

Privity of Contract

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RESEARCH QUESTION:

Should the privity of contract rule be reformed, in order to allow the third party to sue on contracts in their benefit?

In the event that an outsider can sue without privity or consideration, what impact would this have on law of contracts?

1. THE NEED TO REFORM PRIVACY RULE:

In the event that contract implies every single enforceable promise, at that point it is doubtful that the cancelation of privity of outsiders would not hamper the contract; it just gives another elective hypothesis of promissory risk notwithstanding deeds and deals. An individual can sue on a promise made, it was proposed to benefit him and gave it was a piece of deal made with another person.¹ Strict application of doctrine of privity of contract undoubtedly results in hardship and rigidity which to some extent causes injustice to the affected persons. Therefore, the Law Commission of India in its 13th report in order to avoid injustice from the rigid application of the doctrine recommended that a new section 37A should be inserted in the Contract Act.²

According to the overall guideline outsider cannot sue on the agreement nonetheless, there is an outright need to change this standard for the accompanying reasons:

1.1 THE INTENTIONS OF THE CONTRACTING PARTIES:

As the law right now stands, an outsider cannot authorize an agreement made for their advantage, regardless of whether the contracting parties concurred that they ought to have the option to do such. The refusal of courts to give full impact to the agreement could be said to sabotage the standard of freedom of agreement, for example the rule that gatherings are allowed to go into whatever sort of agreement they like, given the agreement was unreservedly and deliberately went into. There are certain special cases for this standard, for instance, a few agreements may be unenforceable on grounds of wrongdoing or public approach. There is, in any case, no open approach motivation behind why the courts should decline to permit outsider to authorize an agreement, or term of an agreement when the contracting parties proposed for the outsider to have this right. Or maybe, the authoritative expectation of the gatherings ought to be upheld in the best manner conceivable by the courts.³ A contract can only confer rights on parties to contract even if it is clearly the intention of the contracting parties to benefit a third party.⁴

¹ Kincaid P, 'Privity and the essence of contract' (1989) < <http://classic.austlii.edu.au/au/journals/UNSWLawJl/1989/4.pdf> > Accessed on 17th November 2020.

² Jain S, 'Rule of Privity of Contract: Study in English and Indian context' (2014).

³ Law Commission of India, *Privity of Contract and third-party rights*, (1991).

⁴ Yeo T, 'When do rights arise in contract?' (2001) Singapore Management University.

1.2 THE THIRD PARTY WHO SUFFERS A LOSS CANNOT SUE, WHILE THE CONTRACTING PARTY WHO CAN SUE HAS NOT SUFFERED A LOSS:

The rule of privity can create the peculiar outcome that the third party who endures misfortune can't sue, while the contracting party who can sue has not endured misfortune, and in this manner may simply be qualified for ostensible harms. When in doubt, it isn't feasible for the promisee to recuperate harms in the agreement for the misfortune endured by an outsider, despite the fact, current facts of the case may can be categorized as one of the exemptions for this standard, or request of explicit execution might be accessible in restricted conditions. The privity and consideration include separate issues of strategy. Be that as it may, when the Law Commission first analysed the regulation of privity the relationship among privity and the standard that thought must move from the promisee caused specific trouble.⁵

Even if the promisee can obtain a remedy, the promisee may not wish to sue. It has been pointed out that —"the stress and strain of litigation and its cost will deter many promisee's who might fervently want their contract enforced for the benefit of third parties"⁶ Also, in a situation where the promisee has died, their personal representatives may decide that it is not in the interests of the estate to bring an action.⁷

In Dunlop's case,⁸ a contract between a wholesaler and a retailer contained a minimum price agreement controlling the resale of tyres manufactured by the plaintiffs. The plaintiff manufacturer sought to enforce this agreement against the defendant retailer. However, the House of Lords held that the plaintiff could not enforce the agreement.⁹

1.3 INCIDENTAL AND UNINTENDED BENEFICIARIES:

These are people not proposed by the contracting parties to have new rights, and not named as recipients or even as the people to whom instalment is to be made or another presentation is given.¹⁰ In a request that outsider may sue upon an agreement made by others he must show that he was proposed by them to have an enforceable right or possibly that the presentation of the agreement should essentially be good for him and such advantage more likely than not been inside the thought and reason for the contracting parties.¹¹

