CHAPTER – 9

CONCLUSION AND SUGGESTIONS

The doctrine of privity of contract originated during the period when the judges were busy in discovering a suitable principle for determining as who is entitled to sue for breach of a promise. However, it took time to come into prominence. The doctrine of privity is strictly a creature of the common law.

The challenges of tracing the history of privity of contract begins with the mysterious and undefined term privity. It is surely a generic term that has acquired diverse meanings and functions in different periods and contexts, thus greatly complicating our understanding. This word conceals a lengthy evolution and a vast inventory of ideas, rules and principles. We must begin with the fact that early law virtually silent as to the definition of privity and that the etymology of the term is very distant from our present usage. In some legal texts, such as Rastells Terms deLa Ley (1624) and Edmun & Wingate’s is Maximes of Reason (1658), privity was given much attention and general kind of privity were listed, together with numerous examples but the authors ventured no definition and conveyed little mind of its function in the law.¹

These writers had to proceed cautiously because privity connoted a series of ideas privacy, secrecy, knowledge, interest and relationship². Dr.

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¹ Restells entry on P 321 reads “Privity or privities. Privy or privities is where a lease is made to hold at will for years, for life or a feoffment infees, and in diverse other cases, now because of this that hath passed between parties, they are called privies, in respect of strangers, between whom no such conveyance have been. For entries dealing with each of these meaning, see Oxford English Dictionary, Vol VIII P, 1393 (1933) and MIDDLE English Dictionary Part, P 7 P 1339 (Mich Press 1983).
Johnson’s first Dictionary (1755) stated that the word originally came from The old French term Privaute meaning privacy³.

In Kelham’s Dictionary of the Norman or Old French language (1779), the French term “privities” is rendered in English as secrets⁴. The transition from the concept of privacy (privaute) to that of knowledge and familiarity is perhaps understandable. But privity acquired more abstract legal connotations such as ‘interest’ and “relationship” an evolution which seems more difficult to explain. A modern legal dictionary similarly indicates that while privity originally meant knowledge, it now denotes in a secondary sense “ a peculiar relation in which a person stands either to a transition or to some other person⁵.

The doctrine of privity of contract is a combined result of these words, i.e. 'Privity' and 'Contract', consequently, the doctrine of privity means something private or secret about the contract. It means that only parties to the contract and third parties are not bound to fulfill the contractual obligations. The doctrine of privity of contract was first time, applied in the case of Jordan Vs. Jordan (1594) Cro, Elliz 369. Tweddle Vs. Atkinson (1861) 1 B8 & 393 is the case in which the doctrine of privity of contract was finally established by the court of Queen’s Bench in 1861.

It is pertinent to mention that the doctrine of privity of contract which had been toiling hard for its existence succeeded in getting the final

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³ Samuel Johnson, A Dictionary of the English Language (1755) reprint ed. A.M.AS. Press 1967 (privity)
⁴ Dixine secrets were described in Eiddle English as namenly privities, and thus the “Book of privities had reference to the apocalypse. See MIDDLE English Dictionary at 1547.
⁵ JOWETT Dictionary of English Law (Privity) John Kersey, Dictionarum, Anglo Britanni Cum (1708 heprint ed.).
seal of approved by the House of Lord’s in the leading case of **Dunlop Pneumatic Tyre Co. Ltd. Vs. Selfridge & Co. Ltd., 1915 A.C. 847** is this case of court rejected the claim of the plaintiff and held that stranger to a contract had no right to sue upon it. Substantial, reforms of the doctrine of privity was proposed by the **Law Revision Committee, in 1937 in its sixth Interim Report**, but reforms were not implemented. In some subsequent cases efforts were made to abolish the doctrine of privity of contract. For example, in **Drive Yourself Hire Co. Ltd. London Vs. Strutt, 1954 1 Q. B 250**, Lord Denning, who opposed the doctrine, observed, "For the last, two hundred years before 1861 it was settled law that, if a promise in a single contract was made for the benefit of a third person in such circumstances that, it was intended to be enforced by him, then the common law would enforce the promise at his instance, although he was not a party to the contract."

**In Jackson Vs. Horizon Holidays Ltd. 1957, 1 W.L. R 1468** very important question came before the court for consideration. The question was as to whether the promisee could recover substantial damages for loss suffered by the third party and not by himself. In **Beswick Vs. Beswick (1968) A.C. 58**, the view expressed by both Lord Denning and Dankwerts L.J. in the courts of Appeal that the doctrine of privity contract could not be applied.

**In Woodar Investment Development Ltd. v. Wimpey Construction (UK). Ltd.** Lord Scarman forcefully urged the desirability of the House of

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6 (1980) 1 All ER 571 at 590, (1980) 1 WLR 277 at 300.
Lords reconsidering the rule and so did Steyn Lj in *Darlington Borough Council v. Wiltshier.* In *Trident General Insurance Co. Ltd. v. Mc.Niece Bros Pvt. Ltd.*, the majority of the majority in High court of Australia (Mason CJ, Wilson J and Toohey j) thought the time had come to reject the privity doctrine. Gaudron j came to the same result on reasoning based on unjust enrichment principles. Brennam j, Deane and Dawson j thought the doctrine still law. Cogent criticism of the doctrine is to be found in decision of the Supreme Court of Canada in *London Drugs Ltd. v. Kuehne and Nagel International Ltd.*

In 1991 the British law commission produced a consultative paper which suggested radial change in the law. Although the proposal to change the law obtained widespread support, the technical questions of exactly how to bring the change about proved much more difficult than had been anticipated and it was not in fact until 1999 that the contract (Rights of Third Parties) Act became law.

