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Comparative Study Between Contract of Indemnity and Guarantee vis-a-vis Provisions of U.K. and India

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ABSTRACT

This research paper aims to find the basic difference between contract law in India and in common law countries regarding the subject of guarantee and indemnity contracts. Both these contracts are highly essential components of the "Indian Contract Act, 1872", which simplified and reduced the amount of risk involved in business transactions. This research paper explains Sections 124, 125, and other sections and compares them to the English Common Law. It talks about how the primary objective of indemnity is to relieve the promisee of responsibility for any and all losses or damages that they have incurred or suffered because of the act of the promisor itself or some other party. It also talks about the contract of guarantee which allows a principal debtor to get credit from the creditor because he knows that the surety will pay back the credit in case the principal debtor doesn't. It shows the important parts of indemnity and guarantee that are needed while drafting a legal contract. Cases from both countries have also been used by researchers in this research paper to make the comparison clearer and more effective. The main reason why the English Common Law system was chosen was that India also uses the Common Law system. Throughout this study, we have attempted to demonstrate how this statute impacts these two principal democracies (India and U.K.) which do the same task in several ways. Researchers have tried to show how indemnity and guarantee work in these two democracies and what is essential and important about them. In this research paper, the differences between these two countries are made clear.

Keywords: *Guarantee, Indemnity, risk, principal debtor, promisee, promisor, surety, English Common Law.*

I. INTRODUCTION

The phrase "contract" is explained in Section 2(h)[2], and the following is an abstract from that section's definition: "An agreement that is enforceable by law is a contract". Chapter 8 of the Indian Contract Act of 1872 includes a definition of indemnity[3] and guarantee[4]. Indemnity and

[1] Author is a student at Nmims, Bangalore, India.
[2] Section 2(h), Indian Contract Act, 1872
[3] Section 124, Indian Contract Act, 1872
[4] Section 125, Indian Contract Act, 1872

guarantees are two of the most effective ways for creditors to shield themselves from the possibility of having their debts go unpaid. Although a lender may be willing to grant credit if they are assured of prompt repayment, they will always require a guarantee and indemnity from the borrower. When parties enter into such a contract, both the surety and the indemnifier are exposed to a significant amount of risk, hence, the Indian Contract Act of 1872 contains provisions that address this issue. The research paper has also attempted to define both these contracts in greater detail, and they have also made comparisons between the legal systems of the United Kingdom and India due to the fact that both countries have a common law legal tradition. According to the Indian Contract Act of 1872, in a contract of indemnity, there is an arrangement in which one party undertakes to protect another party against loss caused to him by the party itself or the behavior of any other person. Thus, it is very clear that his indemnity obligation extends to covering any and all monetary losses that may arise out of any suit involving the subject matter of the indemnity. In the event that he is required to pay any costs related to such litigation, the promisor will reimburse him in full, provided that he did not act contrary to the promisor's instructions and acted reasonably prudent under the circumstances. Any sums paid by him in settlement of such an action, so long as such settlement was not made in disobedience of the claims of the promisor and was one that the promisee might have legitimately made even in the absence of an indemnity arrangement. A "contract of guarantee" is an agreement that requires one party to carry out the promise or releases another party from liability if the first party fails to do so. The individual receiving the guarantee is referred to as the "creditor," the person providing the guarantee is referred to as the "surety," and the person whose default the guarantee is protecting against is referred to as the "principal debtor."

(A) Statement of problem

The primary objective of this study is to compare and contrast the indemnity and guarantee clauses found in contracts drafted in India and the United Kingdom. While assessing the legal position of both of these contracts in India, it compares and contrasts that evaluation with the legal status of the same contracts in the United Kingdom with help of various case laws. The paper also aims to clarify the distinction between an indemnity agreement and a guarantee agreement by using examples and case law. Moreover, case laws are provided to try and make plain the responsibility that may emerge in a wide range of contexts.

(B) Rationale of study

You might think of indemnity as a form of insurance that guards you against the possibility of suffering a loss. Indemnity contracts are a type of risk shifting in which the risks of the promisee sustaining losses are transferred to the promisor of the contract. A guarantee contract involves a minimum of three parties., which are controlled by the contract law enacted in India and includes one of the parties acting as the surety in the event that the other party does not fulfill

his or her responsibilities. Most of the time, parties are needed to get into guarantee contracts in the event that they need credit or product. The guarantee in the said agreements gives the creditor the assurance that the person in need can be trusted, and in the event that the person in need does not pay, the guarantor/surety takes on the duty of making the payment himself. Accordingly, we are able to state that a contract of guarantee is an unobservable form of security that is given to the creditor. The paper tries to explain the meaning of both the above-mentioned agreements and established the difference between the two supporting the same by citing judicial precedents and the role of provisions governing both these laws in both the democracies. The paper seeks to understand how changes regarding the said laws have been made so far in both countries.

II. Contract of indemnity

Such an agreement is essentially a promise made by one party to another to compensate for the losses incurred by the first party. These damages could have been incurred as a result of the behavior of the opposite party or of somebody else entirely.

To compensate for a loss in full is the essence of what it means to indemnify something. It means that if one party incurs losses, the other will be responsible for covering those costs.

If A agrees to pay B Rs. 2,000 per month in exchange for B's regular supply of some specified list of commodities. C steps in and guarantees to cover B's losses if A fails to deliver.

The contractual responsibilities of indemnity between B and C shall be entered into in this manner.

Indemnity contracts and insurance policies are somewhat comparable to one another. In this clause, the insurer makes the insured person a guarantee to compensate them for their damages. In exchange for his services, he will receive compensation in the form of a premium. Nevertheless, the Contract Act does not restrict these kinds of agreements in a particularly stringent fashion. This is due to the fact that some provisions for insurance contracts are included in laws such as the Insurance Act and similar statutes.

(A) Objective of contract of indemnity

Indemnity contracts are made with the intention of shielding the promisor from financial hardships that were not expected by either party.

(B) Number of contracts

Indemnity agreements are unilateral and contain only one contract. Both the indemnifying party and the indemnified party are parties to this agreement.

III. Essentials of an indemnity contract

i. THE PARTIES TO A CONTRACT: There must be a promisor (or indemnifier) and promisee (or indemnified) for a contract to be enforceable.

ii. PROTECTION FROM LOSS The promisee is protected from loss if an indemnity contract is in place because the contract is entered into for that purpose. It's possible that the promisor or someone else was to blame for the loss, but it might just as easily have been someone else.

iii. EITHER EXPRESS OR IMPLIED: Indemnity agreements can be "explicit" (in words or in writing) or "implied" (understood without words being exchanged)

iv. ESSENTIALS OF A VALID CONTRACT: One particular category of a contract is known as an indemnity contract which is subject to the precepts of the contract law as outlined in Section 1 to Section 75[5]. Because of this, it needs to have the necessary components of a legally valid contract.

(A) Parties under indemnity contracts

Indemnity contracts are typically made between two different parties. “Indemnifier” refers to the party that makes a pledge to compensate another for a loss. On the other hand, the term “Indemnified” refers to the party to whom the guarantee of compensation from the indemnifier is made. Another name for the party that is being compensated for their losses is the “Indemnity Holder.”

(B) Nature of indemnity contracts

It is possible for a contract of indemnity to be either explicit or implicit. Thus, the parties upon their wish can expressly construct such a contract according to the parameters that they choose for it. It's possible that indemnity duties could be impliedly created by the nature of the circumstances. For instance, A complies with B's request and performs the act. If B incurs some losses and A offers to reimburse him for those losses, then the two of them have implicitly created a contract of indemnity.

IV. RIGHTS OF AN INDEMNITY HOLDER

When parties enter into an indemnity agreement in writing, they are allowed to set any and all restrictions they deem appropriate. On the other hand, there are situations when they might not do so. In such a scenario, the indemnity holder has the ability to pursue legal action against him. If the promisor or indemnifier has acted properly within his remit, the promisee, the indemnity holder may assert the rights set forth below against him in accordance with Section 125[6].

1. THE LEGAL RIGHT TO RECOVER DAMAGES ALREADY PAID IN A LAWSUIT [SECTION 125(1)[7]]: If the indemnity holder is sued and finds himself in a position where he

[5] Section 1- 75, Indian Contract Act, 1872
[6] Supra 2
[7] Section 25(1), Indian Contract Act, 1872

must pay damages, he can seek indemnity from the indemnifier. Due to his entitlement to full compensation from the indemnifier, this privilege is accorded to him.

2. THE RIGHT TO RECEIVE COMPENSATION FOR EXPENSES SUSTAINED IN DEFENDING A SUIT [SECTION 125(2)[8]]: Indemnity holders have the right to collect from the indemnifier all costs that they may be obliged to pay in any such suit if they did not defy the commands of the promisor and acted as would have been wise for them to act in the absence of any contract of indemnity. Indemnity-holders have the legal right to seek compensation from the indemnifier for any losses sustained as a result of a litigation.