2. THE EFFECT OF THE EXCEPTIONS TO THE PRIVACY RULE:

The privity rule is dependent upon an enormous number of custom-based law and legal exemptions. These special cases have created in piecemeal style to manage explicit issues which were brought about by privity rule. A portion of these special cases are very unpredictable, and there are different troubles related with them. Notwithstanding, more in general sense, it is clear that the current special cases do not, and won't, cover each circumstance where a treacherous or silly outcome is brought about by the privity rule. A further difficulty caused by the variety of exceptions to the rule

⁵ Law Commission of India, *121st report on Privity of Contract: Contracts for the benefits of third parties*, (2008).

⁶ Law Commission, *England and Wales Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) at paragraph 3.4.

⁷ Law report commission, 'Privity of contract and third-party rights' (2008).

⁸ [1915] AC 847.

⁹ Newman R, 'The Doctrine of Privity of Contract: The Common Law and the Contracts (Privity) Act 1982' <<http://www.austlii.edu.au/au/journals/AukULawRw/1983/1.pdf>> Accessed on 15th November 2020.

¹⁰ Corbin A, 'Contract for the benefit of third persons' Yale University.

¹¹ *Durnherr v Rau* [1892] 135 N. Y. 219; *Wheat v. Rice* (1884) 97 N. Y.296.

is that it can be unclear whether the courts will apply the privity rule or an exception to the rule. For example, in Glow Heating Ltd v Eastern Health Board.¹²

In the past this uncertainty could be seen in cases involving trusts, where the courts would sometimes, but not always, imply the existence of trust in order to grant rights to third parties. Today the courts will not imply a trust unless it is clear that the parties intended to create one.¹³

On the off chance that a specialist makes an agreement in his own name, the principal may sue what's more, be sued upon it; for it is an overall principle, that at whatever point an express the agreement is made, the activity is kept up upon it, either for the sake of the individual with whom in purpose of law it was made.¹⁴ This is a doctrine of undisclosed principle.

2.1 COMMERCIAL INCONVENIENCE AND EXPENSE:

It is the Commission's view that a large number of the business authoritative courses of action which are presently gone into could be rearranged by the making of an overall special case for the privity rule which permits outsiders to authorize contracts which are gone into for their advantage. Changes could encourage an alternate methods for leading exchanges with the goal that individuals who wish to go into contracts to help outsiders will have the option to do as such, in the information that such agreements will be enforceable by the outsiders.¹⁵

3. EXCEPTION FOR DOCTRINE OF PRIVACY OF CONTRACT:

3.1 ACKNOWLEDGEMENT OR ESTOPPEL:

whereby the conditions of an agreement are needed to make an instalment to a third-party and he recognizes it to that third party, a restricting commitment is in this way acquired towards him. Affirmation might be express or inferred.¹⁶ Additionally, an outsider might have the option to look for help against a promisor on the premise of promissory estoppel standards. To succeed the outsider would need to build up the components of promissory estoppels.¹⁷ In the case of Kshirodebehari Datta vs. Mangobinda Panda¹⁸, acknowledgment had generated the right to third party to enforce the contract between the parties. The tenant and the sub-tenant of a piece of land agreed between themselves that the sub-tenant would pay the tenant's rent direct to the landlord.¹⁹

¹² [1988] IR 110.

¹³ *Cadbury (Ireland) Ltd v Kerry Co-op Creameries Ltd* [1982] ILRM 77; *Inspector of Taxes Association v Minister for the Public Service High Court* [1983].

¹⁴ *Cothay v Fennel* [1830] 671.

¹⁵ Geva Benjamin, 'Authority for Sale and Privity of Contract: The Proprietary Basis of the Right to the Proceeds of Sale in the Common Law' (1979).

¹⁶ Avtar Singh, *Law of Contract and Specific Relief*, (8th edn, Eastern Book Company, 2008) 121.

¹⁷ *Waltons Stores (Interstate) Ltd v Maher* [1988] 164.

¹⁸ [1933] 841.

¹⁹ Rai N, 'Doctrine of Privity of Contract and its Exceptions' (2012) Kathmandu School of Law.