*The contracts (Rights of third parties) Act 1999* enables a third party to enforce a contract where the parties so intend. While the 1999 Act creates a potentially ‘general and wide ranging exception’ to the first aspect of the privity principle, it does not abolish it and leaves it intact for cases not covered by the Act. It also preserves the statutory and common law exceptions to the rule. A third party who is able to invoke one of these

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7 (1995) 3 All ER 895 at 903.
8 (1988) 80 ALR 575.
9 Kincaid 2 JCL 160.
12 Law Com. No. 242 Sec. 5 to 13.
may be in a better position than one who relies on the 1999 Act. Moreover, the Act does not enable a contract term to be directly enforced against a third party and thus does not change the second aspect of the rule under which a burden cannot be imposed on a third party. Accordingly, it remains necessary to consider the common law principle and the exceptions to and circumventions of it.

Finally, we should note that the doctrine of privity means only that a non-party cannot bring an action on contract. This does not exclude the possibility that he may have some other cause of action. **In India, the doctrine of privity is equally applicable** Although, the Indian Contract Act, 1872 does not contain any specific provision which deals with the doctrine of privity of contract, the implicit in several provisions of the Indian Contract Act. Most of the Indian High Courts followed the decisions of the Privity Council and did not enforce stranger's claim. The opinion of the High Courts is divided on this point. But, the Supreme Court, finally, established the doctrine of privity of contract in the leading case **M.C. Chacko Vs. State Bank of Travancore A.I.R. 1970 SC 504.** Where the doctrine of privity of contract and exceptions to the doctrine were finally settled by the Supreme court.

The principle laid down by the Supreme Court in **M.C. Chacko Vs. State Bank of Travancore, AIR 1970** was again reaffirmed by the Full Bench of Supreme Court in **P.R. Subramaniam Iyar Vs. Lakshmi Ammal and Others (1973), Sail & Others Vs. Salem stainless steel supplies & others (1994).** The rule laid down in **M.C. Chacko's** case also has been followed by various High Courts in a numbers of case such as **Sobhagal**
Kataria etc. Vs. State of Rajasthan and others. AIR 1997.

PRIVITY OF CONTRACT AND PRIVITY OF CONSIDERATION

Many question relates to the nature of privity and what relationship it has to consideration. Is privity a distinct doctrine or merely an aspect of the requirement of consideration? Does the consideration doctrine contain the essence of the privity limitation (Monist position) or is there a distinct parties only principle that extends beyond consideration based privity (dualist position)? Should the rule “Consideration must move from the promisee be regarded as the equivalent of a parties only rule, or is it a narrower rule which leaves by its terms, some scope for an action by a non party.

The general idea of consideration was formed about the middle of the 15th Century. At the time 'nudum pactum' had lost its old meaning. The word 'consideration' was employed in the technical sense by the lawyers of that time. Early writers are found of using words 'considerer', consideration, meaning judgement of the Court of Justice. In the judgements of Common Law the use of the words 'it is considered' is very

13 See R. Flannigan, Privity the end of an era (Error 103 L.Q. R. 564, 568 (1987)
14 Furmston’s view, for example, is that "there is difference between the doctrine of privity of contract and the rule that consideration must more from the promise "H is able to state categorically that is the rules are identified M.P. Furmston, Return to Denlop vs. Self wide 23 Mod. L. Rev. 373, 382, (1960)
15 See Dunlop vs Selfridge, (1915) A.C. 847 per Ld Haledane, Midland Silicone, Ltd vs Cruttons Ltd. (1962) AC 446, 447 per Viscount Simonds SIR. WM ANSON, ANSON’s Law of Contract, 421 (25th ed. By Guest O.U.P., 1979) (Cases rest not only upon the rule that consideration must move from the promise but also " upon the more fundamental assumption that no one who is not a party to the contract can acquire rights under it) Scammell “Privity of Contract” B Current Legal probs. 131 35 two independent rules even if the rule of privity were reversed by the courts, few plaintiffs would be assisted because of the rule that consideration must move from the promise
16 According to the monist position the two rules are basically equivalent, but this requires the monist to read the “Consideration must more from the promise and plaintiff must be the promise”. To illustrate, in a typical life insurance contract the parties only rule would conclusively block the third party beneficiary is action on the policy simply because he was a non party. The consideration rule however, would not have that effect promised by the promise (the insured Party) to the insurance company.
frequent.

The present dimensions of the English concept of consideration were laid down by the court of Exchequer in Curie Vs Misa 1875. It is clear in sec. 2(d) of the Indian Contract Act, that it is not necessary that consideration should be made by the promisee. A promise is enforceable if there is some consideration for it and it is quite immaterial whether it moves from the promises or any other person. The Madras High Court in Chinnaya Vs. Rammaya 1882 The consideration given by the "any other person is equally effective. In Samuel Vs. Ananthantha (1883, 6 Mad. 35). The same principle had been applied in this case. "The Indian Contract Act widens the definition of consideration so as to enable a party to the contract to enforce the same.

Though under The Indian Contract Act consideration need not necessarily move from the promisee, the proposal should in all events be made only to the promisee for signifying his acceptance, the exceptional cases being where the agreement is deemed a family arrangement or is said to create a charge.\textsuperscript{17} The rule that a party wishing to enforce the contract must furnish or have furnished consideration (under the English law) must be distinguished from the doctrine of privity. The rules of privity and consideration may not always coincide. The two rules reflect separate issues of policy. The rule of privity relates to who can enforce the contract, and that of consideration is about the type of promises which can be enforced.

