified party really experienced injury; at that point, the indemnifier had struggled to hold the indemnified party secure from loss by definition.

4. Another limitation mentioned is now that Section 124 of the Act only pertains to express indemnity guarantees. Implicit indemnities[9] have long been recognized in Indian law, regardless of whether such interpretative gloss is genuine. The Law Commission's recommendation in Section 124 to inculcate the words "expressly or impliedly" following

[7] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, NATIONAL LAW SCHOOL OF INDIA REVIEW
[8] Criswell v. Seaman Body Corp., 233 Wis. 606, 290 N.W. 177 (1940).
[9] Secretary of State v. The Bank of India, (1938) 40 BOMLR 868.

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"promises" is acceptable and consistent with case law in this respect. Section 145, on the other hand, relates to a principal debtor's implied promise to reimburse the surety.

5. Section 124 covers a far narrower spectrum of indemnification than the English common law concept of indemnity[10]. When read in conjunction with Section 125, which deals with claims or obligations against the insured party, it suggests that the main concern was with promises to safeguard third parties against complaints or liabilities. Damages produced by natural events, which are typically the subject of indemnity insurance plans, are eliminated by focusing on the action of natural or juristic persons. Limiting the eligible entity to the promisor or a potential party is conceptually complicated.

6. Frequently, indemnification commitments are linked with guarantees[11] in banking or financial goods. The question of enforcement regarding this is whether a third-party indemnification be enforced or not. Indemnity claims are impacted by common law constraints on distance or harm reduction. The knowledge of contract structure and scope is likewise likely to have changed dramatically.

Section 125

The promisee is entitled to redeem from the promiser in an indemnification contract if the promiser acts within his power[12]:

1. Any potential damages that he could be asked to pay as a result of any matter to which the commitment to repay pertains;

2. Any deposits paid in the event of a consensus of any given prosecution, provided that such common ground was not contrary to the promiser's orders and was one that the promisee might have made with no agreement of reimbursement, or in the occasion that the promiser accepted him to reconsider the issue.

3. All charges that he might be liable for in any such scenario if, in providing or securing it, he disobeyed the promiser's instructions and acted as it would've been proper for him to conduct himself without an evidence of reimbursement contract, or presuming that the promiser authorized him to document or safeguard the matter;

[10] Nishith Desai, *Revisiting The Indemnity V/S Damages Debate*, (2016)
[11] Yeoman Credit v Latter [1961] 1 WLR 828.
[12] The Indian Contract Act, 1872, Section 125, Acts of Parliament, 1872 (India)

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III. Recommendations to address the problems and shortcomings and fill the present gaps present in section 124 and section 125 of the Indian Contract Act, 1872

Following the identification of various difficulties in the aforementioned section, it can be inferred that indemnification provisions are highly contested and emphasized on throughout the creation of business agreements. A poorly drafted indemnity provision might have catastrophic consequences. However, the fundamental question is whether there is any need to seek indemnity instead of claiming consequential damages under the Indian Contract Act of 1872, that is already available. Is indemnification only a promise to pay for a party's losses or is it feasible to limit the number of damages that can be awarded under a contract and what's the difference between indemnification and liquidated damages? Other problems emerge in relation to the indemnification provision established by Indian law:

a. One type of contract is an indemnity contract. The same rules also apply to contracts apply to these payments, so laws like free authorization or approval, the validity of the instrument, and so forth are all equally important. Permission to enter into an agreement should not be gained via force, fraud, or deceit, as it is with general agreements; otherwise, the contract will be voidable at the discretion of the party whose assent was obtained in this manner; the same is also true for indemnity contracts. The Indian Contract Act stipulates that the agreement's element or objective must be genuine. A simple indemnification provision will never be sufficient to remedy a liability issue. The law will be unfavorable to those who try to dodge accountability or relieve themselves of responsibility for their actions. The underlying concept is that a negligent party must not be able to transfer all allegations and penalties against him to an innocent party[13].

b. The Indian Law of Indemnity, as discussed in Section 124 of the Indian Contract Act, is insufficient, according to the Law Commission, since it does not specify the many parts of indemnity. Furthermore, the same was stated about Section 125 of the Indian Contract Act, wherein the Indian law yet again fails to consider the promisee's rights. In many cases, courts must turn to the Indian legal system, that is approximately comparable to English law in this sense. The rights of the promisee as outlined in Section 125 of the Indian Contract Act do not contain all the rights of the promisee is also asserted by the Law Commission. Although some judges and courts have acknowledged that the promisee can exercise his right to indemnity and be released from all obligations imposed by the promisor regardless of if he has suffered actual

[13] Law Commission of India, Thirteenth Report, (1872)

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loss, others have disagreed. But on the other hand, the Law Commission supports the expressed position. The courts that agreed with the viewpoint applied English Law of Indemnity, as well as the Commission cited the following to further explain the concept[14].

c. The Commission thinks that the phrase implied indemnity as a notion, as defined under Section 124 of the Indian Contract Act, must be revised and modified to include other forms of indemnification, like losses resulting from natural occurrences, accidents, and so on. The Law Commission of India noted and elaborated on each of the aforementioned difficulties in its 13th report before suggesting a change in the Indian Contract Act of 1872. The Commission proposed that the sentences that characterizes, express and implicit character of indemnity, as well as indemnification arising from the action of objects other than third parties, should be included in Section 124of the Indian Contract Act, which defines indemnity. In its report, the Law Commission mentions an "implied contract" of indemnity. Although an implicit assurance of indemnity might occur in an implied contract, it is important to distinguish between the two concepts. Finally, it recommends that Section 125 be changed to include the required language establishing the promisor's responsibility, which does not arise automatically when the promisee is harmed[15].

d. Incorporation of multiple new aspects to the contract of indemnity under sections 124 and 125 of the Indian Contract Act has been recommended by the Indian Law Commission so as to broaden the definition of the act in order to make it more expansive and dominating, according to several recommendations. Indian law on the subject of indemnity detracts from English in several areas and takes its own course. Their commonalities, on the other hand, exceed their differences by a large margin[16].

The interpretation of the indemnity clause reveals that Indian law contains gaps in its legislation on the true meaning of indemnification. Those gaps are however being narrowed down by judicial proceedings and adequate legislation. Indemnities are an important part of any contract lawyer's toolkit, and they are commonly a point of contention during contract negotiations. In many cases, the legislation that governs indemnities is confusing and unsettled. Having a solid understanding of the principles and being aware of potential liabilities can help one identify contractual risks and, if possible, mitigate them right away.

[14] Ibid
[15] Law Commission of India, Thirteenth Report, (1872)
[16] Ibid

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IV. CONCLUSION

The researcher has discovered that while the provision of indemnification is well-developed, it falls short in various areas where the legislation stipulated with in Indian Contract Act, 1872 leaves several gaps in terms of indemnity's attributes.

Furthermore, Section 124 of the Indian Contract Act, 1872, which defines what an indemnity means under Indian law, only focuses on one type of reimbursement and completely ignores to coordinate what the judiciary should focus on situations where different types of indemnities, such as those resulting from occurrences such as storms starting a fire or natural disasters, fail to incorporate the implicit form of indemnity.

In defining and assigning entitlements to the promisee, the Indian Law of Indemnity fails to live up he expectations in a way that it negates the core premise of indemnification, because indemnity cannot be claimed by a person until he or she has not sustained any of the losses listed in the contract. This presents a tremendous problem for the judiciary, as well as a powerless situation for the said promisee, who is incapable to recompense for the losses on his or her own.

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