
RE-EXAMINING THE LAW OF INDEMNITY IN INDIA

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ABSTRACT

The Indian Contract Act, 1872 mentions the law of Indemnity in only a few sections, mainly Sections 124 and 125. At first glance, these provisions look simple. However, their real-life application leaves many questions unanswered. For example, can the indemnified person claim money even before they have actually paid the third party? The Act has limited definitions for indemnities. In fact, there is no succinct explanation of the relationship between the indemnifier and holder of the indemnity. This is because courts have to step in and display judicial creativity to fill these gaps. This, to some extent, creates a level of doubt regarding jurisdiction and highlights that overhaul of the law is necessary to address these inadequacies and make any attempt to uniformity and fairness obvious.

One major issue is that Section 124 only recognises indemnity against loss caused by the conduct of the promisor or any other person. It does not include losses from events such as accidents or natural causes, which are very common in commercial transactions. In the modern business scenario, indemnity clauses in contracts are increasingly used for various forms of risk management; yet the Act fails to provide full support for the same. In the absence of proper backing for the same under the act itself, courts have gone beyond the literal meaning of the laws by expanding the meaning of the word 'indemnity.' This helps in the delivery of justice while creating an inconsistent position in the laws themselves.

Another significant problem concerns the rights of the indemnity holder. Section 125 lists certain rights, such as the right to recover damages, costs and sums paid under compromise. But it is not clearly stated when exactly these rights can be exercised. Traditionally, the view was that the indemnity holder must first suffer an actual loss before claiming indemnity. However, later judicial decisions have recognised that waiting for actual loss can be unfair and impractical. Courts have allowed indemnity holders to compel the indemnifier to save them from loss even before it occurs. This shift shows that judges have creatively filled gaps left by the legislature, but it also reveals that the statutory framework is poorly thought out.

The law also does not clearly define the indemnifier's duties and obligations. There is little or no guidance on such issues as the extent of liability, commencement of liability, and situations in which the indemnifier is entitled to refuse to indemnify. Due to the latter factor, the courts have frequently adopted principles of equity from English law to decide disputes arising from the contract of indemnity. Judicial creativity promotes confusion and inconsistency, underscoring the need for a clear legislative framework.

This paper argues that the short and vague drafting of the law of indemnity is not suitable for modern commercial relationships. Instead of relying on judicial creativity, there should be explicit and definitive legislative guidance. A detailed legal statutory framework can clarify rights and duties, encouraging the audience to see reform as a shared responsibility that enhances legal stability and predictability.

The research follows a doctrinal and analytical method. It covers the related provisions under the Indian Contract Act of 1872. Equally important is the required judicial decisions related to the topic that could be identified as relevant. Moreover, the gaps identified in the Indian approach could be filled by learning about the developments in the English courts. Sometimes such knowledge could be applicable in advocating a more comprehensive, realistic approach to the definition of the Indian approach to the topic in question. The existing gaps in the Indian Contract Act related to the topic in question could be identified by studying the developments in the English courts. Such learning would be applicable in advocating a more comprehensive approach to the topic in question.

Introduction

The word “indemnity” originates from the Latin word “indemnis” meaning “without loss” or “unhurt”. Indemnity as a legal expression can be defined as a lawful duty or setting in which one party compensates or provides financial security to another party for damages, losses, expenses, or liabilities that are likely to be incurred due to some actions or incidents.¹ The law of indemnity is enshrined in Section 124 and Section 125 of the Indian Contract Act, 1872.

The Indian Contract Act of 1872 marked a pivotal moment in the codification of indemnity provisions, tracing its origins to the second report of the Law Commission dated 28 July 1866, which first drafted comprehensive contractual rules, including indemnity. By the time the Act was passed, English law on indemnity had already developed quite a bit, approaching maturity,

¹ FENDI HARIS DICTIONARY

and this clearly influenced how Indian law approached the concept.

That said, the Act itself does not give a very detailed or structured framework for indemnity contracts. It defines indemnity in simple terms, but does not clearly explain how such contracts should be constructed or how far they extend. Because of this, the scope of indemnity is often understood more through practice than through clear legal rules. Over time, both express and implied indemnities have been applied in different situations, such as when principals protect agents or when someone acting on another's instructions faces liability. The law, therefore, feels a bit scattered rather than fully systematic.

