ABSTRACT

In this research paper researcher has tried to find out the main difference between Indian Contact Law and Common Law on the issue of Guarantee and Indemnity. In this paper researcher has defined Section 124, 125 and other and also has compared the same with the English Common Law. Researcher has also taken the Cases from both the countries to show the comparison more clearly and effectively. The main reason of choosing the English Common Law is because India follows the Common Law system and through this comparison. In research paper researcher has also defined Section 124 of Indian Contract Act and also other sections are also defined very thoroughly and efficiently in this paper. Researcher has also differentiated both indemnity and the guarantee separately in a table for the reader to understand the things in short. A researcher has tried to show the effect of this law in these two big democracies that follow the same thing but in a different way.

Researcher has tried to show the essentials and important and way to do indemnity and the guarantee in these two different countries. In this research paper it is clearly shown hwo these two countriesare different from each other.

Keywords:- Indemnity, Guarantee, English Common Law, Indian Contract Act, Difference.

INTRODUCTION

Indemnity and Guarantee has been defined in Chapter 8 of Indian Contract Act 1872, which defines about indemnity and Guarantee. Indemnity and guarantee are two best way in which creditors protect themselves from the risk of debt default. Lenders will always ask for guarantee and indemnity from the loan seeker if they have dough on the capability of the borrower to return the loan on time. Guaranteers and Indemnitor are at very high risk when they enter into such contract so there is some provision regarding this in Indian Contract Act 1872.

In this research paper researcher has tried to defy indemnity and guarantee in detail and also made comparison in Untied Kingdoms and India because these both countries have the background of common law system. As per *Indian Contract Act 1872*;

A contract by which one party promises to save other from loss caused to him by the contract of the promisor himself, pr by the conduct of any other person is called contract of indemnity.[1]

Which clearly means that all damages for which he may be forced to pay in any suit subjected to any matter to which the promise to indemnify is applicable; • All costs which he may be forced to pay in any such suit if, in carrying or protecting it, he didn't negate the commands of the promisor, and went about as it might have been judicious for him to act without any agreement of reimbursement, or if the promisor commissioned him to carry or defend a suit; • Every sum which he may have paid under the terms of any bargain of any such suit, if the bargain was not in spite of the requests of the promisor, and was one which it might have been reasonable for the promisee to make without any agreement of indemnity, or if the promisor sanctioned him to bargain the suit.

Also given in *Section in 126 of Indian Contract Act 1872*;

A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person in respect of whose default the guarantee is given is called the surety; the person in respect of whose default the guarantee is given is called the

[1] Section 124, Indian Contract Act 1872.

principal debtor,and the person to whom the guarantee is given is called creditors. A guarantee can be written as well as oral.[2]

In the case of *S. ChattanathaKarayalarv. Central Bank of India*[3]*; the court held that; the transaction in more than one document must be read together.*

CONTRACT OF INDEMNITY

Indemnity not only defined in the law of contract or in the contractual context. Indemnity may be defined as a dutytomakegoodanyloss,damageorliabilityincurred by another or it can also be defined as the it is the right of the person to ask for a reimbursement for the damages, loss or the liability from the person who has such duty to do that.

If we see it in literal meaning of Indemnity then we will find that indemnity means that "security from the losses". This kind of term was generally used in Insurances, but we need to note down that Life Insurance contract is not included in this type of Indemnity Contract.

An contract of indemnity under English Common Law means wherein promisor promises, the other party to save him from any harm or damages or any kind of losses being beard by him on the happening off such event in future.

In the English Common Law, the law of Indemnity was established in the case of *Adamason v. Jarvis*[4]*,*

Theplaintiffanauctioneersoldcertaincattleontheorderofthe defendant.It subsequently turned outthatthelivestockdidn'tbelongtothe defendant, butto anotherperson, whomadetheauctioneerliableandtheauctioneerinturnsuedthe defendantforthelosshehadthussufferedbyactingonthedefendant'sdirection. Thecourtlaiddownthattheplaintiffhavingactedontheirquestothedefendant wasentitledtoassumethat,if,whathedidturnedouttobewrongful,hewould be indemnifiedbythedefendant.

