
DOCTRINE OF PRIVACY OF CONTRACTS IN INDIA AND ENGLAND

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ABSTRACT

Privity of contract proscribes third parties or stranger to sue upon a contract to enforce it. It says that only party to contract can sue for the enforcement of the contract. The clause is considered to be rigid by some of the jurists and became inclusive over the period of time. In India courts have adopted some exceptions under which a party who is stranger to the contract can also be allowed to enforce the contracts for his benefits. However the stance in English law is somewhat rigid as compared to India. In England privity is applicable on the consideration also which means that only party to contract can furnish the consideration. Contract for the benefits of third party is one of the exceptions where a third party for whose benefits contract is made can enforce his claim. There are some other exemptions which give the right to third party for the enforcement of the contract.

CONSIDERATION BY PROMISEE OR ANY OTHER PERSON

In Indian Contract Act definition of consideration is given in the section 2(d). It says that the act which constitutes consideration can be done by either promisee or any other third party. As long as there is consideration it is immaterial who furnishes it. This principle has its roots in English Common Law having been adopted by the King's Bench in Dutton v Poole case in 1677. A person had a daughter (plaintiff) to marry for that he decided to sell the woods he possessed that time. His son (defendant) promised to pay 1000 pounds to the daughter if the father decides against selling of wood. The father did not sell the wood but defendant did not comply with his promise. The daughter and his husband sued for the amount. It is clear in this case that, by not selling the wood the father furnished the consideration but plaintiff was not a party in this contract. Yet the judgment was delivered in the favor of the plaintiff as the sole point of the agreement was to give the daughter her share.

THE THIRD PARTY DILEMA

Almost two hundred years later in 1861 in the case of Tweddle v Atkinson the court of Queen's Bench refused to follow this principle of third party beneficiary. Although the contract was done with the objective of providing benefits to the plaintiff he could not enforce the contract as he was not a party to it. This very case laid the foundation of doctrine of privity of contracts. For nearly two hundred years it was a settled principle that a third party or a person who isn't a party to the contract can sue to get the contract enforced for his benefits or if the contract has been solely done for his benefit. But in the subsequent cases *Drive yourself hire co (london) ltd v Strutt* and *Dunlop Pneumatic tyre co v Selfridge and co ltd*. the rule of privity of contract was followed exceptionally. In the dunlop case it was held that right to sue for the enforcement of a private contract cannot be given to a stranger or a third party who has not been involved in the contract. In the dunlop case verdict lord viscount Haldane categorically upheld the doctrine of privity of contract and stated that in English law certain principles are paramount one is the person who is the party to the contract can only sue on it. Such rights cannot be conferred upon a stranger or a third party to the contract.

There are two fundamental propositions of English common law first of them is the consideration for the contract must move from promisee only and if a third party furnishes the consideration the promisee becomes stranger to the contract. This proposition clearly goes against the definition of consideration given in section 2(d) of the Indian contract Act.

According to section 2(d) of Indian contract act consideration can be given by anyone even by a stranger to the contract as long as there is a lawful consideration with some value in the eyes of law it is immaterial as to who furnishes it. One of the cases in which a clear illustration of section 2(d) was given is Chinnaya v Ramayya. In this case though the consideration for the contract was given by plaintiff's sister madras high court upheld the right of plaintiff to get the annuity which the defendant had promised at the time of contract with the plaintiff's sister. The second proposition of English law says that the person who isn't a party to the contract can't enforce it even if the contract is made for his benefits.

PRIVITY OF CONTRACTS: BRIEF HISTORY

The rule of privity of contracts means that a stranger to contract cannot sue for the enforcement of the contract. This principle has a very strong stance in the English common law. This doctrine has faced several criticisms for its inexplicable and to some extent dogmatic restrictions on its enforcement by the third party. Some of the jurists like Lord Justice Deening and lord Right in 1937 have suggested for the abolition of this doctrine. In the subsequent case of Beswick v Beswick the court of appeal went against the doctrine of privity of contract and upheld the right of third party and guaranteed the annuity to the widow (plaintiff) which was promised to her deceased husband by the defendant. The judgment in this case was given by Lord Denning MR who concluded with very lucid words that when a contract is made specifically for the benefit of third party and the party has a legitimate interest in the contract then he/she can enforce it in the name of contracting party or jointly with him. But house of lords was not in the same page with Lord Denning as far as the reasoning of the judgment was concerned. Though House of Lords awarded the annuity to the widow but they did not go against the privity doctrine. They upheld the right of widow to sue only as an administratrix of her husband's estate and not in her personal capacity. The judgement given in this case by Lord Denning was very much in congruence with the reforms suggested in the Law Revision Committee in 1937 under the chairmanship of Lord Right but still the journey was tough. In the same line or in the furtherance of Lord Denning opinion , Steyn LJ in Darlington Borough Council v Wiltshire Northern limited suggested that the contract for the benefit of third party should be recognized and the autonomy of the will of the parties should be respected.