\textsuperscript{17} Dittar Vs Rutlasam 90 EC 1000.
Lord Haldane in *Dunlop Pneumatic tyre Co. Ltd. V. Selfridges & Co. Ltd. 1915*, distinguished between the two In the law of England certain principles are fundamental.

One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaestium tertio arising by way of contract. Such a right may be conferred by way of property, as for e.g., under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personal.

A second principle is that if a person with whom a contract not under a seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request.

A third party beneficiary, in the law of contracts, is a person who may have the right to sue on a contract, despite not having originally been a party to the contract. This right arises where the third party is the intended beneficiary of the contract, as opposed to an incidental beneficiary. It vests when the third party relies on or assents to the relationship, and gives the third party the right to sue either the promisor or the promise of the contract, depending on the circumstances under which the relationship was created. In order for a third party beneficiary to have any rights under the contract be must be an intended beneficiary, as opposed to an incidental beneficiary. The burden is on the third party to plead to plead and prove that he was indeed an intended beneficiary. True adherence to consideration would appear to dictate that the contracting parties should be free to change their intentions at any time. The Third
Party Act 1999 recognise that consideration should give way to the need to avoid the injustice of disappointing the reasonable expectations of the third party, where that third party has relied on the contract or has accepted it by communicating its assent to the promisor.

There’s no objection to accepting that, the Third Party Act 1999 does not affect the requirement of consideration, at a deeper policy level, and within the area of third party rights, it may represent a relaxation of the importance attached to consideration. After all, promises under deed are enforceable without the need for consideration. And there are other established examples in the law of exception to the need for consideration: for example, documentary letters of credit, compositions with creditors, and the doctrine of promissory estoppels. The doctrine of consideration may be a suitable topic for a future. But for the present there’s no practical difficulty in taking the limited step to recommending what may be regarded as a relaxation of the requirement of consideration to the limited extent necessary to give third parties rights to enforce valid contracts in accordance with the contracting parties' intentions.

9.2 EXCEPTIONS OF THE PRIVITY OF CONTRACT

An exception of the privity of contract was admitted in the first half of the eighteenth century, when the rule was itself obscure. The doctrine of privity is, however, neither rigid nor absolute. It is subject to certain non-statutory and statutory exceptions. These have been discussed as follows:

9.2.1 NON-STATUTORY EXCEPTIONS

(i) Trust

This is the most common exception to the doctrine of privity of
contract. It is an equitable exception. Equitable principle was first time enunciated in the **Eighteenth Century** by *Lord Harwicke*, the important development occurred in the Nineteenth Century in *Lloydy's Vs. Harper* (1880) 16 Ch. D. 290. The principle was applied by the House of Lords in *Les Affreteurs Rcunis Soriete Anounyme Vs. Leopold Walford (London) Ltd.* (1991) A.C. 801.

(ii) **Covenants concerning Land**

The Law allows certain covenants to rule with land so as to benefit people other than the original contracting parties. The Law on covenants relating to leasehold land was recently been reformed by the *Landlord and Tenant (Covenants) Act, 1995.*

(iii) **Tort of Negligence**

The tort of negligence can be received as an exception to the third party rule where the negligence in question constitute the breach of an contract to which the plaintiff is not a party. For example *Donognue Vs. Stevenson* (1932) AC 562. It is a very wide sense, therefore, that standard examples of the tort of negligence constitute exceptions to the third party rule.

(iv) **Agency**

Many contracts are made through intermediaries and will be subject to the law of agency.

(v) **Assignment**

Except when the personal considerations are at its foundation, the benefit of a contract may be assigned to a third party.
(vi) **Collateral Contracts**

A contract between two parties may be accompanied by a collateral contract between one of them and a third party.

(vii) **Benefit of Exclusion Clauses**

Promisee’s remedies assistance the Third Party although not strictly an exception to the third party rule, since it is the promisee seeing in certain circumstances the promisee may be able to assist the Third Party by recovering the substantial damages.

9.2.2 **STATUTORY EXCEPTIONS**

A number of statutory and common law exceptions of the third party exist, which have been discussed below:

(i) **Contracts of Insurance**

Contracts of insurance made for the benefit of third parties cannot in principle be enforced by them, unless a insurance is created in this favour.

(a) Road Traffic Act, 1988 Under the Road Traffic Act, 1988, Sec. 148(7), the person issuing a policy of insurance against death or bodily injury to third parties in accordance with the requirement of the Act is made liable to indemnify not only the persons taking out the policy in respect of any liability which the policy purports to cover.

(b) The Third Parties (Right against Insurers) Act 1930 Under the Third Parties (Right against Insurers) Act, 1930 a third party who has a claim against a defendant who has taken out insurance against liability to third parties will be able to claim against the insurer whether the defendant has become, interalia, insolvent either before or after incurring the liability to the third parties.
(c) The Married Women’s Property Act, 1882 The Married Women’s Property Act, 1882, section 11, allows a husband to effect an insurance on his life for the benefit of his wife and children.

(d) Fire Prevention (Metropolis) Act, 1774 Under section 30 of the Fire Prevention (Metropolis) Act, 1774, where an insured house or building is destroyed by fire, the insurer may be required "upon the request of an or persons interested".

(ii) Commercial Practice

Certain exceptions have introduced into the doctrine of Privity of contract as Commercial Practice. Some of these are statutory provisions, other arise out of the agreed practice of merchants as recognised by the courts.