[2]Section 126, Indian Contract Act 1872.
[3]AIR 1965 SC 1856.
[4] 1827

ThusIndemnityinEnglishLawmeansapromisetosaveapersonharmlessfrom the consequencesofanact.Thepromisemaybeexpressoritmaybeimpliedfrom the circumstances of the cases.[5]

PROVISION IN UK

Provision for indemnity in English Common Law is totally different that from India.In original English Common Law the rule was that the indemnity would be payable only when the indemnity holder has suffered a real loss by paying of the losses of the claims.Only when the indemnity holder occurs the real loss by acting upon the instruction of the promisor and all the damages beard b him in defending the suit then only he will be libel for the for the payment of all the costs beard by him. These situations created a hardship in all those cases where the indemnity holder was not in the position of bearing the cost from his pocket. In such cases relief was provided to the indemnity holder by the court of equity. As per the rules laid down in the Court of Equity, it was not necessary for the indemnity holder to be damnified before he is indemnified in the case of:

Richardson Re, ex parte The Governor of St. Thomas Hospital,[6]

The Hon'ble Justice Buckley LJ in this case told that," Indemnity is not necessary given by the repayment after the payment, indemnity requires that the party to be indemnity in the first instanced shall never be call upon to pay."[7]

In another case of *Liverpool Mortgage Insurance Co. s Re,*[8]"that indemnity does not merely to reimbursement term of money, but to save from the loss the liability against the indemnity has been given because otherwise indemnity may be worth very little if the indemnity holder is not able to identify at very first instance." [9]

[5]Avtar Singh pg 571
[6] (1911) 2KB 705, 715 (CA)
[7]Supra at p. 75.
[8] (1914) 2 Ch 617, 638: (1914-1915) All ER Rep 1158 (CA)
[9]Oriental fire and general insurance and co. v. savoy solvent oil extraction ltd.

PROVISION IN INDIA

As we have seen the concept of indemnity was developed in England and came from English Common Law, the indemnity has been defined in Indian Contract Act too in the Article 124. Indemnity has been developed in the Common Law, which includes the losses caused by certain events or accidents that not at all depend on the conduct of any person and thus includes the losses which occur due to accidents or the events which have not been caused due to any accident or any person. Section 124[10], limits it to the losses which are being caused by the indemnifier or any third person. It does not include any losses which re arising of any kind of natural events or occurred because of any kind of accident which is caused by any human activity.

Thus, by the definition of the indemnity we can say that indemnity includes the indemnities which are caused by the following:-

- By the promisor himself
- By any other person

Thus, we can say that this definition excludes the losses which are caused due the accidents such as fire or the perils of the sea it excludes the natural disaster; we can say indemnity includes the losses which are caused by any human agency.

In the case of *GajananMoreswharParelkar v. Moreshwar Madan Mantri:*[11]

In this case the court held that the section 124 of Indian Contract Act Section, it deals only with one particular kind of indemnity which Arises from a promise made by the indemnifier to save the indemnified from the Loss caused to him by the conduct of the indemnifier himself or by the conduct of Any other person, but 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 Upon the conduct of the indemnifier or any other person, or by reason of liability Incurred by something done by the indemnified at the request of the indemnifier. Section125 of the Act deals only with the rights of the indemnity-holder in the Even to this being sued. It is by name a sex causative of

[10]Indian Contract Act, 1872.

[11]

the right so the indemnity -holder, who has ot her rights besides those mentioned in the section. It was further discussed 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 actually to wait till a judgment was pronounced, and it was only after he had satisfied the judgment that he could sue on his indemnity. It is clear that this might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgment and yet he could not avail himself of his indemnity till he had done so. There for the Court of equity stepped in and mitigated the rig or of the common law and held that where the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it.[12]

Indian Contract Act doesn't specifically provide that there are often implied contracts of indemnity. The Privy Council has, however, recognized an implied contract of indemnity also. The Law Commission of India in its 13th Report, 1958 on the Indian Contract Act, 1872, has recommended the amendment of Section 124. According to its recommendation, "The definition of the 'Contract of Indemnity' in Section 124 he expanded to include cases of loss caused by events which may or may not depend upon the conduct of an individual. It should also provide clearly that the promise may also be implied."[13]

Thus we discover out that the essential difference between the indemnity in English law and Indian law is that, English law is wide enough to hide the losses by fire and sea peril whereas the Indian law doesn't approve this. Moreover in the Indian law the loss should be caused by some human agency i.e. the promise himself or by the conduct of any other person. Whereas in English law loss caused by a natural calamity and therefore the promisor are considered but not by any third party.[14]

CONTRACTOFGURANTEE

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the

[12] Indiakanoon.com
[13] Indian Contract Act, 1872
[14] https://www.academia.edu/9012692/Contract_of_Indemnity_and_Guarantee

person to whom the guarantee is given is called the “creditor". A guarantee may be either oral or written.[15]

Bouvier’s Law Dictionary gives the meaning of guarantee as a promise to answer for the debt, default, or miscarriage of another person.[16]

In English Common Law, a guarantee to be enforceable at law must be in writing. By the Statute of Frauds Section 4, it is enacted that "no action shall be brought whereby to charge the defendant upon any special promise to account the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note there of shall be in writing and signed by the party to be charged therewith, or another person there on by him lawfully authorized". Though a contract of guarantee may be oral or in writing in India it must be required to be in writing only in England.

