

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES
[ISSN 2581-5369]

Volume 9 | Issue 4

2026

© 2026 International Journal of Law Management & Humanities

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for free and open access by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of any suggestions or complaints, kindly contact support@vidhiaagaz.com.

To submit your Manuscript for Publication in the International Journal of Law Management & Humanities, kindly email your Manuscript to submission@ijlmh.com.

From Statutory Silence to Judicial Voice: The Evolution of Indemnity under the Indian Contract Act, 1872

SHRAMYA SHANKAR SHETTY*

ABSTRACT

Indemnity contracts have become central to modern commercial practice as instruments for allocating and mitigating risk, yet their statutory basis in India remains confined to Sections 124 and 125 of the Indian Contract Act, 1872. This paper examines how that skeletal framework has left significant gaps concerning implied indemnities, non-human perils and the point at which liability to indemnify arises, and how Indian courts have filled those gaps by drawing on English common law and equitable principles. Through decisions such as Secretary of State v. Bank of India, Gajanan Moreshwar v. Moreshwar Madan, Osman Jamal & Sons Ltd. v. Gopal Purshottam and Jet Airways (India) Ltd. v. Sahara Airlines Ltd., it traces the shift from post-loss restitution to anticipatory protection and the emergence of indemnity as a self-contained risk-transfer mechanism. Reading these developments through the perspectives of corrective justice, legal realism, social engineering and Dworkinian integrity, the paper argues that while judicial creativity has preserved the commercial utility of indemnity, lasting legal certainty requires the legislature to codify principles such as anticipatory indemnity, implied indemnities and a broadened conception of recoverable loss.

Keywords: indemnity, Indian Contract Act 1872, Sections 124 and 125, implied indemnity, judicial interpretation, risk allocation, commercial contracts

I. INTRODUCTION

Indemnity contracts are an essential tool in modern business dealings, enabling the strategic allocation and mitigation of risk. These provisions have developed into something far more sophisticated than boilerplate clauses; they have become mechanisms by which parties can, on a pre-agreed basis, carve out the scope of the financial liabilities that may arise from a third-party claim, a regulatory change, or the inherent uncertainty of future events. Through indemnification, companies can improve transactional efficiency, insure against unforeseeable market shocks and protect themselves against the uncertainty that accompanies changing industries. There is, however, a strong jurisprudential paradox in India: evolving commercial

* Author is a Student at Symbiosis Law School, Pune, Maharashtra, India.

imperatives conflict with the static legal principles of the Indian Contract Act (ICA), 1872. The statutory regulation of indemnity is particularly sparse, consisting of only Sections 124 and 125.¹ This skeletal drafting has created a legislative silence on implied indemnities, non-human agency, and the point at which liability commences. In turn, Indian courts have been pressed to go beyond their conventional interpretative mandate and to assume a judicial voice, filling these legislative gaps with principles borrowed from the English common law. This paper critically examines that development, in which judicial ingenuity has rescued commercial contracts, while arguing that optimal legal certainty can be achieved only through legislative expression rather than continued reliance on judicial interpretation.

II. CRITICAL ANALYSIS

The indemnity problem in India begins with the limited definition in Section 124. The Act describes a contract of indemnity as one by which a person promises to save another from loss caused to him by the conduct of the promisor himself or of any other person. This literalism gives rise to a range of interpretative anomalies.

A. Human Agency and the Act of God

A notable and significant anomaly is the express exclusion of non-human perils. On a strict reading of Section 124, a promise to indemnify against losses resulting from fire, storm at sea or accidental death (that is, events amounting to an act of God) is not a contract of indemnity under the ICA, because such losses do not flow from the conduct of a person. Wayne Courtney, in his influential article *Indemnities and the Indian Contract Act 1872* (2015),² argues that this conservative view does not reflect modern insurance practice. Whereas English law treats almost every kind of insurance other than life assurance as an indemnity, Indian law relegates non-human risks to the category of the contingent contract (Section 31). This fragmentation undermines the commercial imperative of unified loss protection, requiring parties to satisfy disparate legal requirements within a single transaction.