3. THE LEGAL RIGHT TO CLAIM BACK COMPROMISE PAYMENTS [SECTION 125(3)[9]] Additionally, an indemnity-holder is entitled to reimbursement from the indemnifier for any amounts paid in accordance with the terms of any settlement reached in such a case. This is the case if the compromise complied with the promisor's instructions and was one that the promisee would have made if there had been no indemnity contract, or if the compromise was approved by the promisor.

V. Indemnifying party's legal rights

Once the indemnity holder has been compensated for the loss that was sustained, the compensator is entitled to full ownership of any and all procedures and services that have the potential to protect the compensator from damage only if the damage has been incurred by the other party or if there is a certainty of future loss. No provision regarding the time at which the indemnifier is required to begin fulfilling their obligations under the contract is mentioned in the law.

(A) Is the indemnity agreement valid?

Since such transactions are governed by the same principles as contracts in general, Laws governing free consent, object legality, and other issues are as applicable as they would be in any other situation.

In order to fulfill the criteria of the Contract law, the goal of the contract needs to be lawful. An agreement that seeks to violate either the law or public policy is either unlawful or void, depending on the provision of law to which it is subject.

(B) When is a contract of indemnity enforceable?

The earlier point of view was taken into consideration in decisions such as **Shankar Nimbaji v. Laxman Sapdu**[10] where the plaintiff took legal suit against the second defendant to regain the sum of Rs. 5,000 in addition to accrued interest, in the event that this did not produce sufficient funds, to obtain a decree against his inheritance, which was being managed by his

[8] Section 125(2), Indian Contract Act, 1872
[9] Section 125(3), Indian Contract Act, 172
[10] Shankar Nimbaji V. Laxman Sapdu, (1939) 43 Bom. LR. 175.

sons. During the time that the case was being litigated, the second defendant passed away. It is not possible for the plaintiff to file a lawsuit against the defendant if they anticipate proceeds from the sale will not be sufficient and a shortfall will be produced as a result.

In **Chand Bibi v. Santosh Kumar Pal**[11], where defendant's father was purchasing a particular piece of property, he made a promise to the plaintiff that he would pay off the plaintiff's mortgage obligation and indemnify him in the event that the defendant and his son were proven to be responsible for the debt. After he fell behind on the payments, the other party filed a lawsuit to enforce the covenant that had been agreed upon. Because no damages were suffered by the party, the court ruled that the suit should be dismissed because in terms of the cause of action for indemnity, it was brought too soon.

In the case of **Adamson v. Jarvis**[12], which is part of the foreign jurisdiction, the law of indemnity was founded. The plaintiff, who was an auctioneer, carried out the defendant's instruction and sold some livestock. Later it was found that the livestock belonged to someone else and not to the defendant. Following this admission of responsibility, the auctioneer filed an action for the loss he had suffered as a result of following to the defendant's instructions to sell the livestock at auction. The court ruled, due to the fact that the plaintiff responded to the defendant's demand, he had the right to presume that the defendant would compensate him for any damages that resulted from his actions, even if those actions turned out to be illegal. As a result, a commitment may be expressed explicitly or implied through interactions between the parties.

VI. Comparison of the Contract of Insurance and Indemnity

(A) Similarities

1. Both are considered contingent contracts, which means that both are dependent on the occurrence of future events or their absence.

2. Despite the fact that both of these contracts are unique, they are applicable to universal principles.

3. A commitment is both agreements.

4. Presence of consideration clause.

(B) Differences Between an Insurance Policy and an Indemnity Agreement in a Contract

1. A contract of indemnification has a broader scope than a contract of insurance, but not vice versa, because all insurance plans (excluding life insurance policies) are contracts of indemnity.

[11] Chand Bibi v. Santoshkumar Pal, 1933 SCC OnLine Cal 62

[12] Adamson v. Jarvis 4 BING.66:29 R.R 503

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2. If you have a contract for insurance, you will have to pay a premium amount, but if you have a contract for indemnity, you won't have to pay anything at all until the indemnity holder suffers some loss.

3. The element of Uberrimae Fides, which literally translates to "Utmost Good Faith," is present in an insurance policy contract, but it is not present in an indemnity agreement.

VII. Provision in UK

The earliest form of English Common Law established the norm that the indemnity would only be paid if the indemnity holder had actually suffered a loss by covering the losses of the claims. If the indemnity bearer causes the actual loss by following the instructions of the promisor and is responsible for all of the costs spent in defending the litigation, only then will he be liable for the payment of all of the costs incurred by him. These circumstances made things difficult for everyone involved, particularly the person holding the indemnity who was unable to pay for the damages out of his own funds. In circumstances like these, the court of equity would grant the indemnity holder some form of relief.

According to the regulations, it was not essential for the indemnity bearer to be repaid for the loss incurred by him before he was eligible to receive indemnity in the following circumstances:

Richardson Re V. Governing Body President of St. Thomas Hospital[13], in this particular case, Honourable Justice Buckley LJ stated that The repayment following the payment is not necessary to offer indemnity. In contrast, it itself demands that the party receiving it never be asked to make an indemnity.

In **Liverpool Mortgage Insurance Company vs. Re**[14], It was claimed that the purpose of an indemnity is to protect the indemnity holder from the loss for which the indemnity was granted rather than just to reimburse the indemnity holder for the money lost. This was in reference to the fact that if the indemnity holder cannot recognize the situation right away, the indemnity may not be worth much.

VIII. Provision in India

The idea of indemnity originated in England, in addition, the concept has been defined in Indian contract law namely in Section 124[15] as a legal concept that originated in Common Law. It refers to compensation for losses sustained as a result of certain occurrences or accidents that in no way are attributable to the actions of any particular individual. Losses that take place as a result of accidents or the occurrence of circumstances that have not been brought about by any person or any mishap. Any losses resulting from a natural disaster or an accident that was brought on by someone else's behaviour are not covered by the damages brought on by an

[13] Richardson Re V. Governing Body President of St. Thomas Hospital (1911) 2KB 705, 715 (CA)
[14] Liverpool Mortgage Insurance Company vs. Re (1914) 2 Ch 617, 638: (1914-1915) All ER Rep 1158 (CA)
[15] Supra 2

indemnifier or a third party.

As a result, according to the definition of indemnity, we are able to assert that indemnity encompasses all indemnities that are brought about by the following:

1. by the promisor himself in his own right
2. by anyone other than the promisor

Therefore, it does not cover losses incurred as a result of accidents such as fires or the dangers of the sea, it does not cover losses that are incurred as a result of natural disasters. However, we can say that indemnity does cover losses that are incurred as a result of any human agency.

In **Gajanan Moreswhar Parelkar v. Moreshwar Madan Mantri**[16], The defendant entered the picture after the plaintiff failed to utilise a plot he had purchased and brought possession of from Bombay Municipal Corporation in 1934. On the request of the defendant, the possession was transferred to the defendant. The plaintiff had acquired the lease. Since the plaintiff constructed a structure on the property in question, he must immediately mortgage it twice to the artefact provider for a combined sum of 5,000 rupees. Finally, the plaintiff obliged with the defendant's request, which led to the transfer of the land lease into the defendant's name. The defendant never paid the material supplier anything, with the exception of some of the interest on the initial sum and lease installments to the municipal corporations. The plaintiff felt humiliated after more than a year and a half had elapsed before the deadline and asked the artefact supplier for a discharge deed against the mortgage or, alternatively, for a deposit of the mortgage amount with the court to guarantee that the debt would be returned. The judge decided that the plaintiffs could not bring a lawsuit against the defendants in the event that they anticipated that the money received from the sale of the mortgaged property would not be enough and that there would be a shortfall. This decision was decided in light of the plaintiffs' expectation that there would be some residual shortfall. The court considered the note to be an indemnity. The plaintiffs had the choice to completely revoke the mortgage and recover the whole sum from defendant No. 2, but they opted to pursue compensation from the mortgaged property instead. Due to the lack of solid evidence to back up the concern that the earnings from the sale of the property with the mortgage would not be sufficient, the aforementioned order was unable to be given. The stance M. adopted. Madan was the name of that G. The council did not uphold Moreshwar's argument that he had no basis for a claim under Sections 124[17] and 125[18] because he had not suffered any injury. According to the Council, an indemnity holder has additional rights in addition to those that are stated in the Sections that came before. If the indemnity holder has already incurred a liability and that liability has caused the liability to become absolute, the indemnity holder may contact the indemnifier and request that they take care of the liability and settle it. Therefore, G

[16] Gajanan Moreswhar Parelkar v. Moreshwar Madan Mantri *,(1942) 44 BOMLR 703*

[17] Supra 2

[18] Supra 3

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Moreshwar has the legal right to demand that M Madan release him from any liabilities arising out of the mortgage and deed of charge.