Because the statutory language is terse, Key terms like "loss" are not precisely defined, and it is not always clear when liability actually arises. As a result, courts and lawyers often interpret indemnity differently depending on the situation, which leads to inconsistencies. That is why indemnity law needs to be revisited from time to time, especially as new kinds of transactions, like digital finance or unexpected large scale events, become more common.

A classic illustration of how indemnity works comes from *Adamson v Jarvis*. In this case, an auctioneer sold cattle on the instructions of the defendant. It later turned out that the cattle belonged to someone else, who then sued the auctioneer. The auctioneer, having acted in good faith, sued the defendant to recover his losses. The court held that since the auctioneer had acted on the defendant's directions, he was entitled to be indemnified. In simple terms, the decision shows that indemnity is basically a promise to protect someone from the consequences of acting on another person's request.

Literature Review

Existing papers on indemnity law consistently highlights the limited nature of the statutory framework under the Indian Contract Act, 1872. Prachi Sharma and Ananya Sharma, in their study "*Assessment of the Scope of Law of Indemnity under Indian Contract Act, 1872*"², argue that indemnity plays a crucial role in protecting parties from financial liability, yet the Act provides only a narrow and incomplete structure, leaving several aspects such as rights, duties, and scope open to interpretation.

² Prachi Sharma & Ananya Sharma, *Assessment of the Scope of Law of Indemnity under Indian Contract Act, 1872*, 10(3) International Journal of Research and Analytical Reviews (IJRAR) 255 (2023)

Similarly, Ina De, in “*Evolution of Indemnity under the Indian Contract Act, 1872: A Critical Analysis*”³, points out that the Act addresses indemnity in only two provisions, failing to cover essential issues like implied indemnities and the broader scope recognised under English law.

Further, Ankita Toppo and Sanchita Tiwari, in their work “*Contract of Indemnity Case Laws*”⁴, emphasise that indemnity operates as a mechanism of “security against loss” and is heavily dependent on judicial interpretation, especially in areas not expressly covered by statute.

Collectively, these studies suggest that while indemnity is central to modern commercial transactions, its legal framework in India remains fragmented, with courts playing a significant role in shaping its application.

Objective

This research aims to examine the statutory framework of indemnity under the Indian Contract Act, 1872, with particular focus on Sections 124 and 125. It seeks to identify the gaps and ambiguities within these provisions, especially regarding the scope of indemnity, the rights of the indemnity holder, and the duties of the indemnifier. Further, the study aims to analyse the role of judicial interpretation in expanding indemnity law and addressing legislative shortcomings. It also undertakes a comparative analysis with English law to evaluate whether the Indian framework requires reform to better suit modern commercial practices. The study also hopes to answer questions surrounding indemnity laws, mainly;

- Whether Sections 124 and 125 provide a comprehensive framework for indemnity law in India?
- To what extent has judicial interpretation shaped and expanded the concept of indemnity?
- How does Indian indemnity law compare with English law in terms of scope and application?
- Is there a need for legislative reform to address modern commercial realities?

³ Ina De, *Evolution of Indemnity under the Indian Contract Act, 1872: A Critical Analysis*, SSRN (2024).

⁴ Ankita Toppo & Sanchita Tiwari, *Contract of Indemnity Case Laws*, 6(5) International Journal of Scientific Engineering and Research (IJSER) (2018).

Statutory Gaps in Indian Law

The legal framework governing indemnity portion in Indian Contract Act, 1872 is often noticed to be narrow and incomplete. The section 124 defines indemnity as a safeguard against loss due to the conduct of the promisor or any other person. This formulation prevents indemnity to human agency, also it excludes losses arising from accidents, external contingencies and natural events. These limitations makes the provision inadequate and incomplete in the context of modern commercial transaction, in which the risk allocation often extends beyond the human conduct.⁵

The statutory definition being not exhaustive has been consistently recognised by the Judicial decisions. In *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*⁶, the Bombay High Court held that the concept of indemnity is broader and wider than that given under section 124, thereby depending on equitable principles beyond and above the statute. Similarly, in *Osman Jamal & Sons, Ltd. v. Gopal Purshattam*,⁷ the court increased the scope of indemnity by holding the indemnifier liable for all the consequences coming from the indemnified act, even if not covered expressly by the wording of the statute.