(a) Negotiable instruments and bill of Lading Bill of Exchange Act, 1882 In general, negotiable instruments (such as bills of exchange, cheques and promissory notes), are transferable by delivery and give to the transferee for value, who acts in good faith, ownership of, or a security interest in, the instrument free from equities. Under the Bills of Exchange Act 1882, the holder of a bill of exchange may sue on the bill in his own name. If a bill of exchange is dishonored, the drawer, acceptor and endorses are liable to compensate the holder in due course. Bill of Lading Act, 1855, the Act was replaced by the carriage of Goods by Sea Act, 1992, which separate the rights to sue the carrier from the passing property in the goods under the sale contract.

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18 Section 38 (1)
(b) Letters of Credit The irrevocable letter of credit has often been said to be an example of an exception to the privity of contract. The Uniform Customs and Practice for Documentary Credit (1993), Documentary Letters of credit (1993), it enables the short term credit facilities to be made available, guarantees payment to the seller, and safe guards the parties against currency fluctuations.

(iii) Companies Act 1985

Under section 14 of the companies Act, 1985, the registered memorandum and articles of association of a company bind the company and its members to the same extent as if they respectively had been signed and sealed by each member.

(iv) Package Travel, Package Holidays and Package Tours Regulation, 1992

Where a contract for the provision of a package holiday is made between an organiser or retailer and a consumer, the organiser or retailer is liable to the consumer for the proper performance of the obligations under the contract whether those services are to be performed by the organiser or retailer or not.

Exceptions In India, There are certain statutory exceptions to the privity of contract which are discussed below:

(i) Contracts of Insurance

ICICI Lombard General Insurance Co. Ltd Vs. Vinod Bhai Hira Bhai Vader AIR 2009, Gujrat. Motor Vehicles Act, 1988 Sec. 147 Liability of Insurer, Act policy covering risk of third parties also it would include risk caused by death or injury to pillion riders. National Insurance Co. at Godhra Vs. Shabbir Mohmmad Kunj and Others, 2009 (Gujrat) Motor Vehicles Act, 1988 Sec. 149, third party risk liability of insurance co-occupants of private vehicles are third parties in the eye of law, death or bodily injury to such persons would entitle them to claim compensation from insurers even without any additional premium by owners of private vehicles.

(ii) The Law of Agency

An agency is the well known exceptions to the doctrine of privity of contract.

(iii) Indian Trust Act, 1882

Trust is the most common statutory exception to the doctrine. Sec. 56 of the Indian Trust Act, 1882 provides that beneficiary is entitled to have the intention of the owner of the trust specifically executed to the extent of beneficiary's interest.

(iv) Indian Partnership Act, 1932

Indian Partnership Act, 1932 deals with another exception to the doctrine of privity of contract.

A number of statutory and common law exceptions to the third party rule exist. These have been discussed above. The existence of exceptions to
the third party rule have not been tested yet. The existence of exceptions to the third party rule is strong justification from reform. There is two reasons. Firstly, the existence of so many legislative and common law exceptions to the rule demonstrates its basic injustice. Secondly, the fact these exceptions continue to evolve to be the subject of extensive litigation demonstrates that the existing exceptions have not resolved all the problems.

9.3 BURDEN ASPECT OF THE PRIVITY OF CONTRACT

Contractual burden have been divided into following three heads (1). Contractual Burden under English Law (2) Contractual Burden under Indian Law (3) Contractual Burden in other common law countries.

9.3.1 Contractual Burden under English Law

It is to be noted that, as a general rule, the parties to a contract cannot impose contractual burden upon a third party without parties consent. However, these are certain cases, where contractual burden can be imposed upon a stranger. Under English Law, ordinarily, prevents the contracting parties from enforcing contractual burden against stranger to the contract, but there are some exceptional circumstances when a stranger to contract can be used, they relates to (i) Contract concerning land (ii) Contract relating to chattels and other personal property.

(i) Contract concerning Land

It is established doctrine that a restrictive covenant, binding a purchaser not to perform certain acts of ownership upon the land bought, may be enforced, not only against him as the contracting party, but also
against third parties who later acquire the land.

(ii) **Contract relating to Chattels and other personal property**

English law has always drawn a distinction between the principles applicable to real and personal property\(^{19}\). The general rule set out above is subject to statutory exceptions. It does not apply where a contract or an option to transfer a chattel or an intangible interest creates an equitable interest in property or a possessory interest in the transferee, and the Courts may protect this interest against a third party\(^ {20} \).

(a) **Resale Price Maintenance**

Resale price maintenance (RPM) is the policy by which a supplier ensure that his product shall be sold to the customer at a price which has been fixed in advance by him. The Resale Prices Act, 1964 which governs the RPM in U.K. (See also Resale Prices Act, 1976). The general purpose of this Act is to prevent suppliers goods (manufacturers and other) from fixing minimum prices at which the goods are to be resold and to prohibit the withholding of supplies from dealers who sell at a price below the minimum so fixed.

(b) **Intellectual Property**

**Patents**, A patentee has by statute the sole right to make, use, exercise, and vend an invention; and no other person has the right to sell the patented article except under license from the patentee, and subject to


\(^{20}\) Falke v. Grey (1859) 4 Drew 651; Erskine Macdonald Ltd. v. Eyles [1921] 1 Ch. 631, 641, See also Swiss Bank Corp. v. Lloyd's Bank Ltd. [1982] A.C. 584, at pp. 598, 613 (Contract did not create charge over property)
any conditions attached to the license\textsuperscript{21}. But the rights of a patentee to attach resale price maintenance conditions to goods have now been substantially curtailed by section 2 of the Competition Act 1998 and Article 81 (ex. Article 85) of the EC Treaty.