Thus, in these agreements, a single promisor undertakes to compensate the promisee in broad terms for all of the damages and costs that have been or will be experienced as a result of carrying out the contract. Sections 124[19] and 125[20] are the ones that stand out in terms of their significance in legal cases. When an indemnified party contacts an indemnifier and requests that the liability be settled, these clauses come into play. Both of these sections have a significant impact on the case of indemnity because section 124[21] applies when the promisee must bear losses as a result of the promisor's or a third party's actions, and section 125[22] only considers the case ready for litigation if the promisee has actually procured the losses. However, they fall short and may even declare unfairness when the promisee is made fully culpable after the payment deadlines have already passed and the culpability cannot be fixed against the promisor until the obligations or damages are really suffered. In certain situations, they permit the promisee to become totally accountable after the payment deadlines have already passed. Similar to this, it is obvious that the indemnified party is embarrassed when the indemnifier fails to pay the concerned party within the designated time frame. However, any legal action brought against the indemnifier seems premature in light of the fact that what will happen if the promisee isn't financially secure or able to pay at that time is a crucial factor. In these situations, it becomes necessary to take into account other, like instances that have been tried in other courts in order to provide justice for the promisee who is serving as the plaintiff in the case. A Contract of Indemnity would serve little purpose if the Indemnity Holder was Made Liable in the First Instance, according to the Court of Equity in 1914, and the proposition of applying equitable principles became universally applicable within the context of the current situation; however, not a single decision made under the application of Common English Law was of this opinion.The decision that Justice Chagla J made in the case of Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri brought this issue to light. In addition to commenting on the cases that the defense attorney had cited, he came to the conclusion that sections 124[23] and 125[24] do not cover all of the cases, and that in order to decide cases that fall outside of the purview of those sections, it is necessary to give consideration to both the Common English Law and the Equitable Principles.

So as seen from the above provisions in India, all cases of loss are heard, regardless of who or what caused the loss (the promisor, a third party, or an accident), but in England, all cases of loss are heard regardless of who or what caused the loss (an accident or any other person).

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[19] Supra 2
[20] Supra 3
[21] Supra 2
[22] Supra 3
[23] Supra 2
[24] Supra 3

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When the regulation was first established in England, it stated that the indemnity bearer would be compensated for any losses that he sustained as long as they were covered by the policy. Now that there is a chance that the indemnity holder will have to pay for the loss in the future, it is the obligation of the indemnifier to ensure that this doesn't happen.

Below are some illustrations to make the concept of indemnity clear –

Example 1 - Mr. A is a teacher, and towards the middle of the school year, another Mr. B approaches him and offers him a position at his school, asking him to go there right away. Additionally, Mr. B provides Mr. A with the assurance that he will reimburse him for any damage that may be incurred as a result of his resignation from the previous institution. This kind of arrangement will be known as an indemnity contract.

Example 2 - Mr. X makes a proposition to Mr. Y to sell him some things. Mr. Y accepts the deal, but when it comes time to make payment, he refuses to do so and also refuses to take delivery of the item. When this occurs, Mr. X will sell the products to Mr. Z at a price that is lower than normal. Mr. X now has the ability to request that Mr. Y compensate him for the loss that was sustained as a result of Mr. Y's actions. There is an implicit contract of indemnity being made here.

Example 3 - A and B engage in a contract in which B guarantees that he will compensate A for any financial loss that A sustains as a result of the deal. This is a contract of indemnity that is explicitly stated.

Example 4 - X and Y enter into a contract in which X makes a pledge to indemnify Y in the event that Z brings legal action against Y.

Example 5 - A promises to reimburse B for any costs incurred by B as a result of acting on A's orders to file or defend the lawsuit against C. This expense was incurred because B defended the lawsuit against C on behalf of A. The other party is protected by the terms of this indemnification agreement.

Example 6 - It's a compromise between X and Y, and X has to accept certain loses. A prior agreement between X and Z stipulates that should X ever enter into a settlement and be forced to bear financial losses, Z will be held liable.

Example 7: A is a client who has purchased a homeowner's insurance policy from A, and B is the insurance firm that provides that coverage. A gas leak causes B's house to catch fire, and B suffers a significant financial loss as a result. In the event that B suffers a loss that is covered by the policy that B purchased, the insurance company, A, is obligated to compensate B. A contract of indemnity will be used for this kind of insurance transaction.

IX. Contract of Guarantee

A "contract of guarantee" obligates one party to fulfill the promise or absolve the liability of another party in the event that the first party fails to do so. The individual receiving it is referred

to as the "creditor," the person providing it is referred to as the "surety," and the person whose default it is protecting against is referred to as the "principal debtor." It's possible to give a guarantee verbally or in writing. A pledge to answer for the debt, default, or miscarriage of another person is what is meant by the term "guarantee," according to Bouvier's Law Dictionary. In order for a guarantee to be enforceable at law under English Common Law, it needs to be written down. A guarantee contract may be made verbally or in writing in India, but only a written guarantee contract may be enforceable in the United Kingdom.

(A) Essentials of a contract of guarantee

1. It is required that all three parties come to an agreement before it can be finalised -To be able to make such a contract with the agreement of the other party, all the parties to the agreement must agree to do so. It is important to remember that the surety will only be held responsible for the principal debtor's obligation if the principal debtor expressly requests that he do so in order to fulfil his function as a guarantor. Because of this, it is vital for the principal debtor to communicate with the surety, either explicitly or implicitlyIt is not possible to sign a contract of guarantee if the surety approaches the creditor without first telling the principal debtor.

2. Consideration - According to section 127[25] of the act, Consideration for the surety's obligation to issue the guarantee may be anything done or promised to benefit the principal debtor. The consideration that is being taken into account must be one that was recently offered by the creditor and cannot be one that was used in the past. It is not required that the guarantor get any consideration, and in some cases, forbearance on the part of the creditor in the event of default is sufficient consideration in its own right.

In **State Bank of India v. Premco Saw Mill (1983)**[26], The debtor-defendant received notice from the State Bank of India, which also threatened legal action against her. The debtor-husband defendants, on the other hand, consented to serve as sureties and pledged to cover the liability. Additionally, he signed a promissory note in the State Bank of India's favour. The State Bank decided not to pursue the threatening legal action against the debtor-defendant as a result. It was determined that the bank's willingness to be patient and accepting of the surety's conditions represented good consideration on its part.

3. Liability - The principal contract was made between the creditor and the principal debtor; therefore, it is the principal debtor's responsibility to guarantee that the conditions of the agreement are fulfilled to the letter in order for the agreement to be considered valid. The surety's obligation to make payments will only arise in the event that the principal debtor is late with one or more of their instalments.

[25] Section 127, Indian Contract Act, 1872

[26] State Bank of India v. Premco Saw Mill, Ahmedabad, 1983 SCC OnLine Guj 99

4. Is Dependent Upon the Presence of a Debt -The primary purpose is to ensure that the principal debtor will be able to pay back the debt that was incurred by the business. If there is no such debt, then the surety cannot be used to secure anything because there is nothing left to secure. As a result, there is no obligation for the surety to fulfill if the debt is invalid or has passed the statute of limitations. In **Swan vs. Bank of Scotland (1836)[27],** which took place in Scotland, it was held that there cannot be a legitimate guarantee if there is no principal obligation.

5. Basic components of a contract- All of the essential components of a valid contract will also be applicable to contracts of guarantee. Therefore, in order for a contract to be lawful, it must satisfy all of the essential elements, such as free assent, valid consideration, offer and acceptance, intent to create a legal relationship, etc.

6. No information should be hidden. - Any information known to the creditor that could affect the surety's liability must be disclosed to the surety. The assurance that was obtained by concealing such facts is void and cannot be honored. Therefore, the guarantee is void if the creditor gets it by concealing relevant information, as this renders the guarantee illegal.

7. No misrepresentation – Before the surety enters into a contract, it is not necessary for the principal debtor or creditor to disclose all of the material facts to the surety because a guarantee contract is not a contract of absolute good faith. A surety's obligation might be affected by a number of factors, but it's important that those factors be appropriately recorded.

(B) Liability of the surety

Unless specifically stated otherwise in the contract, the surety's liability is always equivalent o thatof the primary debtor. The surety's total liability is limited to no more than this amount. On the other hand, the surety's obligation could be subject to a cap. The contract can stipulate that the surety's liability will be limited to a predetermined percentage of that of the principal debtor.