The gaps and inadequacy of section 124 in context of insurance contracts becomes more evident. In *United India Insurance Co. Ltd. v. M.K.J. Corpn.*,⁸ the Supreme Court of India highlighted and recognised insurance as a type and form of indemnity, despite its broader risk coverage, which often includes non-human causes. This shows the gap between commercial practice and statutory language.

Therefore, the narrow statutory scope, included with its inability to accommodate modern contractual realities, increases the need of judicial intervention. While courts have also expanded the meaning of definition of indemnity to insure justice, such reliance on interpretation necessitates the urgent need for legislative reform.⁹

Right of Indemnity Holder

The section 125 of the Indian Contract Act mentions certain rights of the indemnity holder,

⁵ Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, (2015)

⁶ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, 1942 SCC OnLine Bom 29

⁷ *Osman Jamal & Sons, Ltd. v. Gopal Purshattam*, 1928 SCC OnLine Cal 131

⁸ *United India Insurance Co. Ltd. v. M.K.J. Corpn.*, (1996) 6 SCC 428

⁹ Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, (2015)

which includes the recovery of costs, damages, and sums paid under compromise. But, the statute fails to clarify the precise stage at which such rights can be exercised, often leading to uncertainty due to interpretation.¹⁰

Traditionally, the courts stuck to the rule that an indemnity holder can claim indemnity only after suffering actual loss. This position was held in *M. Ramalinga Iyer v. T.K. Jayalakshmi*,¹¹ where the court needed the actual payment before enforcement. Similarly, *Shankar Nimbaji v. Laxman Supdu*,¹² permitted the recovery of costs only when incurred in good faith.

However a major shift in judicial position occurred with *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*,¹³ in which the court held that the person holding the indemnity need not wait for the actual loss if the liability has become absolute. This position was further reinforced in *Khetarpal Amarnath v. Madhukar Pictures*¹⁴ where the court allowed costs recovery when only incurred in good faith.

Although this change and evolution promotes practicality and fairness, it also creates doctrinal ambiguity. The absence of clear statutory guidance results in dependence on judicial decisions, often leading to inconsistent application. Thus, the rights of the indemnity holder remains uncertain, underscoring the inadequacy of the legal and legislative framework.¹⁵

Duties and Liabilities of Indemnifier

The duties and liability of indemnifier are not clearly defined by the Indian Contract Act which leads to significant uncertainty in enforcement. The statute remains silent on critical aspects such as the commencement of liability, the scope and extent of liability and available defences.¹⁶

The judicial decisions often have attempted to address these gaps. In *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*¹⁷, it was held that the liability of indemnifier only arises when the liability of indemnified becomes absolute. Also similarly in *Osman Jamal & Sons*

¹⁰ Howard B. Thomas, *Contracts of Indemnity against Liability and against Loss*, (1936)

¹¹ *M. Ramalinga Iyer v. T.K. Jayalakshmi*, 1941 SCC OnLine Mad 94

¹² *Shankar Nimbaji Shintre v. Laxman Supdu Shelke*, 1939 SCC OnLine Bom 81

¹³ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, 1942 SCC OnLine Bom 29

¹⁴ *Khetarpal Amarnath v. Madhukar Pictures*, 1955 SCC OnLine Bom 73

¹⁵ Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, (2015)

¹⁶ Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, (2015)

¹⁷ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, 1942 SCC OnLine Bom 29

Ltd. v. Gopal Purshottam,¹⁸ it was clarified that the indemnifier is responsible for all the consequences arising from the indemnified act. Also in *New India Assurance Co. Ltd. v. Kusumanchi Kameshwara Rao*,¹⁹ the Supreme Court India reinforced the broad nature of indemnity obligations.

Even after these developments, the lack of statutory clarity creates uncertainty. The dependence on case laws results into inconsistency, often making it tough to ascertain the precise obligations of the indemnifier in varied contexts of contracts.²⁰

Role of Judicial Creativity

The creativity of the judiciary has played an important role in shaping the indemnity law in India. Courts have often relied on the equitable principles and English common law to cover the statutory gaps. In *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*,²¹ the court applied equitable doctrines explicitly to expand indemnity above the statutory limits. Also in *Khetarpal Amamath v. Madhukar Pictures*,²² it was demonstrated willingness of judiciary to extend the scope of indemnity rights.

