The Doctrine of Privity of Contract: Comparative Study of India and England

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ABSTRACT: Principle of Privity is a common law doctrine that states that there cannot be a stranger toa contract. It is one of the debated doctrines under the law of contracts. Thoughthe doctrine was very well settled by the Judicial pronouncement there is stilla debate between academicians and Judiciary. It is very common that a thirdparty or stranger was imposed with obligation or duties on the failure of parties tothe contract in performing their duties and obligation. The doctrines of Privity based on the interest theory restrict the scope and allows that only the contracting or interested party is liable for obligation and duties. However,with the evolution of the doctrine, there arises a certain exception to thedoctrine where the stranger can also be made liable for the obligation orduties towards one of the contracting parties. The researcher inthis review paper will discuss the meaning and historical evolution of the doctrine of the Privity; applicability of the Contract theory to the Doctrine of Privity; the exception to the doctrine of Privity; landmark judicial pronouncement and makea comparative study to identify the situation in India and England.

KEYWORDS: Contract, Exception, Interest theory, Obligation, Privity and Stranger.

INTRODUCTION

As an essential of the valid contract, it is necessary that the party must have the intention to enter into the contract. As a result, on the breach of the contract or non-performance of the contract only party to the contract is allowed to sue or be sued. This principle in English law is regarded as the common law principle and is called as Privity of Contract. It clearly allows the only party to the contract to sue or besued and strictly prohibits to enforce their rights and liabilities against strangers.Even it also prohibits to sue 3rd party for whom benefits the contract is enacted. From the Jurisprudential point of view, it can be stated that Privity of Contract is based on the interesttheory as the theory suggests that only parties to the contract are entitledto protects their rights and liabilities against each other.[1] It can be more easily explain through an illustration:

If A makes a promise to deliver goods to B in consideration of Rs. 500. If any of them fail to perform their promises. Then they both have the right to sue others for their non-performance of contract or breach of contract and no other person is allowed to sue or be sued.

1. *Prerequisite of the Principle of Privity of Contract*

- Contract must be valid contract i.e. between the competent parties; free consent; consideration; lawful object; and intention to create legal obligation.
- Contract was breached by one of the party; and
- Parties to the contract is entitled to sue each other.

It must be noted that Privity of contract has two aspects. The first being who can enforce thecontract and second who is bound by the contract.Thus, it can be said that it has two aspects-

- Benefit aspect
- Burden Aspect

[1]Rishabh Soni, 'Doctrine of Privity of Contract' iPleaders available on https://blog.ipleaders.in/

2. Brief History of Doctrine of Privity of Contract

The Doctrine of Privity of Contract was highlighted in the year 1861 in landmark case of Tweddle v. Atkinson.[2] However, it was claimed that it was in use since the early 17th century. During the early 17th centurycourts applies interest theory and recognizes the principle that who have interests shall have the right to take action.

Before Tweddle v. Atkinson case it was first recorded in 1599 case of Levett vs. Hawes.[3] The case was based on the fact that- marriage money was to be paid to the son. On the failure of the promise to pay money to son father brings the action. The court is of the view that suit must have been initiated by the son and thus underlying the basic idea of the doctrine that only interested party can be sue or be sued.

Another case can be cited of the Hadves vs. Levit[4]of 1632 where the court rejected the suit filed by the father of grooms on non-performance of promise by the bride father (i.e. denial of payment of money) on the ground that suit must have been filed by the son as he was the interested party. In an another case of Dutton v. Poole[5], suit filed by father against his son was rejected on the grounds that the suit must be initiated by his sister as he is the interested party.

3. Applicability of the Contract theory to the Doctrine of Privity

Different contract theoriesexplain the basis, nature and rationale behind enacting contract between the parties. Here we will analyze these contract theories from the lens of the doctrine of Privity. They can be brieflysummarizedas follows:

3.1.Will Theory:

The will theory is also known as intention theory where intention of the parties isgiven more important than any other factors. This theory was considered asoldest theory of the contract.The legal maxims‘consensus ad-idem’which means meeting of the minds of the two people is basic requirement for formulating contract.The other factorlike concept of liability is also responsible for recognizingthe will theory. The public interest,interest of the parties and common interestare the reason for enforcing contract under will theory. However, the will theory is also criticizes for its objectivity, fictional intention, and complex legal implication. In respect of Privity of contract it was observed that it does not support the doctrine. The will theory signifies that mere meetingof the minds is sufficient for making contractwhich is not the case in reality. This makes the third parties liable for breach of the contract and thus the will theory did not justify the Doctrine of Privity.