(C) Coextensive with liability of principal debtor

According to the general norm, the surety is the party that is liable for paying all of the debts owed by the principal creditor to the creditor. the guarantor may be held liable for the fees, damages, and interests incurred by the principal debtor. only in situations where the contract specifically calls for it these regulations to be bent in any way.

(D) Commencement

As soon as the principal debtor falls into arrears, the surety's obligation to make good on the debt also begins to grow. Creditors are not bound by rules requiring them to file suit or give advance notice to the principal debtor. His responsibility is capped by the surety, and his

[27] Swan vs. Bank of Scotland (1836) (1836) 10 Bligh NS 627

guarantee will remain in effect only up to that level of liability.

(E) Continuation of the guarantee

A continuing guarantee is a promise that is valid for a certain number of transactions consecutively.

(F) Joint debtor and suretyship

A two-person contract with a third party to take on certain responsibilities and liabilities. Then the two people will get into a contract with one another specifying that one of them will be accountable for the default of the other person. The second contract will not include the third party in any of its terms. Even while the third party is aware of the existence of the second contract, it does not have any bearing on the liability that the two individuals have with regard to the third party.

(G) Discharge of surety from liability

Only once the surety's limit of obligation has been exhausted is he released from any responsibility he may have had. The following are the mechanisms that result in the release of the surety from its responsibilities:
Revocation: The surety has the right to revoke the continuing guarantee at any moment by providing the creditor with notice of their intent to do so. This is for any future business dealings.

i. The surety's death revokes the continuous guarantee in future transactions - The continuing guarantee in future transactions is revoked when the surety dies.

ii. A Change in terms - The surety's obligation ceases to exist after the original agreement between the creditor and the principal debtor has been modified.

iii. Release or Discharge of the Primary Debtor If the contract releases or discharges the principal debtor from his obligations, then the surety is likewise released from those obligations. It is the responsibility of the creditor, either actively or passively, to bring about the release of the principal debtor. This will result in the principal debtor being released from their obligations.

iv. Composition, Promise Not to Sue, or Extension of Time: If the creditor makes changes to the contract without consulting the guarantor, then the surety is exempt from such liability. This also applies if the creditor extends the amount of time that they have to file a lawsuit. In addition, these alterations will depict variations in the initial contract.

v. The Refusal of the Creditor to File a Lawsuit - The sheer failure of the creditor to launch a litigation against the principal debtor does not release the surety from liabilities.

(H) Certain rights in surety

There are three different sorts of rights that belong to the surety. These are the categories that are available:

1. Compensation Claims Against the Defaulting Debtor –

a) The surety can hold the creditor's rights against the principal debtor. However, these rights are not granted to the surety until after the principal debtor has been repaid in full for their default.

b) The principal debtor in a guarantee agreement is legally obligated to reimburse the surety for any financial damages sustained by the latter as a result of the guarantee. The principal debtor is responsible for repaying the entire amount that was advanced by the surety. However, there is no requirement to return the money that was paid in error.

2. Legal recourse against the creditor –

a) At the time of the surety's contract the benefit of whatever security interests the creditor may hold against the principal debtor. This right to the creditor's securities is referred to as the "right to creditor's securities." Surety still has rights over securities even though he didn't know about them when the contract was signed. In the event that the creditor loses or otherwise disposes of the security, the surety is released from their obligation up to the value of the security.

b) The Right to Make a Setoff: In the event that the creditor sues the surety, the surety has the right to make setoff.

3. Legal protections for co-sureties

a) The release of a co-surety: When there is more than one co-surety, the release of any one of them does not free the other co-sureties. The surety's obligations to the other sureties remain unchanged, as well.

b) If the co-sureties are responsible for the same debt, then they are liable to themselves for the contribution. In addition, they are responsible for paying an equal portion of the whole debt or a portion of the obligation that has been left unpaid by the principal debtor. This holds true regardless of the culpability of any other contracts, whether they are related or not. It makes no difference whether the co-sureties are aware of the liability or not, they are still responsible for it anyway.

X. Bank guarantee

If a customer fails to meet his financial responsibilities, the bank may step in and guarantee payment to the receiver or arrange for the customer's obligations to be met. The principality of the time, banks are contacted since they are the most likely to be able to meet these commitments financially. If the holder of the guarantee makes the request, you are under an absolute responsibility to pay the remaining balance.

The arrangement between the beneficiary and the creditor, which may include a bank guarantee, is separate and apart from the underlying contract, which remains in effect. Particularly relevant

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when figuring out what happens if a debtor can't pay and the bank has to cover the losses. A bank's guarantee has no other purpose than to facilitate smooth business operations; it safeguards the debtor from financial loss and gives the creditor the legal recourse it needs to collect on a debt in the event of default without resorting to costly and time-consuming litigation.

There are two different varieties of bank guarantees, namely:

1. Guarantee of advance payment: This is a common practise among purchasers of products and commodities, who utilise it to protect the funds they transfer before the things even arrive. It is the sole responsibility of the bank providing the guarantee to recover any payments made in advance of the due date.

2. Payment guarantee: This type of guarantee is more reliable since it creates a binding legal duty for the debtor to make the specified payment.

(A) Provisions in UK

In **Swan v. the Bank of European countries (1836)**[28]

Given that the aim of a guarantee is to ensure that a debt will be paid, it is essential that the debt in question be one that can be covered by the guarantee. For a debt to be guaranteed, either another party must agree to pay the bill in the event the principal debtor can't, or the surety must promise to shoulder the loss if the principal debtor can't. In the event that there is no principal debt, the guarantee will not be considered to be genuine. The petitioner provided sufficient justification for the reimbursement of the overdraft that was owed by a banker's client because the overdraft was done in defiance of the law, the parties to the overdraft were subject to a statutory penalty and the overdraft itself was null and void.After the customer failed to pay their bill, the surety company was taken to court to recover their money. However, he was in control and was not accountable. The court explained that if there is no debt or outstanding balance, then there is no need to calculate anything because there is no obligation to do so. If there is no outstanding debt and the lender is barred from pursuing any claims against the consumer, the co-obligor will bear no responsibility for any obligations. The statute of frauds in England lays forth the legal conditions for a guarantee. No action may be brought under this statute to charge the defendant upon any special promise to declare the debt, default, or miscarriage thus involving any other person, unless the agreement upon which such action shall be brought, or some settlement agreement or note thereof, shall be in written and executed by the party to be charged thereon, or the other person thereto by whom such action is brought.

[28] Swan v. Bank of Scotland NS 627

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In the case between the **Coutts Company and the Browne Lecky Company**[29]

Since the principal defendant was a minor, the second and third associate degree holders argued that the plaintiffs could not incur the overdraft fees because they could not have collected from the first defendant. Those in the second and third cases made this claim. The fact that the main litigant was a minor was not hidden from anyone involved in the case at any point. Justice Oliver ruled that the plaintiffs could not possibly win. Per the terms of Section 1[30] of the Infants Relief Act, the loan to the principal guarantee was deemed to be a contract for the purpose of generating a smart a debt, default, or miscarriage of another person. Since the Act makes it clear that no debt existed during the pendency of this case, no default occurred because the principal litigant was entitled to withhold payment, and no miscarriage occurred because of this. This means that the second and third alleged parties are essentially blameless. A guarantee of transactions that is void because it is founded on unlawfulness is also void under Scottish law, as determined in Swan v. Bank of European Nation. After the guarantee was challenged, this decision was made. To the American government, it appears that the facts surrounding this case are essentially the same, with the sole difference being that there is no unlawfulness about the current deals, as noted by Mister Justice King Oliver.

(B) Provision in India

Lakshmi Bai posted a bond in the legal proceeding known as **Kashiba v. Shreepath**[31] to guarantee that the plaintiff would be paid the amount of Rs. 1,000 plus interest. She was a minor when the bond was executed, even her dad was a member of the bond. The following was one of the most important clauses in the contract that the father had Lakshmi Bai sign: If Lakshmi Bai failed to pay, the father would pay the money. I believe that you should use some of my money to help pay for it because it is not sufficiently paid. The question that needed to be answered was whether or not the mother was accountable for this guarantee in light of the fact that Lakshmi Bai herself was not liable due to the fact that she was a minor. In this scenario, the contract between the alleged surety and the debtor is not considered collateral but rather the main transaction. It is a promise that is contingent upon receiving something of value in exchange. That's why when an adult borrows a coin from a child so the kid can play with it, and then promises to compensate the loan for the coin's value if the kid loses it or doesn't return it in order to appease the kid's anger. That the assurance is called a guarantee doesn't change the reality that the commitment is unquestionably that of a principal rather than a surety under these circumstances. The learned Judge reasoned as such and reached the judgement that the guarantor and his assigns were liable for fulfilling the bond's guarantee.

