CHAPTER - 1

INTRODUCTION

1.1 CONCEPT AND EVOLUTION OF PRIVITY OF CONTRACT

European jurists do not easily recognize the term “Privity of Contract” yet an equivalent principle obtained in European law long before its discovery in English Law. This is a principle of universal law, embodying policies and socio economic factors more general and ancient than the uniquely expressed English doctrine may suggest.

1.1.1 Privity of Contract under English Law

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

(i) Origin and Meaning of Privity of Contract

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. 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

¹ Restells entry on P 321 reads “’Privity or perivities. Privcy or privities is where a lease is made to hold at will for years, for life or a feoffment infe, and in diverse other cases, nowbecause of this that hath passed between parties, they are called privies, in respect of strangers, between whom no such conveyance have been.

² 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).

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.
transition or to some other person.

This transition suggests that privity the fact became a source of obligations when legal meaning was attached to the personal bond or in word relation resulting from knowledge and familiarity contract for example, have a recurrent factual basis in the privacy of meetings, discussions and personal dealings. Privity, then, has possessed a broad inventory of meaning a reason why contemporary usage, seems confused, almost institutional. In large measure, the modern controversy between the monist and dualist schools of thoughts would not exist but for the indiscriminate blending of various meaning of the term.

The doctrine of privity of contract is a combined result of these two words, i.e. 'Privity' and 'contract'. Consequently, the doctrine means something private or secret about a contract or it means the privacy of a contract between the parties. The privacy of contract signifies a privacy or secrecy to terms of the contract. It means that only parties to the contract are bound to comply with the terms of the contract and third party is not bound to fulfill the contractual obligations. This means that only parties to a contract are entitled to enjoy benefits of a contract and no third party can claim the benefits of a contract because he has no concern with the contract. In Black's Law Dictionary a clear concept of the doctrine is

5 JOWETT Dictionary of English Law (Privity) John Kersey, Dictionarum, Anglo Britanni Cum (1708 heprint ed.).
6 This connection still seernives in Fifoot’s Happy phrase ‘‘the dogma of contractual privacy’’.
visible. It purports that 'privity of contract' is that connection or relationship which exists between two or more contracting parties. For the maintenance of an action on any contract it is essential that there should exist a privity between the plaintiff and the defendant in respect of the matter sued on.'

(ii) Functions of Privity of Contract

The functions of the doctrine of privity of contract are an essential tool in analyzing its evolution and in clarifying its meaning. Historically there have been at least four functions of the doctrine in the law of contract.

(a) to classify contractual duties (Schematic)

(b) to regulate evidence and proof of obligations (Evidentiary)

(c) to denote particular relationship necessary to satisfy the contract writes (Interior)

(d) to mark off the boundaries between Contract and other fields of law (Exterior)

(a) The Schematic—Interestingly, when the phrase 'privity of contract' first appeared in the common law it was used in a schematic sense remote from the subject of third party beneficiary contracts. Writing in the early 17th century, Lord Coke listed four kind of privity recognized by the common law, privity in estate (eg. Lessor and lessee) privity in blood (ag. Ancestor and heir) privity in representation (e.g. testator and executor) and privity in tenure (eg. Lord and tenant)coke, was using the privity
concept as a classification tool and he confined himself to the main sources of legal duties, thus proving the early model for the systematic pursuits of Holmes.

The question of the proper classification of real and personal rights had been previously raised in 1565 by a lessor’s action in debt to recurrent. It was argued there was no privity of estate to ground an action in debt against a lessee who had assigned over. Several judges were inclined to hold for the defendant because “the privity between lessor and lessee is gone,” and a new Privity is created which goes with the land between the lessor and the assignee. The reporter of the case then posed the other position left opens by the case. The court used the privity concept to describe the types of obligation created by lease. It reasoned that there were three types of privity involved in a lease following an assignment, estate only, contract only, and estate and contract together. Thus, privity of contract was legal shorthand for the distinction between real and personal duties. The action of debt was no longer purely real. A new variety of privity had entered the schematic ranks via a lessor-lessee dispute that had virtually nothing to do with third party beneficiary.

(b) The Evidentiary function—In Medieval law certain rules of evidence were based on privity, and these gave rise to a distinctive set of privity objections. One such rule was that the parties litigant and “interested” persons generally were barred from testifying in a cause on the assumption that their testimony would be biased consequently a promisee
of a promise for the benefit a third person was normally disqualified as a witness for the benefit of a third person was normally disqualified as a witness if he himself brought the action. Being plaintiff and in privity, the promisee was not a trustworthy witness. The promisee testimony would be admitted, however in cases where the third party beneficiary asserted the action, for then the promise's own action was barred and (he) is become a mere stranger and might be a witness in this action privity was also pivotal to the mode of process available in the medieval.