**Copyright.** The owner of the copyright in literary, dramatic, musical or artistic works has a statutory right to prevent it being copied, published, broadcast, or intrigued in certain other ways by any unauthorized person\textsuperscript{22}.

**Bailment.** In many situations there will be a series of bailments and the question is whether, if the ultimate sub-bailee loses or damages the goods and is sued by the bailor either in tort of for breach of duties arising from the bailment\textsuperscript{23}. It can rely on the terms of the contract it made with its immediate bailor as a defence.

**Ships under charter – party.** The charter cannot obtain specific performance of the contract\textsuperscript{24}. nor, it seems, damages or monetary compensation\textsuperscript{25}. It would also seem that the Court will not be prepared to grant an injunction if the situation is such that, in any case, the vendor was incapable of further performing the charter-party\textsuperscript{26}. or if, in the case of the mortgage of a vessel, the charter is such as substantially to impair the security\textsuperscript{27}.

**Hire-purchase and hire.** There is no authority as to whether a hire-

\textsuperscript{23} For instance, only to deal with the goods in the manner authorized.
\textsuperscript{24} De Mattos v. Gibson (1859) 4 De G. & J. 277, at p. 297.
\textsuperscript{25} Although the form of the order made in the Strathcona case would seem to indicate that damages could be awarded, cf. Port Line Ltd. v. Ben Line Steamers Ltd. (supra), at p. 169; Law Debeniture Trust Cpn. v. Ural Caspian Oil Cpn. Ltd. [1993] 1 W.L.R. 138, at pp. 144; rev’d on another ground [1995] Ch. 152.
\textsuperscript{26} Lord Strathcona [1925] p. 143. See also ante, p. 457, n. 280.
purchase agreement, under which a chattel is bailed to the hirer with an option to purchase the chattel once all the installments have been fully paid, will be binding on a third party purchaser of the chattel from its owner.

9.3.2 CONTRACTUAL BURDEN UNDER INDIAN LAW

Under the Indian Law Burden can also be imposed upon third parties.

(i) The Married Women's property Act, 1874

Sec. 6 of the Married Women's property Act, 1874, A policy of insurance effected by any married man on his own life, expressed on the fact of it to be for the benefit of his wife, or children, shall be deemed to be a trust for the benefit of his wife or such children.

(ii) Motor Vehicles Act, 1988

Sec. 148, Motor Vehicles Act, 1988 an insurer issuing a policy under the Motor Vehicles Act covering third party liability is liable to satisfy any judgment or decree which may be passed in favour of the third party against the insured in respect of compensation for loss to the third party against the insured in respect of compensation for loss to the third party arising in an accident involving a motor vehicle.

(iii) The Workmen's Compensation Act, 1923

Sec. 12, the workmen's Compensation Act, 1923 where an insured under such a policy becomes insolvent or makes composition or arrangement with creditors, or the insurance company is wound up, the

27 The Celtic King [1894] P. 175.
rights of the insured against the insurer stand transferred to such third party to whom such liability is incurred.

(iv) **The Marine Insurance Act, 1963,**

Sec. 17, The Marine Insurance Act, 1963 a mortgagee, consignee of other person having an interest in the subject matter insured may insure on behalf of and for the benefit of other persons insured as well as for his own benefit.

(v) **The Negotiable Instruments Act, 1881**

Sec. 8, The Negotiable Instruments Act, 1881 a holder of a promissory note, bill of exchange or cheque is entitled to recover the amount due thereon.

(vi) **The Indian Bills of Lading Act, 1856**

Sec. 1, The Indian Bills of Lading Act, 1856 every consignee of goods under a bill of lading and every endorsee of a bill of lading has the right of suit and is subject to the same liabilities as if he were a party to the bill of lading.

(vii) **The Railways Act, 1989**

Sec. 74, The Railways Act, 1989 a consignee of goods covered by railway receipt or the endorsee shall have all rights and liabilities of the consignor on delivery of railway receipt to him.

(viii) **Indian Contract Act, 1872**

Sec. 37, Indian Contract Act 1872 For the extent to which any other assignees may sue on a contract, see 'Assignment' under sec 37 of Indian Contract Act. Although, a principal is a party to the contract made by the agent on his behalf, the position of an undisclosed principal requires
consideration. If an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, his principal may require the performance of the contract.

(ix) The Consumer Protection Act, 1986

Sec. 2(d)(i) and (ii) The Consumer Protection Act, 1986 provisions of the Act applied to certain types of goods and services only. A user of goods or beneficiary of services using or taking benefit with the consent of the person who has purchased the goods or hired the services, is a consumer, and can file a complaint and obtain relief for defect in goods or deficiency in services.

(x) The Specific Relief Act, 1963

Sec. 15 ,The Specific Relief Act, 1963  specific performance may be obtained by a person beneficially entitled under a marriage settlement and family arrangement, a new company arising out of amalgamation of a contracting party (company) with another company, and a new company in respect of contracts entered into before its incorporation.

(xi) The Industrial disputes Act, 1947

Section 18 of the Industrial dispute Act, 1947 contains under its different clauses, following provisions in this regard.

