



## **Comparison of Privity of Contract & Consideration Under Indian Law and English Law**

*Janhvi Rajendra Takalkar<sup>1</sup>, Asst. Prof. Akshay Kabra<sup>2</sup>*

<sup>1</sup>LLM-I Sem-II, <sup>2</sup> Guide and Supervision  
Savitribai Phule Pune University, Pune

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### **ABSTRACT**

Together, privity and contract give rise to the doctrine of privity. It alludes to a confidential or exclusive aspect of the agreement. A contract cannot grant rights or impose responsibilities on any person who is not a party to the agreement, according to the common law doctrine of privity of contract. In essence, privity of contract refers to a contract that permits the parties to sue one another but forbids third parties from doing the same. Furthermore, the concept of consideration dictates that a promise must guarantee or offer something in exchange for the promise being made in order for it to be enforceable. The idea is that the only people who should be able to use their rights to enforce contracts, file lawsuits, or seek damages is the party to the agreement.

Obligations and rights under the contract are exclusive to the parties and do not apply to any other party. The concept of privity of contract emphasizes that anyone who is not a party to the contract—a person who is a stranger to the contract—is not permitted to file a lawsuit based on the terms of the agreement. The phrase "Parties" may sound straightforward, but there are situations in which it may not be clear who the parties are in a given situation, and as a result, it may not be clear who is legally liable for an incident that may occasionally occur or who is entitled to compensation. The preliminary investigation revealed that the matter of the rationale and applicability of this idea

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**Keywords:** *Doctrine of Privity, Contractual Parties, Consideration, Indian Law, English law, Stranger, Contract, Third Party.*

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### **INTRODUCTION**

An Intention to enter into a contract is a prerequisite for any legitimate agreement, and only the parties to the agreement may bring legal action or accept legal action on behalf of the other party in the event of a breach or non-performance. This idea, known as Privity of Contract in English law, is recognized as a common law principle. It expressly permits only one party to a contract to bring legal action or to be sued, and it forbids them from enforcing their obligations and rights against other parties. Additionally, it forbids suing a third party for whose advantage the contract was implemented. According to jurisprudential analysis, the interest theory forms the foundation of the privity of contract.

he right to sue others for breaching or failing to fulfill on a contract; no one else may file a lawsuit or be sued.

English law makes it clear that "consideration must move from the promisee alone." The promisee becomes "stranger to consideration" and is unable to enforce the promise if it is provided by someone other than the promisee. The term privity of consideration refers to this idea

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### **HISTORY**

Prior to 1833, individuals who weren't parties to a contract were able to enforce its terms—typically, the relatives of a promise—under English law. The doctrine of consideration and the doctrine of privity came together to form the rules stating that the consideration had to move from the promisee. In other words, if something is promised in exchange for nothing in return, the promise is not legally enforceable unless it is made in the form of a title deed. Thoughts originate from the assurance. The fact is to say, as it was made clear in *Dunlop Tyre co Ltd v. Selfridge Ltd.*, <sup>1</sup>if Party X is able to enforce a contract, Party X is required to provide the promisor with the anticipated compensation.

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<sup>1</sup> *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] UKHL 1

Since the rule of privity was maintained in *Kepong Prospecting Ltd. v. Schmidt*<sup>2</sup> in 1968, this rule of consideration is distinct from the rule of privity and achieves the same goals while attempting to be closely related.

Consider the *Price v. Easton* case in 1833, which established the doctrine of consideration and was closely related to it. This was connected to and established by the well-known *Tweddle v. Atkinson*<sup>3</sup> decision, which established the doctrine of consideration in general. An outsider cannot get rights under a contract, nor can an individual be bound by the terms of a contract in which he is not a party.

Another instance that comes to mind is *Hadves v. Levit*<sup>4</sup> from 1632, in which the court dismissed the complaint brought by the groom's father due to the bride father's failure to fulfill a promise, reasoning that the son, being the party with an interest, should have filed the claim instead. In a different *Dutton v. Poole*<sup>5</sup> case, a father's lawsuit against his son was dismissed on the grounds that his sister, who is the interested person, should bring the lawsuit first.