[29] Coutts Company and the Browne Lecky Company (1946),62T.L.R.421)

[30] Section 1 of the Infants Relief Act

[31] Kashiba v. Shreepath (1895) 19 ILR Bom. 697

In **P.J. Rajappan v. Associate Industries (P) Ltd.19**[32], ruled that an oral guarantee is just as valid as a written one, a guarantor whose signature didn't appear on the Guarantee documents was nonetheless held liable. This decision was made in light of the fact that an oral guarantee is also valid.

In **Punjab National Bank Limited vs. Bikram Cotton Mills & Anrit**[33], it was held that a contract of guarantee might be entirely oral, entirely written, or a combination of the two. It also can be entirely verbal and entirely written. Therefore, we conclude that the most important difference is that a minor cannot be held accountable since the contract is void ab initio under English law, even if the person making the contract knew that the minor was signing it. However, under Indian law, a surety should be held liable in the same manner as a principal debtor where a minor has knowingly guaranteed a debt.

Furthermore, a contract of guarantee must be in writing in British law to meet the criteria of the frauds act, although under Indian law, such a contract may be either oral or written.

Thus, as was just mentioned, the primary purpose of a contract of guarantee is to shield the creditor from financial loss while simultaneously instilling trust in him that the agreement would be upheld thanks to the promise made by the surety. There are two different kinds of guarantees, which are referred to as particular guarantees and ongoing guarantees. Every guarantee contract consists of three parties. The type of Guarantee that is put into effect will depend on the specifics of the situation and the conditions of the contract. Unless otherwise stated in the contract, the surety has certain rights against the other parties, and their obligation is considered to be identical to that of the principal debtor. If the creditor makes a principal misrepresentation to the debtor, or if the creditor fails to disclose material information to the debtor, the contract between the parties will be deemed void.

XI. THE DIFFERENCES BETWEEN GUARANTEE AND INDEMNITY

There are a number of significant distinctions that may be made between indemnity contracts and guarantee agreements in contrast to guarantee contracts, which involve three parties, there are only two in an indemnity. Second, the surety has an existing liability or debt that it must settle in the event of a guarantee. On the other hand, a person's liability under an indemnity is conditional and might never materialize at all. Thirdly, In contrast to a surety, an indemnifier can take action even if the principle debtor hasn't asked them to. In conclusion, the principal responsibility that an indemnifier has is to fulfill its obligations to the recipient of the indemnity. In contrast, the surety's liability is considered secondary when it comes to the guarantee. This is due to the fact that the principal debtor alone is responsible for the primary liability.

The following are some cases distinguishing contract of indemnity and guarantee:

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[32] P.J. Rajappan v. Associate Industries (P) Ltd.19 (1990) 1KLJ77

[33] Punjab National Bank Limited vs. Bikram Cotton Mills & Anrit 1970SCR(2) 462

1. Moschi vs. Lep Air Services, [1973][34]

The appellant's company, Rolloswin, imported items through the services of the respondents. Debt owed to the respondents, who were enforcing a lien, caused the corporation to be in this predicament. The Respondents, the Company, and the Appellant entered into a Tripartite Agreement on in order to release the Goods and have the Debt paid in Installments in the year 1967, on November 29. In the meanwhile, the Respondents were ordered to release the items, and the Company was ordered to pay £6,000 per week until the debt was settled. The corporation defaulted on the conditions of the appellant's personal guarantee, which he had provided. According to the ruling, the language used by the parties to convey their promise determine whether or not it is to be considered a guarantee and hence subject to all or any of the legal implications. The word "guarantee" is used, yet that does not prove anything. As a generic term for a standard warranty, it sees widespread use in business contexts. It's a term that's sometimes used incorrectly to describe what is, in legal terms, an indemnity contract rather than a guarantee agreement. If a contractual promise meets the legal definition of a guarantee, the parties to the contract are free to waive any rights or alter any duties they would normally share with one another as a result of the guarantee's existence. In each instance, the promise's meaning will change depending on how the words are really interpreted.While this may be true in some cases, the precise language used in the instant appeal are clear, unambiguous, and include no qualification except to place a limit upon the guarantor's maximum obligation under the guarantee.

2. Unity Finance Ltd vs. Woodcock, [1963][35]

The arrangement between a finance firm and a dealer is what led to the facts of this case. The financial company Unity Finance Ltd. signed a contract with a dealer named Woodcock on November 5, 1957, anticipating that he would later propose hire-purchase deals to them. This time, a re-course agreement was used. According to the court, the issue is to decide if the recourse arrangement was a guarantee agreement; if it was, then it is obvious that the dealer is released. Formally, it is an agreement to repurchase the car upon request should the hire-purchase arrangement be found to be invalid. However, in essence, it is a contract wherein the dealer assures the loan company that they will get the entire hire-purchase amount. The primary debtor is the hirer. He is the one who is principally responsible for covering the hire-purchase cost (less the nominal option fee). The dealer is not responsible as long as the hirer makes the installment payments on time and the hiring is still in effect. However, the dealer is obligated to make up the full hire-purchase amount if the hirer should default and the hiring is determined. Only secondary and contingent upon hirer default is the dealer's obligation. Employers have the

[34] Moschi vs. Lep Air Services, [1973] KB AC 331

[35] Unity Finance Ltd vs. Woodcock , [1963] 1 WLR 455

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option of unilaterally changing the terms of their contracts when doing so does not lead to a breach of contract. He is not in any way in default if he returns the car and makes all the payments necessary for the purpose. The recourse agreement is just a contract of repurchase under specific circumstances; it is not a contract of guarantee. However, when the finance company chooses the hirer due to the hirer's default, the recourse agreement is nothing more than a guarantee agreement, and the dealer is eligible to benefit from all laws that apply to those who take on suretyship for another — unless they are specifically disallowed by the contract. As a result, it was determined to be a guarantee contract.

3. **Lakeman vs. Mountstephen , [1874]** [36]

The defendant hired the contractor who filed the lawsuit because he needed the work done and promised the worker that he would pay them.The plaintiff had put off performing some sewage repair because he wasn't sure the Board of Health would pay for it. The House ruled that the jury had a right to consider these comments as evidence of the defendant's principal obligation since they did not amount to a pledge to repay someone else's debt. There can be no suretyship without a primary debtor, says Lord Selborne. The principal debtor need not exist at the time of the transaction or even be known at the time, but without one, suretyship cannot exist. Furthermore, a man cannot guarantee another man's obligation unless there is debt to guarantee. Therefore, any interpretation of this contract that would put it in the position of a guarantee for a future obligation to be assumed by the local board would tend to completely defeat the purpose of the communication, which was to resolve a concern the contractor had at the time about whether or not he had enough authority from anyone to proceed with the work. The response was given in terms de praesenti for the express purpose of removing this concern.

4. **Thomas vs. Cook, [1839]**[37]

Morris and W. Cook had a partnership in Thomas v. Cook, which was dissolved amicably as a result of Morris' retirement. Of course, Morris would be responsible for any obligations incurred by the previous partnership while he was a member of it. Morris and W. Cook agreed that W. Cook and two other people should execute to Morris a bond of indemnity to shield Morris from liability of these partnership debts as a means of protecting him. This understanding is reflected in the indemnity bond that was provided. But the defendant assured the plaintiff orally that if the plaintiff signed the indemnity bond to Morris along with the defendant and W., the defendant would pay the plaintiff's legal fees. As per the terms of the agreement, should Cook become liable on the indemnity bond to Morris, the defendant would indemnify the claimant for any damages and expenses that the claimant would otherwise be responsible for paying.This verbal promise was made in order to persuade the plaintiff to sign this bond of indemnity to Morris, along with W. Cook and the defendant. Both the plaintiff and the defendant signed the bond of

[36] Lakeman vs. Mountstephen , [1874] LR 7 HL 17
[37] Thomas vs. Cook, [1839] 10 Ad. & Ell. 453

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indemnity as sureties for W. Cook, the principal. On the indemnity bond, the plaintiff was ordered to pay Morris £400. Following that, the plaintiff obtained £100 from the estate of W. Cook, who had now passed away. The plaintiff filed an assumpsit lawsuit against the defendant to recoup the verbal commitment made by the defendant to hold the plaintiff harmless from any payments he might make as a result of the plaintiff signing the bond of indemnity to Morris. This left a deficiency of £300. The verbal commitment was deemed to constitute an indemnity contract by the court, and as a result, the defendants were held accountable.

XII. 13TH LAW COMMISSION REPORT, 1958[38]

The primary objective was to chronicle the history of the Indian Contract Act from the time it was first enacted, as well as its subsequent amendments and alterations. Another objective of this report was to revise the Act together with the Contract of Indemnity.