3.2 TRUST OF CONTRACTUAL RIGHTS OR BENEFICIARY UNDER A CONTRACT:

One of the exemptions for the principle of privity of contract was perceived by Lord Haldane in Dunlop Pneumatic Tire Co. v. Selfridge and Co.²⁰ For this situation it was referenced that lone involved with an agreement can sue on it and no such right is presented on an outsider, nonetheless, the court yielded that such right might be given by method of property, under a trust. The premise of an activity by the outsider in such a case is really not the implementing of the contract.²¹

Where, under an agreement, assets have come into the promisor's hands or control, in trust, express or implied, to pay the plaintiff's claim, the payment can be enforced by the plaintiff; that is, the trustee can be compelled to execute the trust.²²

3.3 PRIVITY IN INSURANCE:

As per the doctrine of privity, nobody aside from the gatherings to agreement can guarantee for rights and be troubled with liabilities. In any case, in the event of protection contract, however the individual who has guaranteed one's life, in the event that bites the dust, at that point his/her family members can guarantee the safeguarded sum however they were not the gathering to contract. In the case of Tattersall v Drysdale²³ it was held that the driver of a motor vehicle is entitled to the benefit of insurance policy made with insurance company by the owner of the vehicle and which purports to cover the driver.²⁴ Thus, this implies that insurance is also another exception of the Privity of contract.²⁵

By section 11 of the Married Women's Property Act 1882, a strategy of confirmation affected by somebody on his or her own life, and communicated to be to support his or her life partner or youngsters, makes a trust for the protests in that named.²⁶ Insurance Office Ltd v. Ojemuyiwa²⁷ the insurer applied for leave to appeal against a High Court decision given against its insured for damages for the death of a third party arising out of the use of a motor vehicle. The insurer was not a party to the action at the lower court and based its right of appeal as an interested person in the appeal.²⁸

3.4 TORT OF NEGLIGENCE:

Outsiders who are forestalled by the privity rule from suing in the agreement may endeavour to depend on the misdeed of carelessness. For instance, in Donoghue v Stevenson²⁹ a lady who got debilitated subsequent to drinking a jug of ginger beer which contained a dead snail couldn't get an activity contract against the producer of the beer, since she had no agreement with the producer. Be that as it may, she had the option to get an activity the misdeed of carelessness as she could show that the producer had penetrated his obligation of care to her.³⁰

²⁰ [1915] AC 847.

²¹ Jain S, 'Rule of Privity of Contract: Study in English and Indian context' (2014).

²² King v Whitely [1999] 46.

²³ [1905] PR 171.

²⁴ Rai N, 'Doctrine of Privity of Contract and its Exceptions' (2012) Kathmandu School of Law.

²⁵ Jesse W, 'Privity of Contract' (1887) vol 1, Harvard Law Review 226-232.

²⁶ Law Commission of India, *121st report on Privity of Contract: Contracts for the benefits of third parties*, (2008).

²⁷ [1965] 5.

²⁸ Oke O, 'Application of Privity of Contract to insurance Contract' (2015).

²⁹ [1932] AC 562.

³⁰ Law Commission of India, *Privity of Contract and third-party rights*, (1991).

Negligence which causes injury to one who is "invited" to utilize a damaged machine may frame the premise of an activity against the maker, in spite of the fact that the article has passed from the respondent's belonging and the mischief emerges simply from a far off client. One who sells or conveys an article known to be inescapably perilous to life or appendage without pulling out of its characteristics are liable for following wounds paying little heed to any contractual relationship.³¹

The obligation of practicing care might be forced by the customary law, by legislative enactment, or by contract. The inquiry at that point emerges whether an obligation to use due consideration to one individual, because of an agreement, forestalls the forcing of a precedent-based law obligation to other people who endure injury because of the careless execution of the legally binding obligation. In Winterbottom v. Wright³², the rule was declared that a reason for activity in misdeed didn't emerge from the penetrate of an obligation existing by excellence of agreement except if there be a "privity of contract" between the offended party and the respondent. Because of improvement of business relations close to the furthest limit of the nineteenth-century, the rule was discovered irrelevant in specific circumstances.³³

