

Advanced Contracts, Tendering and Public Procurement
Prof. (Dr.) Sairam Bhat
Professor of Law, National Law School of India University
Special Contract: Indemnity- Part 02

(Refer Slide Time: 00:16)

- **Enforceability of the Contract**

- Commencement of Liability is either when the indemnified has actually suffered the loss or when there is such apprehension.
- *Gajanan Moreswar v Moreswar Madam Mantri AIR 1942 Bom. 302*
- **Facts of the case:** The plaintiff entered into an agreement with the Municipal Corporation of Bombay for the lease of the particular land for a stipulated term. In subsequence with the agreement, the plaintiff was put in the possession of the land. At the request of the defendants, the plaintiff agreed to transfer the benefit of the agreement to the defendants and put the defendants in the possession of the land, and commenced to erect a building on the said plot. The material for construction was supplied to the municipal corporation, however, the sum of Rs. 5000 was not paid to Keshava. On the request of the defendants, the plaintiff agreed to mortgage the property to Keshava by depositing the title deeds. Further on, another Rs. 5000 became due to Keshava from the defendants. Again on the request of the defendants, the plaintiff extended the charge on the mortgage to Rs. 10,000 with interest. Later on, the transfer of the plot was sanctioned by the Municipal corporation in favor of the defendants. A suit of indemnity was filed by the plaintiff in respect of the liability he had undertaken for the defendants.
- **Issues raised:**
 - Before the indemnity amount becomes due, can the indemnified claim to be indemnified?
 - Unless and until the indemnified had suffered the actual loss, is he entitled to sue?
 - When does the commencement of liability take place in this case?
- **Held:** The liability of indemnifiers commences as soon as the loss of the promise becomes absolute, certain, and imminent. It is not necessary that the promise should pay for the loss.



While understanding contractual liability on indemnity, it is important to understand the fact that, while indemnity is viewed as an alternate to damages. One should understand that, the cases in India and in other countries and jurisdictions have said that, lot of similarities does exist between damages in indemnity however, indemnity is different from damages for a couple of reasons.

And one of them is that when can indemnity commences or when does an indemnity liability commence in a contract. Usually when you, see it as an extension of a new form of damage then you will probably come to this conclusion that indemnity only arises when a loss is made or when there is a recovery of dues or when there is some kind of damage or proof of the same. So, unless someone has, suffered a loss, indemnity will not come into existent.

This is a kind of understanding that most of us have when we read indemnity along the damages. However, the slight distinction over here is indemnity can commence as soon as the amount of indemnity is confirmed. When the liability is certain and it is not that, the liability has to be absolute or it is not saying that, let us assess the liability finally and only then indemnity will commence.

So, once the, liability is certain and precisely known to require indemnity, and if that amount certain in terms of the actual loss, then the indemnifier's liability commences. So, it is

important to understand that indemnity is not always to cover your loss. Of course, it is, but once the loss is absolute, certain, and eminent, then indemnity should commence. So, you cannot wait for or postpone your remedy to claim indemnity after an assessment of actual or total loss.

An indemnity can even start as a contractual obligation right from the time the contract is made. So, you do not necessarily wait for indemnity for natural breach of contract. You do not wait for the damages to be totally absolute, in terms of the final figure or amount and then you do not want it to, in terms of the proof or actual loss.

The obligation on indemnity can commence at any given point of time as soon as there is an absoluteness and certainty of loss. So that is, what was stated in this Bombay High court case of Gajanan Moreshwar versus Moreshwar Madam Mantri and it is a very important aspect of the distinction about, indemnity as well as, the kind of compensation or damages that you can seek in a contract. The aspects of remedies in contract and damages are usually a remedies for breach of contract. the obligation of indemnity is something fronts that commences even before breach. So, it is not some kind of a remedy only after breach and it can even commence before, the actual breach of contract takes place. It means that you have a duty to indemnify, you have a duty to hold the person harmless, you have a duty to compensate a person as soon as he presents, that kind of a claim. Where it is in absolute terms, some kind of obligation that you need to indemnify that other person.

So, it is not remedying post breach of contract, or is not a condition on breach itself duty and non-obligation to compensate, reimburse, to hold the other person as being harmless, to ensure that the other persons do not continue to suffer any other loss, or any other, damage that is when indemnity can be brought in.

