

RESEARCH PAPER- LAW OF CONTRACTS

TITLE: PRIVITY OF CONTRACT

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BURNISHED LAW JOURNAL

ABSTRACT

The doctrine of privity is a collective result of privity and contract. It signifies something private or secretive about the contract. The principle of privity of contract is a common law principle that offers that a contract cannot confer rights or impose obligations upon any individual who is not a party to the contract. The premise being that only the parties to the contract should be permitted to enforce their rights, sue or claim damages per se. However, the doctrine has proven challenging in the light of the fact of its implications, for the purpose of contracts prepared for the benefit of third parties who are not capable enough to enforce the obligations of the contracting parties. Under the English law, the doctrine thus makes it clear that a third party is neither bound by contractual liabilities nor is entitled to avail the benefits of the contract. Contractual rights, as well as liabilities, are limited solitarily to the parties involved in the contract; and do not extend to a third party. Hence, the principle of privity of contract lays emphasis on the fact that any individual who is not a party to the contract (a stranger to the contract) is restricted from bringing an action on the contract. The term “parties” may seem simple enough but there are cases where it may become uncertain as to exactly who the parties are and resultantly, who, in the eyes of the law should be liable or should be compensated in the event of inevitable breaches that may occur from time to time. The initial research showed that the issue with reference to the reason and application of this the doctrine of privity has been one of much controversy and intricacy in the English law and has been put forward by several crucial cases heard in the England courts as well as in other jurisdictions. The meaning of the doctrine of privity of contract, the scope of its application and exceptions to the doctrine will be discussed further.

KEYWORDS -

Doctrine of privity, Contractual, Parties

1.1 INTRODUCTION

Legal definition and analysis –

"The common law doctrine of privity of contract means that a contract cannot (as a general rule), confer rights or impose obligations arising under it on any person except the parties to it." The rule observed in common law asserts that the contract confers privileges as well as imposes duties solitarily amid the parties to the contract. As an outcome, a third party cannot get a hold of a right and cannot be under a liability under that contract. The principle of privity of contract, thus, propounds and establishes as the predominant rule elemental in contractual relations. The doctrine has long been ridiculed as artificial and opposing to the parties' intention to benefit a third party. As a result, the courts have often resorted to devices such as agency or trust in order to allow a third party to enforce a benefit conferred upon it. Legislation has also made incremental encroachments into the doctrine by providing for certain explicit exceptions.

1.2 History -

Before 1833, contractual provisions were allowed to be enforced by persons, not a party to it, usually the relatives of a promise under the English law. The doctrine of privity emerged in conjunction with the doctrine of consideration, the rules of which state that consideration must move from the promisee, to be precise, it means that if nothing is given for the promise of something to be given in return, that promise is not legally binding unless promised as a title deed. Consideration ought to flow from the promise. That is to say, if X, a party to a contract, is able to enforce it, X must give the expected consideration to the promisor, this was highlighted in *Dunlop Tyre Co Ltd v Selfridge Ltd*.¹

Hence, although this rule of consideration is separate from the rule of privity, like it was upheld in *Kepong Prospecting Ltd v Schmidt* 1968,² it reaps the exact result in an attempt to be closely connected.

¹ Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd | [1915] UKHL 1 | United Kingdom House of Lords | Judgment | Law | CaseMine, 2020

² Kepong Prospecting v Schmidt – Case Summary, 2020

The year 1833 witnessed the case of *Price v. Easton*, which was entirely connected to the doctrine of consideration, and established as such. This was linked to the doctrine of consideration, and established per se, with the famous case of *Tweddle v. Atkinson*.³ A person cannot be subject to the obligation of a contract to which he is not a party and the coherent corollary is that a stranger cannot acquire rights under a contract. This general rule, undoubtedly, is subject to certain exceptions.

Trust of Contractual Rights: Trust is a well-established exemption to the rule of privity. This means that if X makes a promise to Y for the benefit of Z, Z can enforce this promise if Y has constituted himself the trustee of X's promise for Z. But this rule is conditional on certain limitations. There must be an intention to form a trust which remains evidently apparent by sheer intention to bequest. *Rana Uma Nath Baksh Singh v. Jang Bahadur*⁴ is a relevant Indian case in this respect. It was moreover recognized by Lord Haldane in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* The source of an action by the third party in such a case is not the enforcing of the contract. This was affirmed in *Les Affreteurs Reunis v Walford* [1919⁵] AC 801 A trust of contractual right is not created in every contract involving third person beneficiary, was emphasised in the case - *Re Schebsman*

2. Conduct or Acknowledgment: Often privity of contract may be absent between the two parties but if one of them by his conduct or acknowledgment recognizes the rights of the other to sue him, he may be liable due to the law of estoppel. Acknowledgment is either express or implied. This exemption covers cases in which a promisor by admission, acknowledgment, among others, constitutes as an agent of the third party. *Davaraja Urs v. Ram Krishnaiah*⁶ is a relevant case in this regard. Further in *Narayani Devi v. Tagore Commercial Corp. Ltd.*⁷ it was held that the defendant had formed such privity with the plaintiff by their conduct and acknowledgment and therefore, the plaintiff was entitled to her claim.