According to the Law Commission, the Indian Law of Indemnity set forth in Section 124[39] is inadequate since it fails to explain the various facets of indemnity. The same thinking was used to Section 125[40], which again fails to protect the rights of the promisee under Indian law. According to the Law Commission, the Indian Law of Indemnity, as described in Section 124[41], is inadequate. Rather often, Indian courts are bound to apply common law, which is equivalent to English law in this respect and is therefore relied upon quite regularly. (**The Bank of India v. Secretary of State**[42])

Indemnity, as defined by English law, is a promise to protect the promisee from financial damage resulting from events or accidents that are not or need not be the result of any person's actions or from financial responsibility for actions taken by the promisee at the request of the promisor. The Commission is of the opinion that indemnity is best understood as an assurance that the promisee will not suffer financial harm as a result of unforeseeable circumstances that cannot be controlled by the promiser. It is possible to create a claim to indemnity either through an express contract or an inferred contract. This simply broadens the scope of implicit contracts in indemnity such that if the behaviour of one person in response to the demand of another causes harm to a third party, the party that made the demand is obligated to indemnify the party that complied with the demand.

The commission later referred to the case of **Sheffield Corporation v. Barclay, 1905**[43], the following comment was made by Lord Davey: Assuming no fault on his part, a person who is charged with performing a ministerial duty under statute or common law may be held liable to third parties if he acts in a way that appears lawful but is, in fact, illegal and a breach of the

[38] 13TH LAW COMMISSION REPORT, 1958, http://www.scconline.com/DocumentLink/PAfjro2g
[39] Supra 2
[40] Supra 3
[41] Supra 2
[42] The Bank of India v. Secretary of State, AIR 1938 P.C 191 (192)
[43] Sheffield Corporation v. Barclay, 190543 SLR 556

obligation. If the individual making the request does not know, or could not know with reasonable effort, that his request is invalid, that fact is irrelevant.

The Commission believes that contracts with such features should be referred to as quasi-contractual, and it cited a statement by a certain jurist as evidence: The debtor's implied obligation, which we would now classify as quasi contractual, was the basis for the award of damages in addition to the debtor's formal pledge of indemnity. The Commission has concluded that contracts exhibiting these features should be classified as quasi-contractual, and has cited the aforementioned jurist's opinion as support for its position.

As a result of this, the commission proposed include Section 72(A) of the in its recommendations. The commission also argues that the rights of a promisee as defined in Section 125[44] are insufficient since they do not cover all of the rights that the promisee actually owns. A minority of courts and jurisprudence hold that a promisee need not prove real loss before exercising his right to indemnity and being relieved of all liabilities by the promisor. Simply put, if the promisee incurs any actual damage, he may still exercise his right to indemnity and be released from all duties imposed by the promisor.. Having said so, the Law Commission agrees with the aforementioned opinion. The English Law of Indemnity has been followed by the courts that have ruled in favour of this view, and the Commission, with the goal of further defining the notion, has referenced the following in order to buttress its position. In the absence of a specific agreement to the contrary, the party entitled to indemnity may seek to exercise his right in equity as soon as his duty to the third party has arisen, and therefore may receive relief prior to actually suffering damage. This is the case due to the fact that all courts now primarily follow equity principles. Where all courts now primarily follow the principles of equity. Thus, even in contracts of merely indemnity, where the promisor has no obligation to the third party, the promisee may, in appropriate circumstances, obtain an order requiring the promisor to set aside a fund from which the obligation may be satisfied or to make the required payment to the third party.This is because he can get a judgement ordering the promisor to create a special account from which the debt can be paid, or to pay the whole sum owed without further delay. The indemnified party will still be able to receive remedy despite the indemnifying party's inability to have its obligation to the third person enforced against the insurance party.

(A) The additions suggested by the law commission

The Commission believes that the definition found in Section 124[45] needs to be improved and changed so that it encompasses the other type of indemnity where even damages caused by natural occurrences, accidents, etc. are covered. What this means is that the Commission agrees that the definition has to be modified in this way.

[44] Supra 3

[45] Supra 3

The following is the proposed amendment to Section 124[46]. Indemnity contracts are agreements in which one party promises to protect another against financial harm resulting from the promisor's or another's actions, or from the occurrence of an unforeseeable event that does not depend on the promisor's or another's actions.

Adding a new section with the number 72A was just indicated. When it is reasonable to infer that an indemnity contract exists. In the absence of an express agreement to the contrary, a person who does something at the request of another has the right to be indemnified by the person who requested the doing of the thing if the doing of the thing ends up harming the rights of a third party even though the doing of the thing is not in and of itself obviously unlawful to the knowledge of the person doing the doing.

The following is proposed in light of the Law Commission's view on the rights guaranteed by Section 125A[47].

1. In the event that a liability has developed against the promisee in favour of a third party, the promisee in an indemnity contract may seek and, if warranted, obtain from the promisor a decree directing the promisor to discharge such liability himself or requiring the promisor to set aside a fund out of which the promisee may meet such liability.
2. A promisee may file a claim under this section regardless of whether the promisee has experienced any actual injury and even if the promisee has not previously filed a claim under this section as referred to in section 125[48]. Promisee's liability to third party is not properly enforceable against him does not prevent him from qualifying for relief under this clause.

(B) Conclusion and analysis of the 13th commission report

Indemnity is well developed, but it is lacking in several respects, as indicated by the legislature in the Indian Contract Act of 1872, which contains numerous gaps with respect to the features of indemnity. In spite of this, indemnity has a long history. Section 124[49] of the Indian Constitution's definition of "indemnity" only addresses one kind of indemnity; it does not specify what the judiciary should consider when other kinds of indemnities arise, such as those brought on by phenomena like thunder causing a fire or earthquakes, and it excludes the implied kind of indemnity, as the High Court later made clear in its ruling in the case. As a result of the aforementioned considerations, insurance policies are not included in the definition of indemnity.

However, under English law, the definition of "indemnity" and the legislative body both encompass a wide variety of indemnities, including those that are implicit. On the other hand, life insurance policies are not considered to be indemnities under English law. One cannot claim

[46] Supra 3
[47] Section 124A, Indian Contract Act, 1872
[48] Supra 3
[49] Supra 2

indemnification until one has not suffered from any loss indicated in the contract, which defeats the purpose of indemnity under Indian law. This means that indemnity is rendered meaningless under the Indian Law of Indemnity. This presents a significant challenge for the judicial system, and the promisee is left in a condition of helplessness because he or she cannot potentially pay for the damages using their own resources. This originates from the English Legal System, which, when it comes to the rights of the promisee, is the same as other legal systems and adheres to the maxim that states damnification must come before indemnity. Later, however, it was validated not only by a revision in the statute but also by the case law of Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri in both English and Indian law.

The report acknowledged both of the issues that were discussed above, and it went on to elaborate on those issues before recommending a revision to the law. The Commission recommends that the language describing the implied and express nature of indemnity be added to Section 124. It's also important to include language there specifying indemnity for losses caused by parties other than individuals.

Even further, the Law Commission advises the inclusion of an entirely new Section 72(A), which would place indemnities within the umbrella of quasi-contracts.In conclusion, it is suggested that Section 125[50] be amended in order to contain the required language in order to establish that the liability of the promisor arises in other situations outside just those in which the other party suffers loss.

Even though laws in both countries are not the same in every respect, there are several areas in which they are comparable. Both have holes in their laws regarding the genuine nature of indemnity that need to be filled. However, these voids are being addressed in tandem with the jurisprudence and hearings that occur in the courts, in response to the acknowledged needs. Reports like the Law Commission Report are useful because they help shape new legal ideas and refine the way we think about old ones.The English legal system and its laws should be enforced by the Indian courts, but the Indian legal system should not be so entirely influenced by the English legal system.

XIII. Judicial precedents in 18th and 19th century

1. In **Alfred a. James, official liquidator of the international contract company ltd. V James a. May and the liquidator of the West London & wharves company ltd. (1873)[51],** May consented, at the request of the secretary of the Contract Comp. to become the purchaser of the shares in the Wharves corporation. The shares were purchased by him for the Contract Corporation, from which he received $15 for himself. He never paid anything for these shares,

[50] Supra 3

[51] Alfred A. James, Official Liquidator Of The International Contract Company, Limited Appellant; And James A. May And The Liquidators Of The West London, &C., Wharves Company, Limited Respondents., [L.R.] 6 H.L. 328

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the money was paid by the contract company on behalf of whom he has purchased the same. May executed transfer of the shares to the contract company and took no further trouble in the matter. The contract company was ordered to be wound up. There were pecuniary transactions between the two companies. The wharves company made a call on May in respect of his shares. The shares were declared forfeited for non-payment of calls. May explained everything that had happened so far to the Wharves company directors, in consideration of his transferring them all his rights and interest in the shares they released him from all the liability to them. May took out a summon for this purpose of compelling the contract company to indemnify him against any demand that might be made by him by, or on account of the wharves corporation. In the end, the court decided that May should receive the compensation.