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## PRIVITY OF CONTRACT: ENGLISH LAW

According to the doctrine of privity of contract, only parties to an agreement may enforce it. The rule of privity has been significantly undermined in recent years, allowing third party beneficiaries to recover damages for contract breaches in which they were not parties. Previously, only parties to a contract could file a lawsuit for breach of that contract. A recent example in England is the enactment of the Contract (Rights of Third Parties) Act, 1999.

The *Tweddle v. Atkinson*<sup>6</sup> decision recognized and established the privity of contract norm for the first time. In order to help Tweddle and his wife, Tweddle's father and Atkinson, Tweddle's father-in-law, made a financial commitment to one another. While Tweddle's father fulfilled his end of the agreement, Atkinson passed away before making any payments. Tweddle filed a lawsuit against Atkinson's executors. Despite the fact that the contract was for his benefit, his action was dismissed since he was not a party to it. The court ruled that in the lack of consideration from Tweddle to Atkinson, it was not conceivable to assert that there existed an implicit contract between the two parties. In this instance, the plaintiff was unfamiliar with contracts.

In *Dunlop Tyre Co. v. Selfridge*<sup>7</sup>, the House of Lords upheld the principle of privity of contract. The complaining party agreed to give Dew & Co. Wholesale Distributors an understanding from retailers prohibiting them from selling tires for less than the plaintiff's stated price when she sold them tires. Dew supplied some of the defendants' tires, who then sold them for less than advertised price. The plaintiff requested damages as well as an injunction. The action ultimately failed because the plaintiff was not a party to a contract that existed between the defendants and Dew.

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## PRIVITY OF CONTRACT : INDIAN LAW

In India, too, the contract privity norm has been in effect. The common law concept of privity of contract has been broadly applicable in India, meaning that only a party to the contract is authorized to enforce it, even though the definition of consideration under the Indian Contract Act is broader than under English law. The privy council's ruling in *Jamna das v. Ram Avtar*<sup>8</sup> serves as the basis for the rule's applicability in India. In that instance, A had given X a mortgage on some property. X filed a lawsuit against B in an effort to get the mortgage money back. The privy council informed the court that because X and B did not have a contract, X could not

contract between the owner of the circus and the financier. Since the advertiser and the financier did not have a privity of contract, the advertiser's lawsuit against the financier was overruled

Contract privity often applies only to the parties to the agreement, which is typically a sale of goods or services. Additionally, there are two options: vertical and horizontal privileging. When a third person is to receive the advantages of a contract, horizontal privity occurs. A contract between two parties and a separate agreement between one of the Parties and a different person or business is known as vertical privity. A third party that receives a benefit under a contract is not entitled to take legal action against the parties to the contract for any further benefits. As in the case of a producer selling a product to a distributor, who then sells it to a retailer. A customer purchases the merchandise from the shop. There

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<sup>2</sup> *Kepong prospecting Ltd v Schmidt- Case Summary* ,2020

<sup>3</sup> *Tweddle v Atkinson* [1861] EWHC QB J57

<sup>4</sup> *Hadves v Levit* (1632) Het. 176

<sup>5</sup> *Dutton v Poole* 83 ER 523

<sup>6</sup> *Tweddle v Atkinson* (1861) 1 B & S 393

<sup>7</sup> *Dunlop Tyre Co V Selfridge Co Ltd* (1915) AC 847

<sup>8</sup> *Jamna Das v Ram Avtar* (1911) 30 IA 7.

The maker and the customer do not have a privity of contract.

This does not preclude the parties from taking additional legal action, as was the case in *Donoghue v. Stevenson*<sup>9</sup>. In this instance, Ms. D's friend purchased a defective bottle of ginger beer from the shop owner. Although there was no privity of contract in place, it was determined that the manufacturer owed its customers a duty of care, and Ms. D was granted damages in tort. It is crucial to realize that the term "privity" refers to a close, reciprocal, or sequential relationship to the same property right or the authority to uphold a warranty or promise.