B. Implied Indemnity

The Act contains no provision dealing with implied promises of indemnity. In complex commercial arrangements, such as the principal-agent or principal-contractor relationship, the right to compensation frequently arises on an equitable basis rather than by express written stipulation. The consequences of the ICA's silence are illustrated by *Secretary of State v. Bank*

¹ LAW COMMISSION OF INDIA, *13th Report on the Indian Contract Act, 1872* (1958).

² Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 NAT'L L. SCH. INDIA REV. 66 (2015).

of India (1938),³ in which the Privy Council recognised an implied indemnity in favour of a person who had acted at another's request and without committing a tort. That the court had to intervene demonstrates that the statute was too narrow to anticipate the subtlety of commercial dealings.

C. Timing of Liability: Damage versus Payment

A further peculiarity concerns the point at which a claim becomes enforceable. Indian courts formerly followed the strict English common law rule that a claimant had to suffer an actual loss before acquiring any right to indemnity. This 'actual loss' requirement is damaging to commerce, because it compels a party to expend money before it can call upon the protection for which it has bargained.

Gajanan Moreshwar v. Moreshwar Madan (1942)⁴ recognised the inadequacy of this approach and held that an indemnity holder whose liability has become absolute may compel the indemnifier to discharge that liability, even before the holder has actually paid. This marked a shift from post-loss restitution to anticipatory protection.

The principle was reinforced in *Osman Jamal & Sons Ltd. v. Gopal Purshottam* (1929),⁵ which allowed a commission agent to claim indemnity before it had itself paid the third party. These decisions exemplify the creative jurisprudence noted above and confirm that an indemnity would be largely ineffective if it could be enforced only after judgment.

D. The Indemnifier's Unrecognised Rights

Section 125 sets out the rights available to the holder of an indemnity, but the ICA confers no corresponding rights on the indemnifier. The statute is silent on whether the indemnifier may take over or direct the defence of third-party litigation. This omission has obliged the courts to import equitable considerations in order to protect the indemnifier against arbitrary or fraudulent settlements.

III. MODERN CRITIQUE

Indemnity has evolved from a device that merely discharged simple debts into a sophisticated tool for allocating risk in significant commercial transactions, including corporate mergers, acquisitions and share-purchase agreements. In the modern legal order, indemnity has become a distinct covenant, independent of the traditional restitution for breach of contract available under Section 73.

³ *Secretary of State v. Bank of India*, (1938) 65 IA 286 (PC).

⁴ *Gajanan Moreshwar v. Moreshwar Madan*, (1942) 44 Bom LR 703.

⁵ *Osman Jamal & Sons Ltd. v. Gopal Purshottam*, (1929) ILR 56 Cal 262.

A. *Jet Airways (India) Ltd. v. Sahara Airlines Ltd.*

Jet Airways (2011)⁶ illustrates this doctrinal shift. The court had to determine whether an indemnity extended to tax liabilities that arose after an acquisition. Rather than adopting a literal, word-for-word interpretation, it declined to read the clause restrictively, holding that in sophisticated commercial contracts an indemnity should be construed broadly. The case redefines indemnity as a self-contained risk-transfer mechanism. On this approach, an indemnity may be enforced as soon as the trigger event occurs, unlike a claim for traditional damages, which depends on a breach of promise and the claimant's attempt to mitigate its loss.

B. Indemnify and Hold Harmless Clauses

The phrase 'indemnify and hold harmless' is now common in Indian commercial contracts, and its effect reaches well beyond Section 124. To hold a party harmless is not merely to reimburse pecuniary loss but to relieve it of liability altogether. Such clauses are frequently accompanied by survival provisions, which state that the indemnity obligations continue after the underlying contract has expired. The result is a hybrid of statutory and contractual norms in which the intention of the parties is given priority over the absence of an express statutory basis in the ICA.

C. Remote and Indirect Losses

Section 73 ordinarily restricts recoverable losses to those that arise directly from a breach. In insurance and indemnity practice, however, it is common for parties to cover indirect or remote losses. Indian courts increasingly accept that indemnity agreements may displace the limitation in Section 73,⁷ so that a sufficiently widely drafted indemnity clause can cover losses that traditional contract law would treat as too remote. On this view, indemnity offers an investor a superior form of protection to a claim in damages.