2. In **State of Orissa v United India insurance co. Ltd. (1997)**[52], According to An indemnity agreement is a contract in which one party commits to protect the other against loss caused to him by the conduct of any other person, according to Section 124[53] of the Indian Contract Act. An indemnity as applied to maritime insurance must not be an indemnity as defined by the Indian Contract Act because loss in such a contract is covered by the contract itself and is neither caused to the assured by the insurer's action nor by the behaviour of any other person. As a result, the jury decided that policyholders are entitled to full compensation in the event of the loss covered by the policy, but that such compensation is capped at the face amount of the policy.

3. In **Secretary of State vs. Bank of India Ltd (1938)**[54], Although the agent gave the bank with a fraudulent note, the bank used it for a legitimate purpose (redeveloping and issuing it from the public debt office) despite the agent's bad faith. Meanwhile, the true note holder initiated a conversion action against the secretary of state. The Secretary of State then filed a suit against the Bank of America based on a theory of implied indemnification. If you do something at someone else's request and it ends up violating their rights, the court says you can seek compensation from the person who asked you to do it. Indemnity agreements are often implicit, and we saw one in this case. The original norm under English law stated that if the indemnity holder suffered any damage, he could seek compensation from the indemnifier.

4. In **P.J. Rajappan v Associated Industries (1983)**[55]**,** The guarantor avoided signing the guarantee contract and said he was not willing to guarantee the agreement's fulfillment. The evidence, however, established that the guarantor had committed to sign the contract and had done so in deed. The principal debtor, the surety, and the creditor all make up the "tripartite" parties to a guarantee contract. Even though the guarantor did not sign the agreement, that does not disprove that he guaranteed the principal debtor's fulfilment of the contract.

[52] State of Orissa v. United India Insurance Co. Ltd., (1997) 5 SCC 512
[53] Supra 2
[54] Secretary of State vs. Bank of India Ltd (1938) 40 BOMLR 868
[55] P.J. Rajappan v. Associated Industries (Pvt.) Ltd., 1989 SCC OnLine Ker 312

5. In the case of **State Bank of India v Premco saw mill (1983)**[56]**,** State Bank of India served the debtor-defendant with a notice and threatened legal action. But in the meantime, her husband signed on as a guarantor, promising to cover any damages awarded against her in court. He also gave the bank a promissory note. The court found that the bank's tolerance and understanding established good faith on the part of the surety.
6. **In the case of London General Ominibus co ltd vs. Holloway (1912)**[57]**,** Lee has been designated by the bus business as the official agent responsible for collecting payments. After Lee was requested to provide a fidelity bond from a third party, his cousin Holloway stepped up to help. Neither the corporation nor Lee informed Holloway that Lee had previously misappropriated funds, so he gave the bond in good faith. The corporation filed suit against Holloway to recoup additional funds that Lee had stolen. Due to a lack of information, the court ruled that the guarantee was void.
7. **In the case of Lala Shanti Swarup v. Munshi Singh (1967)**[58]**,** For a total of 12,000, the plaintiff-respondent mortgaged some land to Bansidhar and Khub Chand. The original seller of the land in question sold it to the appellant, Shanti Saran, for a sum of sixteen thousand rupees. Shanti saran settled the bill by handing over 13,500 to Bansidhar and Khub Chand as agreed upon. Bansidhar and Khub Chand filed a lawsuit against Shanti saran for nonpayment. Since the vendor suffered a loss due to Shanti Saran's failure to release the encumbrance, the court ruled that the vendor's indemnitor (the respondent) could sue on the contract of indemnity.
8. **In the case of Khatun Bibi v. Abdulla (1880)**[59]**,** The surety had promised to ensure that the rent would be paid. The rent was increased without the agreement of surety. The main creditor did not pay the rent. A suit was filed against the surety. The court ruled that if there is a change to the contract conditions without the surety's approval, the surety is released from its obligations.

(A) Judicial view in the 21st century

1. In the case of **Rentworks India pvt. Ltd. V. Small Industries Development Bank of India (2014)**[60], It is claimed by the Plaintiff that the Deed of Indemnity is void ab initio and unenforceable for want of consideration. Without prejudice to this, it is claimed that since the occurrence of the condition upon which the Deed of Indemnity is premised, has become impossible, the Deed is void. The Plaintiff has, in these premises, prayed for cancellation of the Deed. The consideration for the Deed of Indemnity is the SRA that the Defendant has engaged into with the Plaintiff in exchange for the assignment of the Plaintiff's receivables from Subhiksha. The payment is legitimate. None of the issues raised by the Plaintiff's counsel

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[56] State Bank of India v. Premco Saw Mill, Ahmedabad, 1983 SCC OnLine Guj 99
[57] **London General Ominibus Co Ltd Vs. Holloway** [1912] 2 Kb 72
[58] Shanti Swarup v. Munshi Singh, (1967) 2 SCR 312
[59] **Khatun Bibi V. Abdulla** (1881)ILR3ALL9
[60] Rentworks India (P) Ltd. v. Small Industries Development Bank of India, 2014 SCC OnLine Bom 258

suggest that the Indemnity Agreement was invalid from the start.The ground that the consideration, on which the Indemnity is premised, having become impossible, the Deed of Indemnity has become void, also has no merit. An indemnification contract includes a guarantee to protect the promisee from financial loss or damage that results from the promisor's or another party's actions, or from occurrences that do not (or may not) depend on the promisor's or another party's actions. In this case, the Plaintiff and Subhiksha's actions have caused damage to the Defendant, and the promise is to compensate for that loss. It is not a guarantee that the loss caused by some unknowable catastrophe will be prevented for the Defendant. There is no question of the event being impossible and therefore, the contract of indemnity becoming void. Upon the MRA being terminated by the Defendant, whether Defendant can enforce the indemnity against Plaintiff, is a question of performance of the Deed of Indemnity. That question can be considered by the court which has been asked to enforce the indemnity. It is not for this Court to grant an interim restraint on such enforcement on the ground that the document, namely, the Deed of Indemnity has become void.

2. In the case of **Mula Sahakari Sakhar Karkhana ltd v State Bank of India and another (2007)[61],** The court ruled that where the wording in the questioned document is clear and unambiguous and where the questioned document was uncontested until the Bank Guarantee was invoked, the intrinsic oral evidence or earlier correspondence, executed between the appellants and the company, cannot be used to establish the intention of the document.

3. **In the case of Ongc v. Sbi overseas branch, Bombay (2000)[62],** ONGC awarded a significant gas pipeline contract to an Italian consortium at a predetermined price. The deadline for the work has to be met. M/s. Italian firm Saipem SPA/Snamprogetti missed a deadline to pay a specified proportion of the contract fee and provide a bank guarantee four months before the project was due to be finished. ONGC has the right to pursue the bank guarantee in the event of a failure. Furthermore, if the M/s. The bank guarantee for Saipem SPA/Snamprogetti has to be extended. In the event of a legal disagreement, Indian courts would have jurisdiction. There were disagreements over continuing the bank guarantee and the project went behind schedule as a result. As a result of ONGC's attempts to employ the bank guarantee, the state bank of India declined to do so.

a. If M/s. Saipem SPA/Snamprogetti had secured an injunction from the Italian bank prohibiting it from making further payments to the State Bank of India under the counter guarantee, then the bank would be prohibited from issuing any further bank guaranties in favour of ONGC.

b. Bank guarantee payments in rupees are contingent on being repaid by an Italian bank in a predetermined manner.

[61] State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293
[62] Oil & atural Gas Corpn. Ltd. v. SBI, Overseas Branch, (2000) 6 SCC 385

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c. Should the matter be subjunctive, ONGC should hold off till the issue is settled.

Since there was no evidence of fraud or an unfixable wrong, the court ruled that ONGC was entitled to exercise the bank guarantee without interference. The fact that the counter guarantee was enjoined by a foreign court is not a valid justification for the bank to withhold payment under the bank guarantee.

4. In the case of **National Highway Authority of India v Ganga enterprises (2003)[63]**, Appellant national highway authority of india put out a call for bids to collect tolls on a highway segment. For this purpose two types of securities were to be furnished, bank guarantee and performance security by way of a bank guarantee. The bid security would be forfeited in accordance with the wording of the provision if the bidder withdrew his bid during the bid validity period or if the chosen bidder failed to offer the proper performance security plus sign the Contract within the specified time. Another clause specified that now the bid will remain valid for 120 days beyond the deadline. In addition to its bid, the responding company provided what it called a "on-demand bank guarantee." ganga enterprises later withdrew its bid and did not furnish performance guarantee, following which national highway authority of india encashed the bank guarantee, already furnished. Ganga enterprises filed a petition in HC for refund of the amount. Since offer was withdrawn before acceptance, no contract had come into existence. A clause to the contrary in the tender documents or the guarantee, could not override provisions of a statute. Encashment of bank guarantee by N was illegal, and N should refund.