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## PRIVITY OF CONSIDERATION

It is necessary to distinguish the Indian rule that prohibits strangers from filing lawsuits from the stranger to contract rule. The Indian Contract Act states that consideration can be given by either the promisee or a third party; this does not, however, change the rule of privity of contract. The principle is that an individual may not have received any consideration for himself, but he can still enforce the terms of the agreement if he is a party to it.

The promisee or any other person may provide consideration, as per the Indian Contract Act.<sup>10</sup> It implies that it doesn't matter who provides a commitment as long as there is consideration for it. It can come from the promisee or, in the event that the promisor is unopposed, from anybody else. However, English law has a different stance. The promisee himself must no longer be the primary focus there. As an illustration, suppose A agrees to give B his watch in exchange for payment of Rs. 5,000, which is made to A by C rather than by B. In England, this contract will not be enforceable; but, in India, things are different because Section 2(h) explicitly stipulates that consideration may be given at the promisor's request by the promisee or by anybody else.

This idea is further explained in the *Chinnaya v. Ramayya*<sup>11</sup> case. In this case, A, an elderly woman, left her wealth to her daughter (the defendant) with the condition that the daughter give A's brothers (the Plaintiffs) an annuity of Rs. 653. The defendants and the plaintiffs agreed that day that she would pay the annuity in accordance with A's instructions. The stipulated amount was not paid by the defendant. She argued that the plaintiffs had no consideration and, therefore, no right of action in a lawsuit brought by the plaintiffs against her.

The Madras High Court ruled that the defendant's mother had provided sufficient consideration in this contract, which is required to uphold the plaintiff and defendant's agreement. It is evident from this instance that although A and B engage into a contract, A does not personally supply any consideration to B; instead, B receives consideration from a third party, C. A is unfamiliar with consideration, yet he can nonetheless hold B accountable for the terms of the agreement. It is important to keep in mind that this only applies to Indian law; in English law, the situation is different and the consideration can only go from the promisee to the consideration. A foreigner cannot, under any circumstances, go to the consideration.

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## CONTRACTS (RIGHT OF THIRD PARTIES) ACT 1999

One of the most significant reforms to emerge from the rule of privity, or more precisely the third party-beneficiaries, is this Act. Following the release of interim recommendations indicates that the changes have favored the Doctrine of Privity after five years. The Law Commission set forth its position under English law, although they are unable to view the substantial collection of judicial and intellectual possibilities. Nonetheless, the panel suggested in its core recommendations that third parties need to be able to enforce clauses in contracts wherever "The Contracting Parties aim to confer: such a right upon the third party aim to confer a benefit on the third party."

The contractual parties in this instance do not suggest that the third party beneficiary be denied the ability to enforce the agreement.

According to this assessment, Lord Haldane acknowledged the substantial departure from the prevalent view of the notion of privity, which prevailed in the previous century. The Law Commission is one of the fundamental tenets of English law.

The Law Reform Commission recommended in the final report that, in three scenarios that were studied and expected for a draft bill named the "Contract Law (Privity of Contract and Third Party Rights) Bills, 2008," a third party should be entitled to assert its rights under a contract. The LRC finds that a third party's ability to enforce a contract must include restrictions on when and how it can be done.

The United States legal system recognized a third party's power to litigate under a contract for its own benefit. In several commonwealth nations, it was introduced by statute. The Indian Law Commission should implement the provisions of the Contracts (Rights of Third Parties) Act 1999, which allows third parties to enforce contracts in India.

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<sup>9</sup> *Donoghue v. Stevenson* [1932] All ER Rep 1; [1932] AC 562

<sup>10</sup> *Indian Contract Act* 1872, S.2(d)

<sup>11</sup> *Chinnaya v Ramayya* (1882) 4 Mad. 137.