POSITIONS IN INDIA: FOR AND AGAINST PRIVACY

As we have seen throughout this discussion how opinions are divided for and against the privity

doctrine in the English law. There is no coherence or uniformity as far as the opinions on privity rule is concerned, jurists throughout the England have interpreted the law differently. Well India is no exception to this conundrum. Judges in some cases have relied on this doctrine to inhibit the rights of third party to sue on the contracts whereas in some cases Judges have used a more pragmatic approach I would say to deal with the this third party dilemma.

I would initiate this discussion with some cases in which the idea of a very prominent case law *Tweddle v. Atkinson* has been followed. These cases are in line with the doctrine of privity of contract. The Privy Council in its ruling in *Jamna Das v Pandit Ram Autar Pande*¹ held that “the mortgagee not having been a party to the site could not avail himself of undertaking on the part of the purchaser to pay off the mortgage debt”. Lord Macnaughtan in his judgment said that as mortgagee was not part of the original contract between the mortgager and the lender, so being a stranger to the contract he has no right to avail the undertaking of paying the debt to the lender. There is another prominent opinion of Rankin CJ in the case of *Krishna Lal Sadhu v Pramila Bala Dasi*² pertaining to the right of third party. He opined that not only Indian contract act in no way encourages the idea that a contract can be enforced by a person not a party to it but also the terms mentioned in section 2 of the act i.e. Promisor and promisee clearly stipulate that it was never intended to give the right to a stranger to a contract of its enforcement. These were some of the important cases buttressing the doctrine of privity as well as acknowledging the judgment given in *Tweddle v Atkinson* case.

To have a comprehensive understanding of any law or statute we need to do equal justice to both the viewpoints i.e. for and against. Keeping this notion in the mind and setting aside any kind of penchant towards any viewpoint I would like to further discuss a very important case law against the Privity doctrine. The case law with the name *Nawab Khwaja Muhammad Khan v Nawab Hussaini Begum*³ according to some high courts has established a very firm standing against the application of *Tweddle v Atkinson* case law in India. The case deals with *Kharach-i-Pandan* allowance provided to wives according to Muslim (Mahomedan) law. *Kharach-i-Pandan* literally means betel box expenses which is allowance provided to muslim women by her husband⁴. The agreement on the allowance is done by the respective parents when the couple is minor. Here in this case the husband’s father agreed to pay monthly allowance of Rs

¹ *Jamna Das v. Pandit Ram Autar Pande*, 1911 SCC OnLine PC 35

² *Krishna Lal Sadhu v. Pramila Bala Dasi*, 1928 SCC OnLine Cal 47

³ *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begam*, 1910 SCC OnLine PC 15

⁴ AVTAR SINGH, *CONTRACT & SPECIFIC RELIEF* 122 (EBC 2017)

500 to the wife as kharach-i-pandan. “The suit was brought by the plaintiff, Husaini Begam in the court of subordinate judge of Agra, against the defendant and certain transfers from him, to recover the annuity of Rs 6000 under a registered agreement. The subordinate judge dismissed the plaintiff’s case. The plaintiff then appealed to Allahabad High Court which subsequently reversed the decree of the subordinate judge. It was held by the High court that the wife’s refusal to live with the husband was in itself no ground for depriving her of the allowance. The wife though not being the party to the contract was entitled to proceed in equity to enforce her claim to the allowance, she being the only person beneficially entitled under it”. Further the Madras High Court has also opined that there ample evidence and authority in India to suggest that when a contract is done between two persons for the benefit of a third person the latter should have sufficient rights to sue the defaulter. Calcutta high court in the case of Kshirodebihari Dutta v Mangobinda Panda⁵ also said that there is nothing in the Indian Contract act which prevents the third party to enforce the contract when the sole purpose of the contract is to benefit the third party.

The Supreme Court of India has expressed its support for the Tweddle v Atkinson case and to the doctrine of privity of contract. In MC Chakore v State Bank of Travancore the court further endorsed the judgment of Krishna Lal Sadhu v Promila Bala Dasi and concurred with observations of Lord Haldane in Dunlop v Selfridge.

EXCEPTIONS TO THE PRIVACY DOCTRINE

As we all know Law is never constant, it has to change and acclimatize with ever moving time and with varying needs and demand of the people it governs. If there is no amendment in a law for a long time then the law will become redundant to many demands of the society. To deal with the changing nature of transactions and adapt with innovative business ideas the law of contracts has been evolving since its inception in 1872. In this section of the paper I would be discussing about some of the exceptions to the Doctrine of Privity of Contracts and how courts in India have customized the doctrine to recognize the interest of third party beneficiary.

I will deal with different type of beneficiaries one by one just to make a clear distinction between different criterions.