Indemnity is a contractual obligation. It commences during the contract, and it is not some kind of remedy post breach of contract, though yes, it is, used to also assist the kind of loss but the duty to indemnify commences even before the actual breach of contract take place.

(Refer Slide Time: 05:01)

- **Rights of indemnity under the Insurance Policy**
 - Except for life insurance and marine insurance all the insurances are covered under Sec 124 of the ICA,
 - In *Godsall v. Boldero 1807*, it was held that the policy of life insurance is a contract not to make good a loss but to pay a sum of money on death. The loss of life cannot be calculated.
 - Essential
 - Assured has to show his interest in the subject matter of insurance.
 - Insurer to make good the loss on the happening of the event or on maturity.
 - The indemnity is related to the stipulated amount.
 - Assured should not make a profit out of the insured event.
- **Rights of indemnity holder**
 - To all the damages paid in connection with any suit to which the promise of indemnity applies; and
 - All the costs and sums which he may have paid in bringing or defending the suit.
 - When there is dishonesty, lack of good faith and contravention of the promisor's request, the right to indemnity cannot be claimed.



Finally, when you look at indemnity under insurance, we always say that to cover the indemnity, you always take an insurance policy, and I have given you a couple of examples of how the risk of indemnity or the anticipated loss of indemnities cover through the insurance scheme. However, you must note that, there are several kinds of indemnities that one seeks for in terms of the kind of loss or damage one incurs.

Indemnity is a kind of insurance, but all insurance policies are not indemnity, especially life insurance, because you cannot, assess, the loss of life, in terms of monetary compensation.

So, the loss of life is not equated to what has been promised in the insurance. It can be more than that or it can be less than that. So, it is just a coverage of risk, though indemnity is something that should compensate in monetary terms the kind of loss that has been incurred. Life insurance does not do that. So other forms of insurance were considered as an indemnity kind of contract above and beyond 124

So, what are the rights of an indemnity holder? I think this is critical, and under section 125, you will notice that an indemnity holder to whom a promise of indemnity has been made can recover a couple of things. First, he can recover all the kind of damages that he has occurred or he must pay in a suit. So, in a case that is filed against an indemnity holder, if he is directed to pay some kind of damages, then he can recover all that, this is point number one.

This clearly says that, because of your fault, if I face a litigation, anything that I incur in that litigation, you are responsible to indemnify. Second, in defending the suit or in bringing a suit. So, there are two ways. So, you can bring, you can defend. Any kind of cost or some that

include in doing the same, including legal fees, and legal cost or any kind of cost, can also be claimed under indemnity. This is what the law says, but broadly you will understand that contractual clauses can even say beyond it and you will notice that, any kind of damages in a suit or all costs that, you have to defend can still be considered as some form of direct loss. But as mentioned in the past, indemnity contractually can also go beyond the direct loss and cover consequential damages, which are indirect damages, which will be discussed later.

The Indian law on damages does not permit you to claim consequential losses. One can only claim direct damages, which are reasonable in nature, which can be foreseen and which have a natural consequence to the breach of contract, and which are not very remote to the breach of contract. However, indemnity probably provides you that kind of discretion to get all other forms which damages cannot provide.

Every government tender or agreement should include a strong and mutual indemnity clause. It is essential to emphasize this requirement because it is unfair to expect the contractor alone to bear the responsibility of indemnifying the government for all types of losses or damages resulting from their actions. Similarly, the government should also be held harmless and compensated if they suffer any harm or injury due to the contractor's actions, acts, or omissions, which may encompass various factors. This ensures a fair and balanced approach to indemnification in government contracts.

Like for example, if a contractor has to be given a land for construction or doing a works contract, if that is delay and due to the delay of handing over the land, the contractor suffers any kind of a loss or injury, or because of the construction work on a land, the villagers actually assault or attack a contractor, and he suffers losses, or his employees suffer any kind of an injury, in those circumstances, the government owes an obligation to indemnify the contractor.

Therefore, it is crucial to apply and incorporate the principle of mutuality in contractual obligations. This principle serves as a vital aspect that one must imbibe in contractual obligations. Additionally, it becomes essential to include a well-defined indemnity clause that outlines the scope of coverage and exclusions. It is necessary to determine what falls under the purview of indemnity, such as natural factors, human factors, or accidents. These three categories serve as important considerations when drafting an indemnity clause.