3.2.Promise Theory:

This theoryis more inclined towards the behavior of the common man and thus also known as Common Man’s theory.The basis of the theory is that man is bound by the promisemade by them in course of transactions. This theory at the end affects the society since the society expect and accept those who full-fill the promises and non-performance of the promises is seriously condemned. That means it only make liable parties who were involved in making promises. Thus it can be said that this theory alsodoes not support Doctrine of Privity.

3.3.Equivalent Theory:

It states thatpromises which standsequivalent from both the sides is enforceable.The theory has its origin in the legal maxims quid pro quo means equivalent. This theory is also known as‘bargain theory’.The perusal of the theory suggest that it is combination of the ‘will-theory’ and ‘consideration’.Since the equivalent theory focuses more on consideration factor- a stranger to the contract neither give nor take something in

[2] (1861) 121 ER 762
[3]Cro. Eliz. 654.
[4] (1632) Het. 176
[5] 83 ER 523

considerationis not allowed to sue for liabilities on non-performance of the contract. Thus in this way the equivalent theory advocates the doctrine of the Privity of the contract.

3.4.Reliance Theory:

This theory laid down three perquisites for making someone liable for the breach of the contract. They are as follows:

Promise made by one party either in written form or spoken form

- Agreed by other party
- The party who agreed with the promise made by the other parties suffers loss due to non-performance of the promise.

Asthe above requisites suggest that doctrine of Privity was not supported by the reliance theoryas this clearly laid down that only person making promises will be liable for non-performance of thepromises.

3.5.Relational Theory:

This theory primarilyfocuseson the relationship between the parties to the contract. The theory was promulgated by the Prof. Ian Mac who submits that contract between the parties is independentof social and economic relations. As this theory is primarily concerned with the relationship of the parties to the contract it does not support doctrine of the Privity of the contract.

3.6.Economic Theory:

This theory has economical implication and focuses on economic development and benefits of the parties. This theory also did not support doctrine of Privity. As, result it allowed suing stranger to the parties if it full-fill two conditions:

- Agreement was enforceable by law; and
- Promisee can enforce it specifically.

3.7.Social Theory:

This theory is propounded by the Roscoe Pound. The theory focuses on the social interest rather than the interest of the individual. The only requirement is to note that contract has some social interest and thus any 3rd party to whom benefit of contract is promised is allowed to file case for the non-fulfillment of contract. In this way this theory does not advocated doctrine of the Privity of contract.

3.8.Unconscionability Theory:

This theoryprimarilyfocuses towards the benefit of the promise and more concern about thecircumstances thatthe promisor must full fill their promise. This make it clear that stranger has no role in performingor enforcing the contract. This theory to the certain extent advocates doctrine of Privity of the contract.

From the above discussion it can be drawn that Unconscionability Theory and equivalent theory favor the doctrine of the Privity of the contract. Both the theories are more concern about the inter-relationshipbetween the parties and have nothing to do with the strangers.

4. Exception

The doctrine of the Privity of contract is neither rigid nor absolute and is subject is certainexceptions. The exception can be broadly categorized in two parts- Non Statutory and Statutory. First we will discuss the exception recognize in England:

5. Exceptions recognized in England:

5.1.Non Statutory Exception

5.1.1. Trust:

The most common exception is trust. In a contract when trust is formed in favor of the 3rd parties he can be made liable for the breach of the contract.6 However, while dealing with cases the court did not enter to identify the existence of trust from intention of the parties. It has to be drawn from the circumstantial evidences that trust has been formulated in his favor.