Economicfunctionofguarantee

Thefunctionofacontractofguaranteeistoenableapersontogetaloan,orgoodsoncreditoran employment. ‘Guaranteesareusuallytakentoprovideasecondpockettopayifthefirstshouldbe empty.’

Considerationforguarantee. -Anythingdone,oranypromisemade,forthe Benefitofthe principaldebtor, may be a sufficientconsideration to the Suretyforgivingtheguarantee.

Essentials of contract of guarantee

1. The contract of guarantee should satisfy the need therefore solfa syllable valid contract:

A contract of guarantee could be a special quite contract. As such, it should have all the essential components of a sound contract like thought, free consent, competence of the parties, lawfulness of object and thought. As regards the consideration and capability of the parties, a contract of guarantee has special features, that square measure mentioned within the following 2 essentials:

2. The contract of guarantee should be supported by consideration:

[15] Section 125, Indian Contract Act, 1872.
[16] Vol 2, 1914, p 1386

It is, however, not necessary that there ought to be direct thought between the surety and mortal. The law presumes that the thought received by the principal human is that the comfortable thought for the surety. Thus, something done for the advantage of the principal human is that the comfortable thought for a contract of guarantee. And it's not necessary that the surety himself should he benefited (Section 127).

3. The contract of guarantee should be created by the parties competent to contract:

We know that the competence of the parties is a vital demand of a sound contract. As such, the parties to a contract of guarantee should even be competent to contract. However, the in capability of the principal human doesn't have an effect on the validity of a contract of guarantee. Thus, the requirement is that the mortal and therefore the surety should be competent to enter in to a sound contract. A principal human could he a minor. In such cases, the surety is thought to be principal human and is in person liable to pay the debt, though the principal human isn't liable. In such cases, the contract between the mortal and surety is treated as a primary and freelance, and not collateral. The surety is additionally liable if the guarantee is given knowing the minority of the human.

4. There should be somebody primarily liable:

it is a necessary demand of a contract of guarantee that there should be somebody primarily liable (i.e., liable as principal debtor) apart from the surety. As a matter of reality, a contract of guarantee presupposes the existence of a liability enforceable by law. If there's no such primary liability, there is no valid contract of guarantee. However, as slated higher than, the guarantee given for min or's debt is enforceable.

 ProvisioninU.K

i. *Swan v Bank Of European nation*

The purpose of a guarantee being to secure there payment of a debt, the existence Of square measure coverable debt is important. it's of the essence of a guarantee that there ought to be some one liable as a principal debt or and therefore the surety undertakes to be liable on his default. If there's no principal debt, there will be no valid guarantee. This was thus control by the House of Lords within the Scottish case of Swanv. Bank of Scotlandten full admiral NS 627} set as early

as1836. 'The payment of the over draft of a banker's client was warranted by the litigant. The Over drafts were contrary to a statute, that not solely obligatory penalty upon the Parties to such drafts however additionally created them void. The client having defaulted, the Surety was sued for the loss.' Buthe was control not liable.The court same that "If there's nothing due, no balance, the requirement to create that nothing smart quantity itself to zilch. If no debt is due, if the banker is for bidden from having any claim against his client, there's no liability incurred by the co-obligor. the statutory requisites of a guarantee square measure, in England, prescribed by(1) the statute of frauds, that provides that" no action shall be brought whereby to charge the litigant upon any special promise to declare the debt, default or miscarriage thus fan alternative person, unless the agreement upon that such action shall be brought, or some memoranda or note there of,shall be in writing and signed by the party to be charged thereupon, or another person there unto by him law totally licensed,"[17]

ii. *Coutts Company v Browne Lecky Company.*[18]

The second associate degreed third litigants had warranted the number of an overdraft granted by the litigant bankers to the primary defendant, an infant .The second and third litigants contended that the plaintiffs couldn't endure them as a result of 'they couldn't have Recovered from the primary defendant. All the parties knew through out that the primary litigant was associate degree baby. Oliver,J., held that the plaintiffs couldn't recover. Underneath section 1of the Infants Relief Act the loan to the primary guarantee was a contract to create smart a debt, default or miscarriage of another person. however during this case there was no debt, as a result of the statute says so; there was no default, as a result of the primary litigant was entitled to refrain from paying; forth E a mere as on there was no miscarriage. On principle there was therefore no liability on the a part of the second and third defendants. In Swan. Bank of European nation the House of Lords control that underneath Scottish law a guarantee of dealings that was void on the bottom of unlawfulness was additionally void. 'The solely distinction between those truth sand the facts be for me', said Mister Justice King Oliver,'is that there's no unlawfulness regarding the current dealings. Excluding the distinction the facts during this case seem to American state to be identical in essence.

