SIGNIFICANCE OF THE PRINCIPLE OF RESTITUTIO IN INTEGRUM TO THE NATURE OF THE CONTRACT OF INDEMNITY UNDER THE INDIAN CONTRACT ACT, 1872

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ABSTRACT

Restitutio in integrum is the principle of restoration[i] (Bant, 2007) to the original condition. This condition refers to the pre-contractual position of an injured party had no injury been caused. The principle has emerged as a pillar for awarding damages under the common law dating back to the landmark judgment of *Living Stone v Raywards Coal Co*[ii] (*Living Stone v Raywards Coal Co,* 1880). The case allowed compensation to be seen under the purview of restitutio in integrum. It opened riveting insights into the nature of the contract of indemnity. The contract of indemnity has been seen as a subset of the idea of compensation by eminent scholars including Rene Demogue[iii] (Demogue, 1918), David Pearce, and Rodger Halson [iv](Pearce & Halson, 2008). Thus contrary to its limitations to only common law tort claims, the paper seeks to exhibit that the principle of restitutio in integrum can also be held significant to the nature of the contract of indemnity under the Indian Contract Act, 1872[v] (Pollock & Mulla, 2018).

While applying the principle of restitutio in integrum, the paper focuses only on the loss suffered concerning the indemnifier and indemnity holder. The contract of indemnity is not secondary in nature and hence is also seen as an independent form of contract. The paper assumes that the action of the indemnifier promising to compensate the indemnity holder is voluntary and with free consent. It also covers the possible dissensions that could declare the relationship or significance between the two concepts of indemnity and restitutio in integrum as redundant. Possible explanations of the shortcomings in these arguments have also been

addressed. Finally, relevant case studies, illustrations, and codified sections of the Indian Contract Act of 1872 have been cited for proving the thesis statement.

INTRODUCTION

To begin with the discernment of the nature of the contract of indemnity, we must have a preliminary understanding of what the contract of indemnity signifies. In common parlance, the term indemnity implies reimbursement or protection of someone from incurring a loss [vi](Columbia Law Review, 1924). Section 124 of the Indian Contract Act, 1872 defines the contract of indemnity[vii] (Courtney, 2015) as a legal agreement by which one party promises to save the other for the loss caused to him. The loss can be caused by both a) the promisor himself and b) by the conduct/action of any other party. The person who compensates for the loss of damage is referred to as an indemnifier whereas the party who is compensated is called the indemnity holder.

The essence of an indemnity contract is protection from a loss [viii](Schultz, 1950) to the party as expressed in the paragraph before. It is upon the action of a person depending upon the occurrence or non-occurrence of an event. The implication here is collateral. Thus the contract of indemnity is contingent as defined under section 31 of the Indian Contract Act[ix] (Varandani, 1995). The contingent nature of the contract of indemnity augments the case for restitutio in Integrum. For illustration, K contracts to indemnify R against consequences of the proceedings which a third party may bring against R in a respect of a particular sum of 700 rupees. Here there is a valid contingent contract between K and R, in which K compensates R for the loss he will suffer based on the action or an event in the future.

The above illustration extends the nature of a contract of indemnity to that of an express contract but does not limit itself to the same. Express contracts[x] (Ramachandran, 1970) as defined under section 9 of the Indian Contract Act are ones where two parties have entered into a contract by words written or spoken. However, this does not mean that the law of indemnity fails to consider cases where no express contract was agreed to between the parties. It still endeavours to compensate or restore the injured party to its original condition, even if the indemnity contract is implied in nature. One could argue that section 124 of the Indian

Contract Act does specifically mention implied indemnity. However, they would fail to consider the principle of compensation within the employer-agent relationship[xi] (David, 1991). The compensation pertains to the implied nature of the contract of indemnity. Moreover, the special provisions of implied indemnity[xii] (Bansal, 2021) have been substantially covered under section 69, section145 and Section 222 of the Indian Contract Act, 1872.

Ambade, an experienced legal author mentions that a relevant case study for 'implied indemnity would be the case of Adamson vs Jarvis'[xiii], (Ambade, 2020) where the plaintiff Adamson was an auctioneer. His job was to sell goods. At the request of the defendant Jarvis, he sold the cattle given to him by the defendant in an auction. The plaintiff had no idea that the defendant was not the true owner of the cattle. The true owner of the cattle then sued the plaintiff and was successful. Upon having to pay the damages Adamson then sued Jarvis for the indemnification of the loss he had suffered. The court in its judgement pronounced that Adamson had simply acted in good faith, under the instructions of Jarvis. In his act, Adamson was entitled to assume that there was an implied indemnity agreement between them. On account of this, Jarvis had to compensate for the losses, and Adamson here was restored to his original condition. Similar lines of understanding have been reached in *K.P Ram Kuppam Chettiar vs Sp Ram Swami Chettiar*, *Betts vs Gibbins*, and *Toplis Vs Grane*, as pointed out by Hemant, another eminent legal scholar.[xiv](More, 2020). It thus strengthens the claim of the relationship between implied indemnity and restoration to original condition.