5.1.2. Covenants Concerning Land:

There are certain agreementthat areallowed for the purpose of benefitting other people than the contracting parties.These agreements are primarilyconcerned with freehold land or leasehold land. In this case also the stranger can be made liablefor the breach of the contract by any of the party.

5.1.3. Tort of Negligence:

Tort of negligence is another exception to the doctrine. This is the case where negligence causedby theone of the parity to the contractresults in to breach of contract and injury to 3rd person. This can be illustrated by an example whereX and Yenters into contractand X is under an obligation to serve Y. X perform negligently and as a result Z, a 3rd party suffers injury.

5.1.4. Agency:

Some laws are based on the law of agency and was formulated through any intermediaries. An agency is two-way relationship where the principal agrees that other will perform on their behalf and the agent give his consent to do so. In such scenario if agent enters into contract with 3rd part on behalf of the principal, generally, without excessive fiction, it can be said that the doctrine is the actual part of the contract entered into by his agent. However, in reality the agency is the principal despite being a 3rd party to the contract. Thus in this way agency can also be considered as the exception of it where principal being a 3rd party in the contract entered by his agent can sue or be sued on the breach of the contract.

5.1.5. Assignment:

As long as personal consideration is not fundamental, the profits of the agreement can be transferred to a third party. Assignments were made by an agreement between the promisee under the main contract and 3rd party. If a contract is made for a person's advantage, he will sue on the contract even if he is not a party to the agreement.[7]

5.1.6. Collateral Contracts:

One of the principle features of the Collateral Contracts is that it is either entered between the existing parties or entered with third party. In that case it is possible that third party is allowed to enforce the main contract. Thus, the collateral contracts were also considered as an exception to the doctrine where the third party can sue or be sued for the non-performance ofthe contract.

6. Statutory Exception

6.1.Contracts of Insurance:

It is the general principal that in contract of insurance third party can only enforce the contract when the contract is made in his favor by trust. However, there are some statutory exception which can be briefly described asfollows:

[6] Doctrine of Privity of Contract, available on https://www.toppr.com/guides/

[7]Ibid.

6.1.1. Road Traffic Act, 1988:

Sec. 148(7) provides that the driver of vehiclewill be entitled for Insurance benefit even if the insurance policy was made by the owner of the car. It states that such policiescover the driver (or any other party) as the case may be.

6.1.2. The Third Parties (Right Against Insurers) Act, 1930:

As the name suggest it provides right to third partyagainst the insurer. However, it is necessary to establishclaim before proceedings.

6.1.3. The Married Women's Property Act 1882:

This act provides thatman/womencantake the insuranceon their life for the benefit their wife/husband and children.

6.1.4. Fire prevention (Metropolis) Act, 1774:

Section83 provides that any person or persons interested can claim theinsured money where object is destroyed by fire.

6.2.Commercial Practice:

Exception to the doctrine of Privity covers some commercial practice either incorporated under any statute orevolved as practice or recognized by the court. For instance, bill of exchange; Bill of Lading; letters of credit where recognized as exclusion to the doctrine of the Privity of the contract.

6.3.Law of Property Act, 1925:

Section 5 of the act repealed the generalprinciple that3rd party who is not party to the agreement cannot take advantage of the deed. Now with the introduction of Section 5 of the Act 3rd party can also take the advantage of the deed after full-filling other requirements as given under the act.

7. Exceptions recognized in India

7.1.Statutory Exception:

As similar to the situation in England, in India it is the general principal that in contract of insurance third party can only enforce the contract when the contract is made in his favor by trust. However, there are some statutory exception which can be briefly described as follows:

7.1.1. The Law of Agency:

By entering into a contract with a third party, an agent binds the principal to that third party. As explained above there are some laws that are based on the law of agency and was formulated through any intermediaries.It explains the scenario if agent enters into contract with 3rd part on behalf of the principal, generally, without excessive fiction, it can be said that the principal is the actual part of the contract entered into by his agent. However, in reality the agency is the principal despite being a 3rd party to the contract.

7.1.2. Indian Trust Act, 1882:

Trust has been regarded as the most prominent statutory exception to the Doctrine of Privity of Contract. As enumerated under Section 56 of the Indian Trust Act, 1882beneficiary can be treated as owner of the trustee subject to other terms and condition enumerated in the act.