Section 18(1) provides that a settlement arrived at by agreement between the employer and workmen otherwise than in the course of conciliation proceedings shall be binding on the parties to the agreement. It applies where the agreement is arrived at without assistance of authorities under this Act. It has been observed by the Supreme Court in Tata Engineering and Locomotive Co. Ltd. v. Their Workmen,
In ITC Ltd. Workers welfare Association and another v. Management of ITC Ltd and another\(^{28}\) the Supreme Court observed that admittedly, the settlement arrived at in the instant case was in the course of conciliation proceeding and therefore it carries a presumption that is just and fair. It becomes binding on all the parties to the relates and all other persons who may subsequently be employed in that establishment. An individual employee cannot seek to wriggle out of the settlement merely because it does not suit him.

The legal effects of both kinds of settlements are not identical. Under Section 18(3) of the Act a settlement arrived at in the course of conciliation proceedings will be binding on all parties to the industrial dispute referred in clause (a) to (d) of Section 18 (3) which in the case of workmen will include all persons who are employed in the establishment or part of the establishment to which that dispute relates on the date of dispute and all persons who subsequently become employed in the establishment or part. But a settlement arrived at between the management and workmen otherwise than in the course of conciliation proceedings will bind only the actual parties to the agreement in accordance with Section 18 (1) of the Act, 1947\(^{29}\).


9.3.3 CONTRACTUAL BURDEN IN OTHER COMMON LAW COUNTRIES

(i) United Kingdom

Statues similar to those discussed above confer rights or impose liabilities on third parities in the UK.

(ii) United States

There is vast literature on third party rights in the United States. The New York Court of appeal in Lawrence v. Fox 20 NY 268 (1859) it has become generally accepted that the third party is liable to enforce a contractual obligation made for his benefit.

(iii) Western Australia

**Section 11 Western Australia Property Law Act 1969**, Section 11 of the Western Australia Property Law Act 1969 enables the enforcement of a contract by the third party on whom benefit is conferred expressly by the contract. All parties to the contract must be joined in an action by the third party. It permits variation or cancellation of the contract by the parties until the third party adopts the transaction, either expressly or by conduct.

(iv) Queensland

**Section 55 Queensland Property Act 1974**, Section 55 of the Queensland Property Act 1974, provides that the promisor shall be subject to a duty enforceable by the (third party) beneficiary to perform that promise upon acceptance by the beneficiary; variation or discharge by the parties to the contract being possible without consent of the third party before such acceptance. On acceptance, the beneficiary is bound to

30 Chitty on Contracts, 28th end, pp 1017-23, paras 19-103 to 19-114
perform any acts that may be required of him by the terms of the promise. Defences normally raised against an action to enforce a promissory duty can be raised by the promisor against the beneficiary.

(v) New Zealand

The New Zealand Contracts (Privity) Act 1982, The New Zealand Contracts (Privity) Act 1982, does not limit enforceability by a beneficiary to express promises only. It reverses the onus of proof by requiring that the parties to the contract have to establish that their promise was not intended to have the effect of creating a legally enforceable obligation in favour of the third party. It requires that the third party must be sufficiently designated in the contract. Parties to the contract cannot vary or alter the promise benefiting the third person after he has materially altered his position in reliance on the promise, or has obtained judgement or award on the promise.

9.4 CRITICISM

The considerable criticism of the principle that a third party cannot acquire rights under a contract has been discussed as follows.

Its desirability as a matter of policy has been questioned by judges, law reform bodies, and commentators. Its pedigree has also been

criticized on the ground that it was doubtful that the nineteenth century cases on which it is based in fact established its existence and that it was only a rule of procedure. It is said that it serves only to defeat the legitimate expectation of the parties and the third party, who often organize their affairs on the faith of the contract; that it undermines the social interest of the community in the security of bargains; and that it is commercially inconvenient. Above all it defeats the intentions of the parties to the contact.

Firstly the third party rule prevents effects being given to the intentions of the contracting parties. If remedy is denied to the third party when the contracting parties intended it to be so, it frustrates their intentions. Secondly it causes injustice to the third party who may have relied on the contract to regulate his affairs, and thus upsets the reasonable expectations of the third party to the benefit under the contract. Thirdly such a third party who suffers a loss cannot sue, and the promisee who has suffered no loss can. Fourthly therefore, the third party who suffers loss cannot claim compensation, and the promisee not having suffered any loss can claim nominal damages only. Fifthly even if the promisee were to obtain a satisfactory remedy, he may not be able to, or may not wish to sue.

Lastly the third party rule causes difficulties in commercial life,
particularly where transactions and projects involve a ‘network’ of contracts allocating risks, responsibilities and liabilities between the parties.\textsuperscript{36} In the standard situation the person who has suffered the loss cannot sue, while the person who has suffered no loss can sue but may be able to obtain only nominal damages. Where the object of the contract is to benefit the third party, the effect of this is tantamount to ruling that the object of the contract is unenforceable.

The third party rule now a days causes real difficulties in commercial life. there are two types of contracts (i) construction contracts and (ii) Insurance Contracts.

The attention has also recently been drawn to the difficulties caused by the third party rule in the offshore oil and gas industry, which provide an excellent example of the anomalies and inconsistencies generated by the rule in practice. It can be understand that for many years, major oil companies and their advisers have attempted to minimize litigation arising from drilling contracts in the North Sea. This has largely been achieved by the use of cross indemnities between oil companies and contractors, which to be effective, must not only benefit the parties to the contracts in question but also all other companies in their respective groups, their employees, agents, sub-contractors and co-licensees. This is because, for example, it will often be unclear at the outset of a project which member of a client company’s group will operate a platform and will thus be caused loss by any failings on the part of the contractor. An indemnity should

therefore ideally benefit all companies likely to be affected. It is generally impractical for more than a handful of the beneficiaries of the indemnities given to be made parties to the contract.