4. HISTORY OF PRIVITY OF CONTRACT:

4.1 ROMAN LAW:

In the count of modern law in Dunlop Pneumatic Co Ltd vs. Selfridge and company Ltd.³⁴ Here, two standards were set down, Privity of agreement and the standard that thought must move from the promise. In Roman law without the assistance of the Doctrine of Consideration there existed a harsh articulation of privity.³⁵

4.2 MEDIEVAL COMMON LAW:

In the medieval period indeed later the choice of right form of action, fact situation which we would now regard as contractual were pursued by the actions of covenant or debt.³⁶

4.3 THE NINETEENTH CENTURY:

In Price vs. Easton³⁷ the case mainly about considerations and it was held that the plaintiff cannot sue where he was not a party to the contract. (plaintiff was neither a party to the contract nor provided with any consideration, he could not enforce it).

³¹ Taft C, 'Negligence in relation to privity of contract' (1921) Vol. 30, 607-612 Yale Law Journal.

³² [1842] Eng. Reprint 402.

³³ 'Torts-Duty Arising from Contract-Privity' (1937) vol.1, Indian law journal.

³⁴ [1915] AC 847

³⁵ Furmston M, 'Privity of Contract' (2015) Oxford University Press.

³⁶ Ibid.

³⁷ [1833] 518.

5. RULE OF PRIVACY OF CONTRACT:

5.1 ENGLISH LAW:

The rule of privity of contract was first recognized and established in the ruling of Tweddle v. Atkinson³⁸, In this case, the plaintiff was both a stranger to contract as well as stranger to consideration and therefore, he could not enforce his guarantee. The rule of privity of contract was reaffirmed by the House of Lords in Dunlop Tyre Co. v. Selfridge.³⁹ Here the action failed because although there was a contract between the defendants and Dew, the plaintiff were not party to contract.⁴⁰

While the LRC changes at first sight reflect their English furthermore, Welsh counterpart, the English and Welsh methodology is impressively more extensive than the LRC changes. The English and Welsh legislation – Contracts (Rights of Third Parties) Act, 1999, incorporates a privilege of authorization where explicitly accommodated and furthermore where the agreement indicates to give an advantage on the third party. In any case, the inquiry might be posed, who decides if the Does the agreement imply to profit the outsider? The way that the third party is depending upon an agreement which just implies to profit him/her would at first sight demonstrate that the advantage in such contracts will be equivocal.

In reality, on the off chance that such is the situation, at that point the formation of an assumption of authorization will make implementation rights dependent on an agreement which just indicates to advantage an outsider. Consequently, such an assumption of requirement where the agreement only indicates to give the advantage could be viewed as superfluously inclining the law for the third party.⁴¹

5.2 INDIAN LAW:

The rule of privity of contract has been applicable in India as well. Even though under the Indian Contract Act the definition of consideration is wider than under English law, yet common law principle of privity of contract has been generally applicable in India, with the effect that only a party to the contract is entitled to enforce the same.⁴² The authority for the application of the rule in India is the decision of the Privy Council in Jamna Das v. Ram Avtar.⁴³ Privy Council held that since there was no contract between X and B, X could not enforce the contract to recover the amount from B.

Privity of contract happens just between the parties to the agreement, most normally agreement of offer of products/services. Horizontal privity emerges when the advantages from an agreement are to be given to third party. Vertical privity includes an agreement between two gatherings, with a free agreement between one of the gatherings and another individual or organization. On the off chance that an outsider gets an advantage under an agreement, it does not reserve the privilege to conflict with the parties to the agreement past its entitlement to benefit.⁴⁴

³⁸ [1861] 393.

³⁹ [1915] AC 847.

⁴⁰ Jain S, 'Rule of Privity of Contract: Study in English and Indian context' (2014).

⁴¹ O'sullivan K, 'Privity of Contract: Potential Impact of the law reform commission recommendations on Irish Contract Law' (2010) Judicial Study Institute Journal.

⁴² Narayani Devi v Tagore Commercial Corporation Ltd. [1973] AIR 401.

⁴³ [1911] 30 IA 7.

⁴⁴ Jain S, 'Rule of Privity of Contract: Study in English and Indian context' (2014).