The danger of false proof was increasingly felt when third parties became involved in a past transaction. One class of cases posing the danger were those of executors and administrators sued in a representative capacity on the contracts of a deceased person, or an abbot sued upon a contract made in the time of his predecessor. These defendants were third persons who could not be absolutely sure whether their deceased principal may have contracted the debt, received quid pro quo or need paid the plaintiff. The situation was too unsafe to allow the use of wager. It was explained in 1594.

The reason why debt lies not against an executor upon the contract of the testator is because the law does not intend that he is privy thereto, or can have notice thereof, and he cannot gage his law for such a debt as the testator might. Since the “Country” might have no knowledge of such a contract either, there was no process to try the matter and consequently no liability. The result produced a direct correlation between the absence of
privity, the failure of proof and the liability to impose liability. It was but a short step from the evidentiary objection to the substantive position that the plaintiff had no right of action, and this would explain what mediæval judges intended by the statement “the action of debt cannot maintained without privities. An immunity originally deduced from the defendant’s inability to wage law was transformed into the lack of a right to sue.

The same problem did not arise in account. A third party plaintiff under the action of account was permitted to have an action despite his lack of personal nexus to the defendant. The third hand situation in account was considered an instance in which proof by wager was ousted.

After the covenant lost its informality in the reign of Edward I, the rule became established that comment would only lie on a deed under seal. Covenants inter parties were highly formal bilateral contracts containing a “parties clause” in which all parties were named. The person who was not named as a party was a “stranger” who could not sue. The use of plaintiff’s seal was not the key to his right to sue. A plaintiff named in the parties’ clause, though he did not seal the agreement, could maintain an action. Generally this privity meant a promisee seeing a promisor consideration passing between them was irrelevant, and any less formal relationship was insufficient.

For generally speaking the early writers were in agreement with Edmund Wingate’s pronouncement “An action of account (sic) must be grounded upon privity, for without privity no action if can be maintained.
The particular kind of privity here, however, was that plaintiff could not recover without showing that the defendant stood in what equity might regard as a fiduciary relationship towards him. The declaration needed to state that the receipt was in fact for the plaintiff's use and that the defendant took money on that basis.

For this reason account could not be founded upon a wrongful receipt, such as the theft of funds by a stranger nor upon donation.

(c) **Debt**—debt cannot be maintained without privity. It will be remembered that in the 16th century the expression “privity of contract” had arisen in connection with debt action against a lessee, but that it was only used in an abstract or schematic sense and was not the concrete objection raised in debt when a third person sought an action.

(d) **Making the boundary of Contract**—There is a forth distinctive function in the repertoric of privity. The doctrine has been used repeatedly as a mechanism to mark the boundary between the contract and other field of law. This function became particularly noticeable in the 19th century when privity of contract began to play a role in the fields of tort and the trust. Historically the entry of privity into the law of tort has been viewed as so anomalous (allegedly owing to the contract “fallacy” procedural blunders or economic prejudice) that the significance of this function has been overlooked. Privity’s role in the shaping the law of trust is less well known but this was another vital episode which shaped the modern privity principle. The privity objection in these areas carried no writ oriented meaning.
The terminology is important here. The word *contract*, as used these obligations, did not connote a consensual agreement but was used instead to describe an informal transactions, such as a sale or a loan, that transferred property or generated a debt. A specialty or formal agreement was variously described as a grant, as an obligation, or as a covenant, but not as a contract. Assumpsit was considered to be an action upon “promises” not contracts, and contract did not begin to acquire its promissory connotation until assumpsit had expanded to take over the older actions of covenant and debt. It took until the 19th century for the exact expression “privity of contract” to be developed.

**(iii) Judicial Development of the Privity of Contract**

The doctrine of privity of contract was, for the first time, applied in the case of *Jordan v. Jordan*. In this case the suit of a non-party to a promise did not lie. But, in *Levett v. Hawes* the court overruled the decision in *Jordan v. Jordan* and allowed the stranger’s suit on a contract. In this case the father of a girl promised the father of a boy that if he would be willing to give his consent to the marriage of the boy with the girl and assure pounds 40 to the son, he would pay pounds 200 to the son in marriage. The action of assumpsit was brought by the son upon breach of the promise. It was held that the son was entitled to sue.