5. In the case of **Sreelal vs District Collector and ors. (2007)[64],** In the case of a continuing guarantee, which is an agreement by the defendant to pay any sum that may be due by a corporation to a financial institution on the general balance of its account or any other account as long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the statute of limitations for a lawsuit to enforce the bond could not be said to have started running.

6. In the case of **Maitreya Doshi v Anand Rathi global finance ltd. And another (2022)[65],** Mr. Vishwanathan argued that the terms contract of indemnification, contract of guarantee, and pledge should not be used interchangeably. It is common for one party to a contract to pledge to compensate another for financial harm that may have been brought on by the other party's own actions or those of a third party. Insurance policies frequently include indemnity clauses. Indemnity contracts give the promisee the right to seek compensation from the promisor for any losses sustained by the promisee while acting within the scope of his authority. A contract of guarantee, on the other hand, is a promise in which the promisor agrees to release a third party from liability in the case of a breach by the promisor of his own duties.

[63] National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410
[64] C.P. Sreelal V. District Collector & Ors., AIR 2007 KER 131
[65] Maitreya Doshi v. Anand Rathi Global Finance Ltd., 2022 SCC OnLine SC 1276

The term "surety" refers to the person or entity that gives the guarantee. One who guarantees another's default is called a big debtor, whereas the beneficiary of such a guarantee is called a creditor. Anything done or agreed upon for the benefit of the principal debtor could be sufficient consideration for the guarantor to issue their guarantee. Pledges, on the other hand, include putting something up as collateral in order to ensure that a debt will be paid or a promise will be carried out.

7. In the case of **Sundaram Finance limited v. Noorjahan Beevi and another (2016)[66],** It was ruled that the guarantee and indemnity agreement stands on its own and is not part of the primary contract. After the items were auctioned off, the right to sue on the contract of indemnity arose. Since the amount can now be determined, this is the sole stage at which a suit for the recovery of the overdue payment can be filed and set off.

XIV. Critical analysis

Even though the notions of indemnity (repayment) and guarentee (assurance) differ on a few things, they are both payment systems with similar values. Indemnity refers to the act of repaying, while guarentee refers to the act of providing assurance. The parallels and contrasts between the two are compared and contrasted throughout this paper.

Indemnity is defined as an obligation to hold a meeting that is repaid in the event of a disaster and may be found in Section 124. An individual has an ability to get credit for the purchase of goods or services in exchange for a valid consideration if they have a guarantee. Indemnity agreements often involve only two parties who share principal responsibility, whereas warranty agreements typically involve three parties who share varying levels of liability. There are a few more parallels that can be drawn, such as a guarantee being similar to all-encompassing legislation or a repayment being similar to something that changes on a consistent basis.

Both indemnity (also known as reimbursement) and guarantee (also known as assurance) are essentially the same thing. This indicates that restitution and assurance are not the same thing in a number of respects, despite the fact that they are comparable with regard to the topic of recompense and fundamental values such as unfair enrichment (treacherous augmentation) and good faith.

Despite the fact that they share some fundamental similarities, indemnity (reimbursement) agreements and guarantee agreements are not the same thing at their core (assurance). After everything is said and done, the guarantor can't possibly be in any more difficulty than the buyer. The instrument is going to be viewed as a guarentee if the duties of the surety are going to be behind the principal, and then they are going to come out after a commitment between the principal and the investor has been violated. The dedication is not intentional but rather a reflexive act. A repayment rises in response to a case, whereas an assurance grows in response

[66] Sundaram Finance Ltd. v. Noorjahan Beevi, (2016) 13 SCC 1

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to the default of an outsider.

On the other hand, an indemnity provides for simultaneous duties with the principle despite the fact that there is no solid reason to look at the primary first. This is because an indemnity is a form of reinsurance. In general, there is a duty between the surety and the borrower that the surety will indemnify the lender from all damages that come from the principal-lender agreement. This responsibility exists since the surety and the borrower are both parties to the principal-lender agreement. In most instances, a warranty will cover a liability that is separate from the principal's responsibility.

A promise, in most circumstances, entails a far-reaching commitment in addition to the principals being discussed. After all, the customer is the one who is ultimately responsible for the debt, and the guarantor cannot be held liable for anything beyond that. The contract may be seen as a pledge if the surety's obligations are to "stay behind" the principal and not come to the forefront until a commitment made by the principal to the lender is broken.

The act of dedicating anything is instinctive rather than deliberate. The occurrence of an incident triggers indemnities, while a third party's breach of warranty triggers warranties.

As a result, we've discussed the meanings of indemnification and warranty, as well as their key distinctions, such as the number of parties engaged and the type of risks covered.In light of this, it is important to note that the nature of a promise and an indemnity are quite distinct from one another, despite the fact that there are certain similarities between the two.

As a consequence of this, contracts of indemnity and contracts of promise can be grouped together as examples of things that share the same purpose but are distinguished by distinct qualities. Because of the technical differences between them, we will be looking at two distinct provisions of the same legislation. On closer study, however, it becomes clear that they serve the same purpose as ensuring that parties involved in business transactions are not misled.

Although choose one option over the other is largely a matter of personal preference and is heavily influenced by the goals and constraints of the many parties involved. In general, they are statutory regulations that make it easier for parties to engage in commercial transactions and level the playing field in terms of their respective negotiating strength.

XV. Suggestions and conclusion

A contract of indemnity is a particular kind of agreement in which the promisor (also known as the indemnifier) promises to safeguard the promisee (also known as the indemnified) from any harm that might be brought on by the promisor's or a third party's conduct. It is very helpful in all contractual transactions since it safeguards the promisee against loss even in the event that the contract is unenforceable, lowering the risk to which the promisee is exposed. From both Indian law and English law, it can be inferred that a contract of indemnification may have a narrow scope while also having a broad reach. Indemnity is defined in a more expansive manner

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under English law because it takes into account all of the losses that are not the result of human conduct. In contrast, Indian law places tighter restrictions on the meaning of indemnity. Similar to the previous example, a contract of guarantee is a special kind of contract whose main goal is to protect the creditor from financial loss by promising that the principal debtor's obligation will be paid in full in the event that the latter is unable to do so. The guarantee contract shall not be enforced unless there is valid consideration between the creditor and the surety. A loss is referred to as an indemnification when it happens as a result of the promisor's or a third party's activities. In contrast, a guarantee is triggered when the principal debtor doesn't make the payments according to the schedule. Both the contract of indemnity and the guarantee are distinct from one another for a variety of reasons, which have been covered in the previous section. Nevertheless, both types of contracts are significant. The first type prevents a party from suffering a loss, while the second type helps a person obtain a loan or take possession of items before the payment is made without running the risk of being indebted.

Indemnity and guarantees are concepts that were popularised by the British government during India's tenure as a colony and are now widely used in the country. Indemnity and guarantee are defined very differently under the common law of the United Kingdom and India throughout the time of the British empire, as can be seen from the many case laws and decisions that have been handed down thus far. There is a difference between indemnification under English law and Indian law due to the fact that the former is flexible enough to include damages caused by fire and maritime risk while the latter does not give its blessing. This led me to conclude that the primary distinction between English law and Indian law regarding indemnity contracts is that the former is more expansive in its coverage of damages caused by fire and maritime risk.

In addition, according to Indian law, the loss must have been brought about by some form of human agency, such as the promisor themselves or the actions of any other person. Unlike American law, English law takes into consideration losses caused by natural disasters and the promisor but not those caused by other parties. Here are the terms of the Guarantee contract: that a contract made by a minor is null and void from the start under English law. Although the other party to the contract may have known that He was a kid at the time, under Indian law, a surety who guarantees a debt on behalf of a minor is just as accountable as the principal debtor. Because under English law, every agreement reached with a minor is null and void from the start. even In addition, under British law, the Contract of Guarantee must be written, although under Indian law, it can be or as well as written.

Thus, In India, all cases of loss are heard, regardless of whether the loss has been caused by the promisor, some other party, or an accident. On the other hand, in England, all cases of loss are heard, regardless of whether the loss was caused by any person or by an accident. When the regulation was first established in England, it stated that the indemnity bearer would be compensated for any losses that he sustained as long as they were covered by the policy. Now

that there is a chance that the indemnity holder will have to pay for the loss in the future, it is the obligation of the indemnifier to ensure that this doesn't happen.

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