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## EXCEPTIONS

**Trust of Contractual Rights:** In *Dunlop Pneumatic Tyre Co. v. Selfridge & Co*<sup>12</sup>, Lord Haldane pointed out one of the exceptions to the theory of Privity of contract. The court acknowledged that a right to sue under a contract may be granted by property, such as under a trust, even if it was stated in this instance that only parties to the contract have this ability. In this scenario, the enforcement of the contract is not the basis for the third party's action.

**Conduct, Acknowledgment, and Admission:** Although there may not always be a privity of contract between the parties, if one of them acknowledges or admits in any way that the other has the right to sue him, he may be held accountable under the theory of estoppel. There was no contract between the plaintiff and the defendant in *Narayani Devi v. Tagore Commercial Corp. Ltd.*<sup>13</sup> but the defendant had promised to pay the plaintiff's husband a specific amount during his lifetime and then to the plaintiff after that. The issue of the plaintiff's ability to sue the defendant had come up in this instance. It was determined that the defendant had given the plaintiff a specific payment after following the agreement, she had requested an extension of the payment deadline in the wake of her husband's passing. It was decided that the plaintiff was entitled to her claim since the defendant had established such privity between them by their actions and admissions.

**Maintenance Under Family Arrangements:** When a contract under a family arrangement aims to protect a third party's interests, the beneficiary may bring a claim in his own right. This kind of action has frequently been permitted when it comes to the division of joint family property amongst the male members; the purpose of this provision is to ensure the upkeep of the female family members. In *Sundaraga Aiyanger v. Lakshmiammal*<sup>14</sup>, the male family members' partition-deed stipulated that the defendants would pay a portion of the plaintiff's marriage-related costs. It was decided that, despite the plaintiff's non-participation in the transaction, the arrangement created a situation akin to a trust in her favor.

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## EXAMPLES OF THE PROBLEMS CREATED BY THE DOCTRINE OF PRIVACY OF CONTRACT

Three scenarios serve to highlight the issues raised by the privity of contract concept concerning beneficiaries who are third parties. The first is similar to the circumstances in *Beswick v. Beswick*. When A and B reach a deal wherein A commits to paying C a certain amount of money. Both parties agree that C should benefit from A's commitment; nevertheless, due to the law of privity, C cannot sue A in the event that A defaults. For the advantage of C, B must try to enforce the contract, even if B may not have experienced any losses.

The second issue arises in the context of construction, wherein A, the developer of the property, and B, the contractor, engage into a building contract. A procures guarantees from B, for the benefit of C, purchasing that any problems will be fixed within a specified timeframe. Since the buyers are unaware of the terms of the building contract, in this scenario, C will have no legal recourse against B should they later discover a flaw in their building. However, the truth is that A acquired B's warranties in order to benefit C.

Essentially, a developer might deduct some money from the contractor's payment to guarantee that B keeps its end of the bargain with A for C's benefit. The insurance context in the third scenario is when A, the employer, buys insurance from B, the insurer, for the benefit of A and C, the employees. Even when the parties to the insurance contract are in C's favor, C may have trouble getting indemnity from B because C is not a party to the contract.

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## NEED FOR AMENDMENT

The implementation of the doctrine of privity ultimately results in some degree of difficulty and rigidity, which in turn produces unfairness to those who are impacted. Therefore, the Law Commission of India proposed in its Thirteenth Report that a new section 37A be added to the Indian Contract Act in order to prevent injustice resulting from the strict application of the concept.

37A: Advantage for other parties:

1. Unless otherwise specified, a contract that directly confers on a third party must be enforceable by the third party in his own name, subject to any defences that would have been admissible between the contracting parties.
2. The parties to a contract cannot add a new contract for it or repudiate it after it has been adopted by a third party directly benefiting from it, either explicitly or implicitly, so as to impair the rights of the third parties.

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## DIFFERENCE BETWEEN INDIAN LAW & ENGLISH LAW

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration from the promisee," according to Section 2(d) of the Indian Contract Act, is considered consideration.

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<sup>12</sup> *Supra* note 7.

<sup>13</sup> *Supra* note 8.

<sup>14</sup> *Sundaraga Aiyanger v. Lakshmiammal* (1915) 38 Mad 788.