IV. PHILOSOPHICAL CRITIQUE

From a philosophical perspective, the law of indemnity may be examined through the lenses of corrective justice, legal realism and the social engineering of risk.

A. Corrective Justice and the Rights-Based Approach

In the *Nicomachean Ethics*, Aristotle conceives of justice in private dealings as corrective, seeking to restore the position that existed before a wrong.⁸ On this doctrine, redress is available

⁶ *Jet Airways (India) Ltd. v. Sahara Airlines Ltd.*, (2011) 113(3) Bom LR 1725.

⁷ POLLOCK & MULLA, *THE INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACTS* (R. Yashod Vardhan & Chitra Narayan eds., 16th ed. 2021).

⁸ ARISTOTLE, *NICOMACHEAN ETHICS* (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999) (c. 384 B.C.E.).

only once a loss has actually materialised, which reflects the literal meaning of corrective justice. Modern Indian jurisprudence, however, sits closer to the rights-based approach associated with Ernst Weinrib, for which the right to be protected against loss is itself valuable. Where an indemnifier waits until the indemnified party has been harmed and has already borne the loss before acting, it does not correct an injustice; rather, it sanctions an injustice to that original protective right. The philosophical emphasis has thus shifted from the remedial restitution of a material loss to the safeguarding of an abstract protective right.

B. Social Engineering and Roscoe Pound

Roscoe Pound's theory of social engineering holds that the law should reconcile competing interests, satisfying as many of them as possible with the least friction.⁹ In commercial practice, the indemnity is a paradigmatic instrument of this kind: by transferring risk, it supports economic activity and growth. In its terse and open-textured form, the Indian Contract Act is ill-suited to advancing such social engineering. Indian courts have therefore taken up the role of social engineers through landmark rulings such as *Gajanan Moreswar v. Moreswar Madan*,¹⁰ ensuring that the legal system adapts to the needs of a modern economy that depends on credit and the taking of commercial risk.

C. Legal Realism

The manner in which the Indian courts have proceeded is consistent with legal realism. As Oliver Wendell Holmes observed, the law is not a set of purely logical constructs; it is shaped by the realities of experience. The lived experience of Indian commerce showed that Section 124 was too confining, and this prompted the development of a judicial voice into what Eugen Ehrlich called 'living law'. On this understanding, the courts recognised that the social reality of commercial practice required a more robust legal framework than the 1872 Act supplied. The judiciary thus accepted that a law which ignores the established commercial practices of trade is largely ineffective.

D. Ronald Dworkin and Integrity

Ronald Dworkin argued that even where the law appears to fall short or to be silent, a sound resolution can still be reached from the underlying principles of the legal order. Applying this doctrine, Chagla J did not confine himself to the literal meaning of Sections 124 and 125 but invoked the principle of integrity. Examining the underlying purpose of the Contract Act, he concluded that a contract intended to secure a person should not be construed so as to defeat the

⁹ ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922).

¹⁰ *Gajanan Moreswar* (n 4).

very security it was meant to provide. On this view, the judicial voice is not a usurpation but an expression of the justice inherent in the contractual relationship. In philosophical terms, there was a shift from legal positivism towards the equitable conscience of English equity. The original text of the ICA reflects a nineteenth-century mistrust, namely the fear that an indemnity holder might unjustly enrich himself if allowed to recover before making any payment. Today, by contrast, the emphasis is on commercial trust. This movement of the Indian courts from distrust to trust is a significant step towards a theory of contract grounded in autonomy, in which the parties' willingness to share risk takes precedence over statutory technicalities.

V. CONCLUSION

The Indian law of indemnity is an example of jurisprudential resilience. Although Sections 124 and 125 provide only a spare and skeletal framework, the judiciary has given these provisions workable content. Judicial patchwork, however, can never be a substitute for long-term consistency. The legislative silence that has persisted since 1872 must now be addressed by legislation. India can reconcile its dated statute with modern commercial requirements by codifying the principle of anticipatory indemnity, recognising implied indemnities and broadening the definition of loss, so that the law of indemnity is no longer merely the voice of the courts but a firm, statute-based mandate.