⁵ Kshirodebihari Datta v. Mangobinda Panda, 1934 SCC OnLine Cal 65

1. BENEFICIARIES UNDER TRUST OR CHARGE OR OTHER ARRANGEMENTS

As we know the thing that binds any kind of relation is trust. Without trust it would be almost impossible for us to get involved into any kind of relationship be it personal professional or commercial relationship. So the beneficiaries under trust are the first group of people I would be talking about who have the right to sue upon a contract in which they are not party to. If any contract deals with providing any kind of benefit to a third person exceptionally, then that third person can sue upon the contract for its enforcement. Very Important case law in this regard is of *Nawab Khwaja Muhammad Khan v Nawab Hussaini Begum* about which I have already discussed in brief. It was held in this case that plaintiff although was not a party to contract but the contract was entered between her parents and her in laws with the sole intention to provide benefit to the plaintiff. As the plaintiff was the only beneficiary in the contract and without her interest the Contract would have been preposterous, thus she was allowed to claim the annuity, making it a very significant case of third party beneficiary.

Another case law cementing the case of third party beneficiary is *Rana Uma Nath Baksh Singh v Jang Bahadur*. A father transferred his all the rights over his properties to his son, in return of the deed the son had to pay a certain amount of money to the illegitimate son of the father on his attainment of majority. After attaining the majority the Jang Bahadur (the illegitimate son) sued for his share mentioned in the will. Though the plaintiff was not a party to the contract but The Privy Council considered his suit maintainable.

There are also many cases in England dealing with beneficiaries under trust one of them is *Gregory & Parker v William*. Parker was indebted to both Gregory and William, Parker transferred all his property to William in return of which William had to pay Parker's debt to Gregory. William failed to pay the debt and was subsequently held liable.

2. MARRIAGE SETTLEMENT AND FAMILY ARRANGEMENTS.

A contract entered into a marriage settlement or any kind of family arrangement for the benefit of a third party can be enforced for any such benefit provided into the contract to the third party. For example in *Rose Fernandez v Josesph Gonsalves* the girl father entered into a contract with defendant that the girl can sue for the damages once she

attains majority in case of breach of promise of marriage, and defendant could not take defense that she was not a party to the contract. In another case *Shappu Ammal v Subramaniam* two brothers agreed to invest equal share from their property to maintain their mother. The contract was held enforceable by the mother. Similarly in *Veerama v Appayya* when a daughter along with her husband agreed to maintain her mother in return of the father's property, the daughter was held entitled to maintain the mother.

3. ACKNOWLEDGEMENT OR ESTOPPEL

When by means of a contract a party agrees to pay a certain amount to the third party then the contracting party is obliged to pay the amount and the third party has the right to sue upon the contract for his benefit. For example in *Kshiedebihari Dutta v Mangobinda Panda* tenant and sub tenant of a land agreed that subtenant would pay the rent of tenant directly to the landlord. The agreement had to be acted upon by all the parties.

4. COVENANTS RUNNING WITH THE LAND

This is another very important exemption to the rule of privity. Third parties can take the benefit of this exception in case of transfer of immovable property. "In the famous case of *Tulk v Moxhay* it was held that when the purchaser of the land knows that the land is bound by certain agreements or covenants then it would be binding on him although he was not a party to the agreement". A proper illustration of this exception can be studied through a case law of *Smith and Snipes Hall Farm Ltd v River Douglas Catchment board*. The defendant (board) agreed with certain landlords adjoining a stream to maintain the bank of stream. One of the landlord sold his land to the plaintiff. In due course of time stream over flowed and flooded the lands. The plaintiff sued upon the board and was successful in his suit though he was not originally a party to the contract.

CONCLUSION

The concept of privity of contract was taken from the English Common Law, which says that no third person can sue up on the contract for its enforcement even if the contract is made for his benefits. This clause was included in the contract laws of England to keep a contract

between two parties private between them, which in case of disputes can be settled between the parties and no third person can claim for enforcement of his rights under the contract. But over the period of time in some cases it became really inequitable to deprive the third parties right to sue upon the contract. With time the act had to be made less rigid and more flexible to be inclusive or open to the changes happening in the nature of contracts with time. Jurists started to explore different cases where claim of third person arose. There were arguments both and against the privity clause and its relevance with time.

In England law related to privity is more rigid as compared to India. According to Indian Contract Act there is no privity on consideration and anyone can furnish the consideration as long as it is valid in the eyes of law. However in the English Common Law there is privity on consideration also and only a party to contract can furnish the consideration. With time there are some exceptions which have evolved to the privity clause, and a third party can enforce the contract if the contract is made for his benefits.

In my opinion this clause plays a very significant role in the day to day contracts made around the world. It protects the rights of parties to the contract so that a stranger to the contract can't sue upon it. Though the exceptions related to the privity are very justified as it gives right to third party for whom contracts are made to enforce his claims. Our Judiciary has maintained a fine balance in the Privity law and the significance of the law remains intact.

REFERENCES

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