7.1.3. Indian Partnership Act, 1932:

Another exception is incorporated under the Indian Partnership Act 1932. As the condition for the valid contract specifically establish that minor is incompetentto make a contract and cannot be partner to a firm. However, Sec. 30 of the Partnership Act laid down that minor can be beneficiary to the partnership subject

to consent of all the partners. It further provides that minor (beneficiary) have the right to access and inspect copy of the accounts subject to his share in the property and profits.

In this way it can be drawn that the minor who is stranger to the principal contract enteredby the partners or partnership firm is entitle toreceivebenefitswith the mutual consent of all the partners. It's worth noting, though, that the minor can't sue the partners for his share because he's working for the firm. It may be argued that the exceptions introduced in various Acts, such as the Law of Contract, the Law of Partnership, and the Law of Indian Companies Act, have correctly narrowed the scope of the doctrine of privity of contract, since in modern society, contracts in various dimensions are likely to impact a stranger's rights. As a result, certain restrictions on the doctrine of privity of contract are for the stranger's advantage.

8. *Landmark Judicial Pronouncements in England:*

As discussed above the doctrine was highlighted in the year 1861 in landmark case of Tweddle v. Atkinson. However, it was claimed that it was in use since the early 17th century. The doctrine was affirmed in the case of Dunlop Pneumatic Tyre v. Selfridge and Co. Ltd.8 In this case, Dunlop Case court enumerated two basic principle of Doctrine of Privity of Contract:

- Parties to the contract is entitled to sue or be sued
- No stranger is allowed to enforce the agreement in the court of law
- There must be valid contract and consideration.

The doctrine was reaffirmed in the case of Beswick v. Beswick[9] where it was held that plaintiff was not entitled to sue in his personal capacity as she was Stanger to the contract. However, she was allowed to sue in his official capacity.

9. *Landmark Judicial Pronouncements in India:*

In India, the position regarding the doctrine of Privity was not clear and there was different of court opinion concerning the applicability, nature and scope of the doctrine of the Privity of contract. Indian Contract Act, 1872 or any other statute did not incorporate the provision relate to the doctrine of the Privity of the contract.

It was the Privy Council in Jamna Das v. Ram Autar Pande who applied the doctrine of the Privity of the contract as similar to those established in the Tweddle v. Atkinson. Here in this case, the mortgaged property was sold by the debtor to the buyer. In exchange, the buyer decided to pay off a mortgage. The judicial committee decided that because the mortgagee was not a party to the contract, he could not sue the purchaser to collect the debt because he was not a party to the contract.

CONCLUSION

From the above discussion it was observed that only party to the contract is allowed to sue or be sued and strictly prohibits to enforce their rights and liabilities against strangers. Even it also prohibits to sue 3rd party for whom benefits the contract is enacted.We have also observed the two aspects of the doctrine i.e. Benefit aspect and Burden Aspect.

Further, we have seen that court had started applying the doctrine since the early 17th century,however, it was recognized in Tweddle v. Atkinson case. In the next part an attempt was made to analyze contract theories from the lens of the doctrine of Privity of contract. We have found that Unconscionability Theory and equivalent theory favor the doctrine of the Privity of the contract. Both the theories are more concern about the inter-relationship between the parties and have nothing to do with the strangers.

In the next part we have discussed the exception to the doctrine of the Privity of the contract. The exception was broadly divided in to categories i.e. statutory exception and non –statuaryexception. From the

[8] [1915] AC 847.
[9]AC 58, UKHL 2.

discussion made above it can be observed that mainly there are four exceptions to the doctrine. They are- Law of Agency, Law of Trust, Tort of Negligence and law of partnership.

As we have observed that, doctrine was enacted in the England,however, with the Law RevisionCommittee of 1937 abolishedthe doctrine in his 6threport. The Position waschanged withthe enactmentof TheContractsAct 1999. As of now, the situation in England is that stranger can sue or be sued for the breach of the contract. In India the situation is still the same and only party to the contract is allowed to sue or be sued and strictly prohibits to enforce their rights and liabilities against strangers.