In all the illustrations and cases above I make the assumption and inference respectively, of the indemnity holder acting in good faith. Neither Restitutio in Integrum nor Contract of indemnity imply to save an indemnity holder who has committed an intentional wrongful act. This 'argument was upheld in the judgment of Geismar vs Sun Alliance and London Insurance Ltd.'[xv] (Clarke, 1981) Geismar the plaintiff had brought Jewellery into the United Kingdom, for which he failed to declare or pay the customs duty. Later the plaintiff claimed an indemnity from the insurers for the jewellery on account of loss of the same by theft. Since the jewellery was deliberately uncustomed, the judges ruled in favour of the defendant. Technically Geismar was himself acting in bad faith and so the argument of restoring him for the loss suffered should hence be far from consideration. The fundamental logic here is that a party

acting carelessly or in bad faith should not be allowed to entirely shift the claims or damages occurring against him to another non- negligent party or the indemnifier in this case.

Finally, let's take a look at the two crucial arguments that could arise against the establishment of the significance between the relationship of the law of indemnity and restitutio in integrum. 1) The contract of indemnity allows the indemnified to save himself from liability. Here the liability must be absolute. In such a case the indemnified will be entitled to call upon the indemnifier and the indemnifier will have to pay it off. This has been well 'witnessed in the leading judgement of Gajanan Moreshwar vs Moreshwar Madan' (Verma, 2021)[xvi]. Succinctly put, unless you suffer an actual loss being indemnified, you cannot technically be restored. Had he made the payment, then the restoration would have taken place. Sais Neha Das a research scholar refers to the case of *Osmal Jamal and Sons. Ltd vs Gopal Purushottam* under this context (Das, 2016)[xvii], where the court held that indemnity does not mean repayment after payment. Instead, it requires that the indemnified should never be called for payment in the first instance.

In response to the first argument, it is well established that in this paper I have only attempted to explore the possible significance between the contract of indemnity and the principle of restoration. If no repayment is taking place then the concept of restoration does not apply. However, the principle is significant to a contract of indemnity does not mean that it rests solely on the pillars of restitutio in integrum. The argument fails to consider the evolving nature[xviii] (McKenna & Bartler, 1965) of law. The argument is being made in the light that law is static. One cannot disregard the fact that the dynamic nature of law has caused the contract of indemnity to change over the years. Moreover, the original maxim of English law which states that "you must be damnified before you claim to be indemnified" [xix] (Potamkin & Plotka, 1994) still finds its existence in judicial practices in India. The Indian courts have not disregarded this principle and it's open to interpretation, on a case-to-case basis. The view that liability of the indemnifier commences only when the indemnity holder suffers an actual loss, was upheld in *Chand Bibi vs Santosh Kumar Pal* [xx] (*Chand Bibi v Santosh Kumar Pal*, 1933).

In Chand Bibi Vs Santosh Kumar Paul the defendant's father while purchasing certain

property, promised to pay off the mortgage debt incurred by the plaintiff and indemnify him, if they were held liable for the debt. When the defendant's father failed to pay off the mortgage debt, the plaintiff sued him to enforce the agreement. The court took note of the fact that the plaintiff had not suffered any loss yet. Hence, the suit was held to be premature as far as the cause of action for indemnity was concerned. A similar 'conclusion was derived in the landmark case of Shankar Nimabji vs Laxman Sapdu' (LawTeacher, 2013)[xxi]. The court held that the plaintiff cannot sue the defendant in mere anticipation or because there could be a deficit in the future.

The second argument deals with physical deprivation. What if the indemnity holder suffers a loss physical in nature, including bodily harm? What if an irreparable loss is caused, such as the death of the indemnity holder? The contract of indemnity does not include Personal accident insurance. Limbs or any other body parts cannot be measured in terms of money for the indemnity holder. Under this scenario, how will Restitutio in Integrum apply if restoration cannot take place? A 'case study used for the argument is Graham vs Egan' (Kanha, 2021)[xxii]. The point of contention here was that should money damages be paid or the property itself be restored to the plaintiff? It was held that the principle of restitutio in integrum can be implemented in letter and spirit, only when there is a complete restoration that is restitutio in integrum. Evidently, the physical restoration cannot take place for death and physical injury and hence the principle of restoration becomes insignificant to the contract of indemnity.

The second argument is irrelevant on account of several reasons. Firstly, it fails to consider that physical deprivation being not equated to mere monetary compensation is not specific to the contract of indemnity. It's a general concept in law because one cannot put a price on someone's body parts under the concerned context. For the same reason, the principle of restoration also includes compensation for terms of loss of amenities. It further reflects upon the decrease in quality of life or standard of living on account of the pain and suffering caused due to the loss. This logic is further established in terms of irreparable loss or death. The contract of indemnity generally covers insurances like fire, motor but life insurance [xxiii] (Van der merwe, 1970) is held as an exception to the nature of indemnity contracts. Life insurance is a contract to pay an assured sum in case of death not an indemnity for any amount of loss suffered by the insured. The case study for Graham vs Egan also becomes irrelevant because

in the same judgement it was held that complete restoration should only be implemented if there is ground for restoration. You cannot restore someone's life, so there would be no ground actual for restoration in the first place.

In conclusion, restitutio in integrum is often seen only in the light of awarding damages. However restoring the indemnity holder, or providing immunity to restore the indemnity holder in case of loss suffered is an interrelated concept. The significance as highlighted throughout the paper should not be confused with dependence. The explicit and implied nature of the law of indemnity rightly opens the scope for the application of restitutio in integrum. With that being said, I do understand that a lot has not been written about the implications of this principle on a contract of indemnity. Instead, restitutio in Integrum is seen in the light of damages under common law, especially in the United Kingdom. In the words of Harvey McGregor, "If not for the principle of restitutio in Integrum, damages should have no lawful existence" (McGregor, 1965)[xxiv]. Law of indemnity on the other hand, if not derived, can surely be inspired from restitutio in integrum.

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