In *Westralian Farmers Co-Operative Ltd. v. Southern Meat Packers Ltd.*\(^\text{37}\) the Supreme Court of Western Australia found that, where the plaintiff third party had established the existence of a contractual payment term in its favour, and the defendant claimed that it had already made payment to the original promisee, the plaintiff third party could nevertheless maintain its claim to payment.

**Section 55** of the *Queensland Property Law Act 1974* provides that:

\[\text{A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform the promise.}\] \(^\text{38}\)

Prior to acceptance, the promisor and promisee may vary or discharge the terms of the promise without the beneficiary's consent.\(^\text{39}\) After acceptance, the promisor's duty to perform in favour of and at the suit of the beneficiary becomes enforceable, and the promise may only be varied with the consent of the promisor, promisee and beneficiary.\(^\text{40}\) On acceptance, the beneficiary is bound to perform any acts that may be

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\(^{38}\) Queensland Property Law Act 1974, s 55(1). The New Zealand Contracts and Commercial Law Reform Committee, Privity of Contract (1981) p. 52 regarded the Queensland legislation as "deficient in not providing that the duty may be created by deed as well as by simple contract"

\(^{39}\) Queensland Property Law Act 1974, ss 55(2).

\(^{40}\) Queensland Property Law Act 1974, ss 55(3)(a) and (d).
required of him by the terms of the promise.\textsuperscript{41} Unlike the Western Australian legislation, discussed above, the Queensland legislation does not require that the contract expressly purports to confer a benefit on the third party.\textsuperscript{42} And it imposes no obligation to join all parties in any action by the third party.\textsuperscript{43}

Lord Reid in Beswick Vs. Beswick (1968) AC, 58, 72 had called for a reconsideration of the rule, and hoped that all cases which "stand guard over this unjust rule" might be reviewed. Lord Scarman concluded his judgement with an unequivocal call for reform. The proposition that the state of English Law is such that neither the third party for whom the benefit was intended nor the promisee who contracted for it can recover it, if the contract is terminated by the promisor's refusal to perform, calls for review, and now not forty years on.

Lord Goff and Steyn JJ, have added their influential voices to criticism of the third party rule. In White Vs. Jones (1995) 2 AC 207 his Lordship said "Our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration and through a strict doctrine of privity of contract stunted through a failure to recognise a jus quaestitum tertio".

**United States**

Since the New York Court of Appeals decision in "Lawrence v. Fox",

\textsuperscript{41} Queensland Property Law Act 1974, ss 55(3) (b).
\textsuperscript{42} Although the promise must appear to be intended to confer a legal right enforceable by the third party: see note 29 above.
\textsuperscript{43} If criticisms (i) and (ii) in paragraph 4.6 above are accurate, the Queensland legislation also differs in that the beneficiary need not be named or in existence or identified at the time of the contract: see s 55(6) (b). See Ontario Law Reform Commission, Report on Amendment of the Law of Contract (1987) pp. 62-64; Manitoba Law Reform Commission, Privity of Contract (1993) Report No. 80 pp. 32-34.
20 NY 268 (1859) it has been generally accepted in the U.S. that a third party is able to enforce a contractual obligation made for his benefit. The First Restatement of the Law of Contract in 1932 restricted third party rights to those who fell in one of two categories i.e. donee beneficiaries and creditor beneficiaries. The courts however found these two categories overly restrictive and eventually adopted the “intention to benefit test”. The Second Restatement of Law of Contract in 1981 adopted the intention to benefit test. The Second Restatement addresses other issues including variation and termination and defences. The well established rule in Illinois is that if a contract is entered into for the direct of a Third person, the third person may sue for a breach of the contract in his or her own name, even though the third person is a stranger to the contract and the consideration. This principle of law is widely accepted throughout the United States, because allowing a third party beneficiary to sue the promisor directly is said to be manifestly just and practical. In cases it increases judicial efficiency by removing the privity requirement, under which the beneficiary must sue the promise who then it turn must sue the promisor.

The common law did not recognize third party beneficiary rights. The leading authority was “Beswick v. Beswick” (1968) AC, 58, 72. The U.K. recently adopted detailed legislation, the contracts (Right of Third Parties) Act 1999, abrogating the rule of privity of contract for third party beneficiaries. The U.K.’s 1999 Act was modeled in part on the New Zealand Contracts (Privity) Act 1982. Calls for reform in the area; however, date back to at least 1937 with the recommendations of the English Law Revision Committee. This earlier call for reform was not implemented.
1991, the Law Commission (for England and Wales) put forward for discussion in a consultation paper proposals for reforming the privity rule and subsequently recommended a detailed legislative scheme in its final report in 1996. An important consideration behind its recommendation for detailed legislative reform was the fact that although the House of Lords had been highly critical of the third party rule in English law it had declined on a number of occasions to reconsider it. The U.K’s 1999 Act essentially replicates the recommendations in the Law Commission’s 1996 report. The 1999 Act has been generally well-received. In contract, the U.K. Act offers a greater balancing of third party interests with those of the contracting parties. It provides that where a third party right arises under the terms of the contract, the parties to the contract may not vary or rescind it without the consent of the third party once: (i) the third party has communicated his assent to the term to the promisor, or (ii) the promisor is aware that the third party has relied on the term; or (iii) the promisor could reasonably foresee that the third party would rely on the term and the term and the third party has relied on the term.