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But, in the leading case of Bourne v. Mason\textsuperscript{10} the court overruled the Provender and Sprat cases and held that the doctrine of privity of contract was applicable. In this case there was one Parry who was indebted to Bourne, Mason and Robinson (who was a co-defendant). Chanter was indebted to Parry. Mason, in consideration that Parry would allow Mason to sue Chanter promised to pay to Bourne a part of the sum owed to him by Parry. The plaintiff’s action to sue the contract failed. The court held that the plaintiff was not a proper person to sue. It said that the plaintiff was a stranger and no meritorious cause moved from him.

However, in Dutton v. Poole\textsuperscript{11} the court of King’s Bench again overruled the decision in Bourne v. Manson case and upheld the stranger’s claim but on a different ground. The court did not follow the doctrine of privity of contract strictly. The court observed that the stranger was having very close relations to the promise. He could, therefore, maintain an action on a contract as a beneficiary. In this case the father of the defendant wanted to sell some timber trees. The defendant promised (in consideration that his father would refrain from cutting down the trees) to pay to his sister Grizil pounds 1000 Grizil (as Mrs. Dutton) with her husband sued from breach of the promise. It was held that the action was maintainable.

It appears that the basic ground in this case for ignoring the doctrine


\textsuperscript{11} (1678) 2 Lev. 210 Also cited in Anson’s law of Contract, 26th Ed. (1984) at 364.
of privity of contract was the very near and affectionate relation between the plaintiff and her father who was the promisee under the contract. The court was of the opinion that natural love and affection could constitute consideration. Therefore, the consideration and promise to the father could extend to the children for there exists natural love and affection between them. The plaintiff was, no doubt, a stranger to the contract, but not a stranger to the consideration, she was deemed to have furnished consideration, so she was held entitled to sue.

It is submitted that this was the case where an idea enacted that if the stranger, upon whom contractual benefit was to be conferred, was closely related by blood to the promisee, a right of action would vest in him.

Crow v. Roger was a case where a stranger could not base his claim on breach of a promise. In this case, a person named Hardy owed pounds 70 to Crow. An agreement was made between Rogers and Hardy whereby Rogers promised to repay Hardy's debt in consideration that Hardy would give a house to him. On the basis of this promise Crow sued Rogers. But, the court rejected his claim on the ground that he was a stranger to the agreement and consideration.

The above view was confirmed in the leading case of Price v.

13 (1724) 1 str. 592.
14 (1724) 1 str. 592.
Easton. However, in the present case, the court preferred to accept only one of the two reasons given for rejecting the claim in Crow v. Rogers. This reason was that as the plaintiff was a stranger to the contract, he could not enforce the contract. The facts of the case were that one W.P. owed pounds 13 to Price. He promised to work for Easton who in lieu of it, promised to replay his debt to Price. W.P. did the work but, Easton failed to repay the debt. Price sued Easton for breach of his promise. The suit was rejected. The observation of the court in this case in defence of privity of contract is worth quoting: "No one may be entitled to or bound by terms of a contract to which he is not an original party."

Tweddle v. Atkinson is the case in which the doctrine of privity of contract was finally established by the Court of Queen's Bench in 1861. In this case in consideration of an intended marriage between plaintiff and daughter of one W. Guy. By this contract both agreed to pay the plaintiff a definite sum of money. But, Mr. Guy failed to do so. The plaintiff sued his executors. The suit was dismissed by the court.

It is to be noted that the court in rejecting plaintiff’s claim laid more emphasis on doctrine of privity of consideration than on the doctrine of privity of contract. Nevertheless, the doctrine of privity of contract acquired a definite shape in this case.

An analysis of above judicial decisions reveals that although the

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15 (1833) 4 B. & Ad. 433.
16 (1861) 1 B. & S. 393.
origin of the doctrine of privity of contract may well be traced in some earlier decisions,\(^\text{17}\) but it was the decision in \textit{Tweddle v. Atkinson}\(^\text{18}\), which indeed ended the uncertainty about the doctrine and gave finality to it. Ever since the decision of this case, the doctrine of privity of contract has been followed. The above mentioned judicial decision also makes it clear that the doctrine of privity of contract lays down two general principles of law of contract. Firstly, it purports to say that a stranger to a contract cannot sue. Secondly, it states that a stranger to a contract is not bound by the contract.