Although this approach ensures practical justice and fairness, but however it also leads to unpredictability and inconsistency, as often an outcomes depend on the judicial interpretations rather than crisp and clear statutory rules. So while judicial creativity handles the deficiencies, it also simultaneously exposes the ambiguity and inadequacy of the legislative framework.²³

Comparison with English Law

English law has a more flexible and broader approach to indemnity, mostly created and developed through equitable principles and case laws. Unlike the Indian Contract Act, it does not restrict indemnity to losses due to conduct of a human, instead it also recognises a wider range of indemnity arrangements.²⁴

The English principles are frequently used by Indian courts to address the legal and statutory

¹⁸ *Osman Jamal & Sons, Ltd. v. Gopal Purshattam*, 1928 SCC OnLine Cal 131

¹⁹ *New India Assurance Co. Ltd. v. Kusumanchi Kameshwara Rao*, (1997) 9 SCC 179

²⁰ Howard B. Thomas, *Contracts of Indemnity against Liability and against Loss*, (1936)

²¹ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, 1942 SCC OnLine Bom 29

²² *Khetarpal Amamath v. Madhukar Pictures*, 1955 SCC OnLine Bom 73

²³ Wayne Courtney, *supra* note 1.

²⁴ *Contracts. Contract of Indemnity*, Harvard Law Review (1917)

gaps. In *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*,²⁵ the court invokes the equitable doctrines of English law. Similarly, *Osman Jamal & Sons, Ltd. v. Gopal Purshattam*²⁶ demonstrates the adoption of broader common law principles.

This comparative perspective underscores the limitations of the Indian legal framework and highlights the requirement for reforms to align domestic law with international standards and modern commercial realities.

Conclusion and Suggestions

Summary of Issues

The foregoing analysis reveals that the legal regime relating to contracts of indemnity under the Indian Contract Act of 1872 is afflicted with basic structural problems that have continued to exist for over one and a half centuries without any attempt to rectify them through legislation. The only provisions dealing with contracts of indemnity are sections 124 and 125 of the Indian Contract Act of 1872, but together they account for fewer than two hundred words of the entire text of the Indian Contract Act of 1872. Section 124 limits an indemnity to losses resulting from the acts of the promisor or any other person,²⁷ thus excluding losses due to accidents, contingencies, and nature, which are very common in commercial contracts. Section 125, meanwhile, enumerates the indemnity holder's rights without specifying when those rights become exercisable, leaving a foundational question unresolved on the face of the statute.²⁸ The duties and defences of the indemnifier receive no attention whatsoever. As Ina De has observed, only two provisions in the Act address the contract of indemnity, despite it being an essential and frequently used commercial instrument, and certain crucial issues are entirely unaddressed.²⁹ This legislative inadequacy has produced chronic overdependence on the judiciary to supply, through creative interpretation, the guidance that the legislature has failed to provide.

²⁵ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, 1942 SCC OnLine Bom 29

²⁶ *Osman Jamal & Sons, Ltd. v. Gopal Purshattam*, 1928 SCC OnLine Cal 131

²⁷ The Indian Contract Act, 1872, § 124.

²⁸ The Indian Contract Act, 1872, § 125.

²⁹ Ina De, *Evolution of Indemnity Under the Indian Contract Act, 1872: A Critical Analysis* (May 15, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5180789.

Critical Evaluation

The tension between the limited language of the statute and the expansive body of case law that has developed around it produces a condition of legal uncertainty that is antithetical to commercial efficiency. The courts have, with laudable flexibility, resorted to English equitable principles to supplement the deficiencies of Sections 124 and 125. In *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*,³⁰ The Bombay High Court relied on equitable principles to accord the right to the indemnity holder to enforce the right of indemnity prior to sustaining any loss, which the statute does not specifically provide. In another case, *Osman Jamal & Sons Ltd. v. Gopal Purshottam*,³¹ the courts extended the liability to all consequences of the act for which indemnity had been granted, going beyond the provisions of the statute. Although these decisions achieve substantial justice, they also produce a law that is judge-made, jurisdiction-specific, and prone to inconsistent application. As Wayne Courtney has observed, the definitional incompleteness of the Act instills uncertainty into all subsequent inquiries of scope, enforcement, and defense.³² The resultant unpredictability is incompatible with the demands of a modern commercial economy, in which parties require the ability to structure, price, and enforce risk-allocation arrangements with confidence in their legal consequences.