**Singapore**

The Law and Revision Division of the Attorney-General’s Chambers, Singapore introduced legislation that is virtually identical to that of the U.K. The extent of the criticism and reform is itself a strong indication that privity is flowed, but most members of states of the European Union allow Third Parties to enforce contract.
9.5 SUGGESTIONS

The doctrine of privity is very useful, for it helps in preserving the sanctity of the contract. The sanctity of the contract is preserved if the parties to a contract are held answerable to each other and not a third person. It would be illogical and unjust to abolish the doctrine totally. If it is abolished, each and every member of society will become free to sue the contracting parties. Consequently, chaos will result and social fabric and bond of brotherhood may be weakened.

However, it is also clear that the doctrine cannot be applied strictly, with passage of time, it was found that a contract between the parties did not affect only the contracting parties but, in certain circumstances, if affected third person also. Consequently, it was felt desirable and logical that the person who is a stranger to a contract should also get contractual benefits. The third party rule means that only the parties within each contractual relationship can sue other.

In an effort to overcome the privity deficiency of the law of contract, attempts were earlier made by subsequent owners of defective premises to sue in tort, and the expansion of the categories of negligence following *Hedley Byrne & Co. Vs. Heller & Partners Ltd.*,\(^\text{44}\) and particularly *Anns v. Merton London Borough Council*,\(^\text{45}\) initially resulted in such claims being successful.\(^\text{46}\) However, the law is now set against the recovery in negligence of economic loss caused by defective construction.

\(^{44}\) [1964] AC 465.
\(^{45}\) [1978] AC 728.
There is no reason why the architects’, engineers’ and contractors’ liability to the third party could not be limited, as it presently is under collateral warranty agreements, so as to exclude consequential loss and so as to be limited, as it presently is under collateral warranty agreements, so as to exclude consequential loss and so as to be limited to a specified share or a just and equitable share of the third party’s loss. 47

An advantage of the reform, as against collateral warranty agreements, is that it would not be necessary to assign the benefit of a provision extending the contractor’s or architect’s duty of care to sub-financiers and other purchasers and tenants down the line, since these persons could simply be named as potential beneficiaries. Thus, the difficulties caused by quantification of damages in claims under assigned collateral warranty agreements would be entirely removed.

At present therefore, the third party rule is circumvented by making the parties to the contract agents or trustees for the other beneficiaries. Some devices used have become even more complex than those commonly employed in the construction industry, with webs of mutual cross-indemnities, back to back indemnity agreements, and incorporation of all main contract provisions into sub-contracts. The contractors and employers should straightforwardly extend the benefit of indemnity and exemption clauses contained in a contract to other companies in a group, employees, sub-contractors and others.

The existence of the privity rule, together with the exceptions, has

47 In contrast to limitations warranties, limitation clauses will not be subject to ss. 2(2) or 3 of the Unfair Contract Act 1977 where an action is brought by a third party under our proposed Act: see paras 13.8-13.15 below.
given rise to a complex body of law and to the use of elaborate and often artificial structures in order to give third parties enforceable rights. In exceptions reforms is necessary which enables the artificiality and some of the complexity to be avoided.

It is recommend by the British Law Commission the rule of English law whereby a third party to a contract can not enforce, should be reformed so as to enable contracting parties to confer a right to enforce the contract on a third party. The right of third party to sue on a contract made for its benefit is recognised by the law of Scotland and the legal system of the United States. It has also been introduced by Statute in several Commonwealth Countries. Contract (Rights of Third Parties) Act 1999 provides enforcement of contractual terms by third party. The UNIDROIT principles provide that a contract is binding upon the parties.

**Hong Kong**

On 25th October 2005, the Law Reform Commission of Hong Kong released a report on proposals to reform the doctrine of Privity of Contract. The report recommends that the doctrine should be reformed by means of a detailed legislative scheme which would provide comprehensive, systematic and coherent solutions. It also recommends that all the major issues arising from their proposed statutory exception should be dealt with in the new legislation. In a nutshell the proposed reform should be regarded as a general and wide-ranging statutory exception to the privity doctrine.

**UNIDROIT**

The working group for the Preparation of Principles of International
Commercial Contracts of UNIDROIT, the International institute for Unification of Private Laws also developed draft articles to recognize third party beneficiaries. The draft articles included provisions addressing the identification of third parties, exclusion and limitation clause, defenses, revocation and renunciation. Thus from the above statements we can conclude that where a contract is made for the benefit of a third person there may be an equality in favour of the third person to sue upon the contract, and it has been suggested that a person who takes a benefit under a contract may sue on the contract. Thus, a stranger having beneficial interest under a contract can sue in equality to enforce although he himself is a stranger to the contract.

The rigid adherence to the doctrine of privity of contract under the present state of law in India should be done away with to remove the hardship caused by the same. This can be done by dispensing with the particular instances where the rule should not apply and by incorporating a separate section with similar instances under the laws adopted by other countries mentioned above.

In India, there is no specific statute to deal with third parties rights like other common law countries, statute such as Third parties (Rights Against Insurer) Act, 1930, New Zealand (Privity) Act, 1982, Third Parties Rights Act, 1999. Consequently, the principle laid down in Tweddle Vs. Atkinson (1861) 1 B & S. 393 case is still applicable in India without any modification; now there is need of specific statute to deal with third parties Rights. Evolution of the Law and changed circumstances, required it. New suggestions have been incorporated in the thesis.