[17]CosgiganJr.,George P.(1913)."The Date and Authorship of Statute of Frauds". Harvard Law Review 26:329 at 334–42.
[18](1946),62T.L.R.421)

Provision in India.

Kashiba v Shreepath

One Lakshmi Bai entered into a bond to secure payment to the plaintiff of Rs. 1000 and interest. At the time of the exe

cution 0f the bond, she was a minor and Her father joined in the bond. The material terms of the contract by the father were: Should she (i.e.,Lakshmi Bai) fail to pay, I will pay the above-mentioned amount personally without pleading her excuse and take back this bond. I fit is not so paid, you should get it paid off from my income. The question was whether the father was liable on this guarantee in view of Lakshmi Bai herself not being liable because of her minority. In that case, the contract of the so called surety is not collateral, but a principal, contract. It is a conditional promise founded upon valuable consideration. It is like the case of a person, who to-appease the anger of a child, requests another to lend a guide a to the child to play with , and promises if the child loses or does not give back the coin, to make it good to the lender. The promise in such, circumstances is clearly that of a principal, and not of surety, And the situation is not altered by its being called a guarantee. On this reasoning, the learned Judge held that the surety and those claiming under him were liable to The promise of the bond.

In P.J Rajappanv Associate Industries (P) Ltd[19] *it was held by the Kerala High Court that since an oral guarantee is also valid, a person who otherwise appeared To be a guarant or was held liable though his signature did not appeared on the Guarantee papers.*[20]

In Punjab National Bank Limited vs Bikram Cotton Mills &Anrit was held at though, The bond, it is true, did not expressly recite that the Company was the principal debtor; it Is also true and the Company did not execute the bond. But a contract of guarantee may Be wholly written, may be wholly oral, or may be partly written and partly oral Thus we find out that the basic difference is that in English law a minor may not Be held liable as the contract is void ab-initio even though at the time of contract The person may have known him to be a minor, but in Indian law where a minor Has been knowingly guaranteed, the surety should be held liable as a principle debtor.

[19] (1990) 1KLJ77
[20] 1970SCR(2) 462

More over a in U.K the contract of guarantee has to be written as defined in frauds act, where as in Indian law it can be oral as well as written.

INDEMNITY	GUARANTEE
Section 124 of Indian Contract Act: a contract by which one party Promises to save others from loss Caused to him by the conduct of The promisor himself, or by the Conduct of any other person.	Section 126 of Indian Contract Act: a contract to perform the promise, or discharge the liability of a third person in case of his Default.
Toprovidecompensationforloss	To give assurance to the creditor In lieu for his money
Indemnifier is the sole person Liable. The liability of indemnifier is primary. Liability arises only on occurrence Of a loss The indemnifier can't sue the third Party for loss in his own name.	Liability shared between Principal Debtor (primary liability) and Surety (secondary liability).i.e. The liability of the surety is Secondary and arises only if the Principal debtors fail stop err form His obligations. Fixedlegalliability. Surety after discharging the debt Can sue the principal debtor.

CONCLUSION

We can see here that though the concept of indemnity and guarantee prevalent in India was introduced by the government of the crown, when India was a colony Under the British empire then also significant differences between the two concepts Of indemnity and guarantee in common law of U.K vis-à-vis India can be seen, Through various case law sand the judgements held by the courts so far. Thus in the End the basic difference that I found in the provisions, as to contract of indemnity were: that the indemnity in English law and Indian law is that, the English law is wide enough to cover the losses by fire and sea peril whereas the Indian law doesn't approve this. Moreover in the Indian law the loss should be caused by some human agency i.e. the promisor himself or by the conduct of any other person. Where as in English law loss caused by a natural calamity And the promisor are Considered but not by any third party. And the provisions, as to contract of Guarantee are: that in English law a minor may not be held liable as the contract Is void ab-initio even though at the time of contract the person may have known Him to be a minor, but in Indian law where a minor has been knowingly guaranteed, The surety should be held liable as a principle debtor. Moreover in U.K the Contract of guarantee has to be written as defined in frauds act, whereas in Indian law it can be or as well as written.

REFREANCE

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