Need for Reform

The imperative for legislative reform is clear. The need for commercial certainty, which is one of the basic necessities for any legal system to be effective, requires that the obligations and rights created by a contract of indemnity should be determinable from the statute itself and not from a plethora of judicial decisions that may be different in different jurisdictions and judges. This was recognized in the Thirteenth Report of the Law Commission of India in 1958. In this report, it was noted that “the recourse to English law to fill the gaps in the Act is not conducive to certainty and simplicity.”³³ This warning seems to have fallen on deaf ears, and the same trend persists today. A reformed legislative framework would also substantially reduce the judicial burden that arises from litigating questions of fundamental scope and enforceability that ought to be settled by statute. Finally, reform is necessary to ensure uniform application of

³⁰ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, AIR 1942 Bom 302.

³¹ *Osman Jamal & Sons Ltd. v. Gopal Purshottam*, AIR 1929 Cal 208.

³² Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 Nat'l L. Sch. India Rev. 66, 68 (2015).

³³ Law Commission of India, *Thirteenth Report on the Indian Contract Act, 1872*, at 50 (1958).

the law across India's multiple High Court jurisdictions, where divergent equitable borrowings from English law have produced inconsistent outcomes. Yashika Garg has similarly observed that the lack of legislative specificity produces inconsistent judicial results that make it difficult for parties to assess their potential liability.³⁴

Recommendations

Firstly, Section 124 must be amended to provide for the extension of the scope of indemnifiable loss to include accidents, external contingencies, and natural events. In this regard, the Supreme Court in *United India Insurance Co. Ltd. v. M.K.J. Corpn.*³⁵ had already acknowledged the concept of insurance as a form of indemnity, where the scope of loss includes non-human causes. Secondly, the rights of the indemnity holder under Section 125 must be compounded by a specific provision codifying the pre-loss enforcement right established in *Gajanan Moreshwar Parelkar*,³⁶ thereby resolving the uncertainty that presently surrounds the temporal issue of enforceability. Thirdly, a new provision must be added to specifically define the indemnifier's responsibilities. This includes the commencement, extent, and defenses of liability, all of which are presently left to judicial determination. Fourthly, established judicial principles, including the equitable principles borrowed in *Osman Jamal*³⁷ and *New India Assurance Co. Ltd. v. Kusumanchi Kameshwara Rao*,³⁸ must be codified, thereby providing a stable platform instead of judicial borrowing. **Fifth** and lastly, the reform exercise must utilize the comparative study of English common law and the UNIDROIT Principles to bring Indian indemnity law in line with global commercial practice.

Closing Observations

Indian indemnity law is at a crossroads. It may continue to rely on judicial ingenuity to address legislative inertia, or embrace the principled statutory reform that commercial modernity demands. One route is uncertain and inconsistent; while the other offers clarity as well as fairness. Sections 124 and 125 of the Indian Contract Act, 1872, therefore, not only require

³⁴ Yashika Garg, *Indemnity Unveiled: Section 124 and 125 of the Indian Contract Act, 1872*, 4(3) Int'l J. Adv. Legal Rsch. (2024).

³⁵ *United India Insurance Co. Ltd. v. M.K.J. Corpn.*, (1996) 6 SCC 428.

³⁶ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, AIR 1942 Bom 302; *Khetarpal Amarnath v. Madhukar Pictures*, AIR 1956 Bom 106.

³⁷ *Osman Jamal & Sons Ltd. v. Gopal Purshottam*, AIR 1929 Cal 208.

³⁸ *New India Assurance Co. Ltd. v. Kusumanchi Kameshwara Rao*, (1997) 8 SCC 339.

comprehensive reform for doctrinal integrity but also for a legal system that seeks to support a dynamic and outward-looking economy.