3. Maintenance in Family Arrangements: Where in a family arrangement, the contract is intended to avail a benefit to a third party; he may perhaps sue in his own right as a beneficiary. In this case, an agreement is made in the stated concerns, further; a provision is

³ *Tweddle v Atkinson* | [1861] EWHC QB J57 | England and Wales High Court (Queen's Bench Division) | Judgment | Law | CaseMine, 2020

⁴ AIR 1938 SC 24

⁵ *Les Affreteurs v Leopold Walford*

⁶ AIR 1951

⁷ AIR 1973 Cal 401

created for the benefit of a person, who may utilise that agreement even though he is not a party to it. Relevant cases include *Sundarage Iyer v Lakshmiammal*,⁸ *Rose Fernandez v Jose Joseph Gonsalves*⁹ and *Daroptiv Jaspat Rai*¹⁰ among others.

1.3 JUDICIAL ANALYSIS

Third Party rule had been ridiculed extensively over the years by several law reform bodies and most importantly, the judiciary. The calls for reform in the past cases, made by the judiciary are mentioned further.

In *Beswick v Beswick*,¹¹ Lord Reid stated with sanction the Law Revision Committee's proposes that when a contract by its terms confers a benefit on a third party, it shall be enforceable by the third party in their own name, whilst implying that the path ahead was by legislation, he itemised that the House of Lords may think that it is essential to deal with the matter if a further extended period of Parliamentary procrastination existed.

In *Swain v Law Society*,¹² Lord Diplock referred to the non-recognition of third party rights as "an archaic shortcoming that has for several years been regarded as a rebuke to English private law".

In *The Pioneer Container* Lord Goff questioned the future of the tenet, moreover in *White v Jones*¹³ his Lordship said, that the law is deficient as it is perceived to be hindered by the existence of an essential doctrine of consideration and privity of contract stunted

In *Marchington v. Vernon*,¹⁴ Buller J said that, independently of the rules prevailing in mercantile transactions, if one person makes a promise to another for the benefit of a third, the third may maintain an action upon it.

⁸ AIR 1972 SC 1930

⁹ AIR 1924

¹⁰ AIR 1905

¹¹ *Beswick v Beswick* 1968

¹² *Swain v Law Society* 1983

¹³ *White v Jones* 1995

¹⁴ *Marchington v Vernon*: 1797 - swarb.co.uk

CONTRACTS (RIGHT OF THIRD PARTIES) ACT 1999¹⁵

This is one of the major reforms that took shape when the rule of privity or, specifically, third party-beneficiaries is considered. After the publication of its interim recommendations (five years) in favour of reforming the privity doctrine in English Law (of contracts), the Law Commission established its view and, undeniably the view of a considerable body of judicial and intellectual opinions. In its fundamental recommendation, the Commission proposed that the third parties (subject to being explicitly identified) should have the right to enforce contractual provisions where either

1. The contracting parties aim to confer : such a right upon the third party aim to confer a *benefit* on the third party

On the condition that the contracting parties do not more over propose that the third party beneficiary should be devoid of the right to enforce the contract.

The report, thus, indicated a significant break from the prevailing attitude of the privity doctrine which, in the earlier part of the century, was recognized by Lord Haldane LC as one of the elementary principles of English contract law.

In the concluding Report, the Law Reform Commission (LRC) has acknowledged and suggested that a third party should be able to enforce its rights under a contract in three situations as discussed and also anticipated for a draft bill titled “Contract Law (Privity of Contract and Third Party Rights) Bill, 2008.” The LRC acknowledges that there must be a limit to how and when a contract can be enforced by a third party.

The right of third party to sue on a contract for its own advantage is acknowledged by the legal system of the United States, It was presented by statute in various Commonwealth countries. Contract (Rights of Third Parties) Act 1999 – it provides enforcement of contractual stipulations by third party In India, the Indian Law Commission should form a body on Third Parties’ rights.

1.4 CONCLUSION

¹⁵ Contracts (Rights of Third Parties) Act 1999

With the assistance of essential legislative actions and decisions in various countries, especially those of England and India, this study has established the basis of the Doctrine of Privity. The current unperturbed needs of modern contract law and the non-conventional approach of the judiciary proportionate to Doctrine of Privity have provided a path for redress to legitimately affected persons who subject to the strict elucidation of Doctrine of Privity might have been deprived of rights per se. Under the current procedure of the law, a stranger could be awarded damages if the contravention is proved. However, the stranger should be included until the extent of the “proposed beneficiary” who has reciprocal obligations. Accordingly, it was desirable and rational that the person who is a stranger to a contract should be imposed with contractual liabilities and also get contractual benefits. With a view to assisting such persons, the courts eventually recognised certain exceptions to the privity rule. These exceptions make it tolerable in practice, but the question arises whether it would be better to further modify the doctrine or to abolish it wholly. With the increasing unpopularity of the doctrine, the judiciary developed numerous ways around it. These were often both complex and artificial and used the law relating to agencies and trusts, along with other ideas and areas like collateral contracts. These exceptions, though, have been limited in how they can be used.

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