The words "the promisee or any other person..." appear in this section. conveys the idea that, provided the promisor has no objections, it doesn't matter who provided a promise as long as there is consideration for it. A third party may provide this as payment for an agreement.

The consideration must shift from the promisee to the promisor alone, according English law. The promisee becomes strangers and is unable to execute the promise if another person provides the consideration. There is a distinction between Indian law and English law regarding consideration and privity laws.

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## CASE LAWS

The judiciary, along with other law reform agencies, has played a major role in winding down the Third Party rule in recent years. The following lists the requests for reform that the judiciary has made in previous cases.

In the *Beswick v. Beswick case*, Lord Reid stated that the Law Revision committee's proposal states that if a contract's terms provide a third party with a benefit, the third party may enforce the contract in their own name. While he implied that legislation was the best course of action, he listed the reasons why the House of Lords might believe that addressing the issue was necessary if there was still an extended period of parliamentary procrastination.

The non-recognition of third party rights in *the Swain v. Law Society* case is interpreted by Lord Diplock as "an archaic shortcoming that has for several years been regarded as a rebuke to English Law."

Regarding *White v. Jones*, Lord Goff, the Pioneer Container, raised concerns about the survival of tenet. In this instance, he stated that the law is inadequate because it is acknowledged to be impeded by the notion of consideration and privity of contract.

In the *Marchington v. Vernon* case, Buller J. explained the facts by saying that a third party may pursue legal action based on a promise made by one party to another for the benefit of the third, regardless of the laws governing mercantile transactions.

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## CONCLUSION AND SUGGESTIONS

After reading the entire study paper, I discovered that the sole party to the contract has the exclusive right to sue or be sued, and that it is expressly forbidden for them to exercise their obligations and rights against a third party. Suing a third party for whose advantage the contract is implemented is likewise forbidden.

Additionally, we have noted that Indian and English law differ in their views on consideration and privity of contract. In my opinion In accordance with Indian law, an individual who is a party to a contract may enforce it even though he has not received any value for it. It is important to distinguish the Indian rule "stranger to contract cannot sue" (Privity of Contract) from the rule "stranger to consideration can sue." Because the doctrine of privity of consideration is not applicable in India, yet the privilege of contract is applicable in both England and India, "stranger to consideration" may sue but stranger to contract cannot.

The common law doctrine of the Doctrine of Privity is widely recognized in India, despite the fact that the Indian Contract Act defines consideration more broadly than English law and permits consideration to come from non-contracting parties. According to the doctrine of privity, only the parties to a contract are generally entitled to rights and responsibilities flowing from it. However, privity of consideration stipulates that the only person authorized to enforce the contract and take legal action against it is the one who has given consideration; in this regard, consideration is related to privity of contract.

Additionally, we have noted that the *Tweddle v. Atkinson* case recognized the idea, which the court had been implementing from the early 17th century.

The comparison of consideration and privity of contract under English and Indian law was covered in the next section.

We have also spoken about the contract's consideration and the exceptions to the privity theory. It is clear from the explanation above that the law of privity and consideration to a contract has three primary exceptions. They are as follows: Admission is the last, followed by Conduct, Acknowledgment, and Trust of Contractual Rights.

The doctrine of privity was implemented in England, as we saw in the following section, and it was eliminated by the Law Revision Committee of 1937 in its sixth report. However, with the passing of The Contracts (Rights of Third Parties) Act, 1999, this viewpoint was altered. The Contracts (Rights of Third Parties) Act, 1999 is a concept that is easily understood.

In addition, we have seen a number of case laws, such as *White v. Jones*, *Swain v. Law Society*, and *Beswick v. Beswick*. and comprehend the issues brought about by the privity of contract using a variety of examples. Finally, we have also researched the contents of section 37A as well as how it should be placed into the Indian Contract Act.

Currently, in England, a stranger may file a lawsuit for breach of contract or may be sued themselves. However, things remain the same in India, where it is expressly forbidden for parties to exercise their rights and obligations against third parties and only the parties to the contract may sue or be sued.

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