It is pertinent to mention that a doctrine which had been toiling hard for its existence in the nineteenth century has finally succeeded in getting the final seal of approval by the House of Lords in the leading case of \textit{Dunlop Pneumatic Tyre Co. Ltd. V. Selfridge & Co. Ltd.},\(^\text{19}\) in the year 1915. The plaintiff in this case sold a number of tyres to Dew & Co. with an agreement that Dew & Co. would not resell them below a fixed price. Dew & Co. sold the tyres to Selfridge who agreed to observe the restriction and promised to pay to Dunlop Co. pound 5 for each tyre if he violated the restriction clause. But, Selfridge sold the tyres to another at a price which was below the price fixed by restriction clause in the agreement. The court rejected the claim of the plaintiff and held that a stranger to a contract had

\[^{17}\text{Jordan V. Jordan, supra note 11; Taylor V. Foster, supra note 13 Crow V. Rogers, supra note 22; Price V. Easton, supra note 23.}\]
\[^{18}\text{(1861) 1 B. & S. 393.}\]
\[^{19}\text{(1915) A.C. 847.}\]
no right to sue upon it. It is clear that the plaintiff was a stranger to the contract between Dew & Co. and Selfridge. It is submitted that the claim of the plaintiff was rightly rejected, as in the absence of such an attitude of the court the commerce would have suffered badly.

It is to be noted that in some subsequent cases efforts were made to abolish the doctrine. For example, in Drive Yourself Hire Co, Ltd. London V. Strutt,20 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, 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 Beswick v. Beswick21 the views expressed by both Lord Denning and Dankwerts L.J. in the court of Appeal was that the doctrine of privity of contract could not be applied. But, the House of Lords, rejecting the views of Lord Denning and Dankwerts, L.J. unanimously emphasised the utility of the doctrine of privity of contract. In this case, there was a contract between the plaintiff’s husband and her husband’s nephew. It was held that the plaintiff was not entitled to enforce obligation in her personal capacity since she was a stranger to the contract, however, she could as the personal representative of her husband (the promisee) obtain

20 (1954) 1 Q.B. 250.
21 (1968) A.C. 58.
specific performance of the promise in favour of herself as third party.

In *Wooder Investment Development Ltd., v. Wimpey Construction U.K. Ltd.*\(^2\) similar arguments were taken before the court. The facts of the case, in brief, were that the defendant agreed to buy from the plaintiff 14 acres of land for £8,50,000. It was agreed that on completion £1,50,000 of this sum would be paid by the defendant to a third party, T.T. Ltd. The plaintiff sued for damages for breach of contract and repudiation of contract. The majority view of the House of Lords was that the contract was actually not repudiated. Their Lordships agreed that if the contract had been repudiated, the plaintiff’s could not, without showing that they had themselves suffered loss or were agents or trustees for T.T. Ltd., have recovered damages for non-payment of the pounds 1,50,000. This judgment shows that the court proceeded on the assumption that a stranger to a contract cannot sue even if made for his benefit\(^2\). But, Lords Salmond and Russel forming the minority view dissented. They expressed that the defendant’s conduct amounted to a repudiatory breach. However, the majority view is correct because it allows the promisee to recover damages for loss suffered due to failure of promisor to pay the agreed sum to the third person.

**The main difference between English law as established in 1915 and many other systems** was that the third party would not derive

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contractual rights even if the contracting parties clearly intended to confer benefits on the third party. It is clear that in *Tweddle v. Athkinson* the whole purpose of the transaction was to confer enforceable rights on the husband and that in Dunlop v. Selfridge once of the major purpose was to confer enforceable rights on Dunlop. What English law said was that even if the parties clearly intended by contract to a right on a third party, they could in general not succeed in doing so. It was this result that was unique and special to English law and which distinguished it from most other systems.

Substantial reform of the doctrine was proposed by the British law revision committee in 1937 in its sixth interim report, but this was not implemented. In *Woodar Investment Development Ltd. v. Wimpey Construction (UK). Ltd.* Lord Scarman forcefully urged the desirability of the House of Lords reconsidering the rule *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.

It is clear that both before and after the Act there many contracts which create rights and duties between the parties only but, this can be regarded not as being the result of the doctrine of privity properly understood, the parties could not confer contractual rights on a third party even if they wanted to. Under the 1999 Act, the parties (or in practice sometimes one of them) may choose to confer rights on a third party. As we shall see, there is no doubt now that the parties enjoy the freedom to create rights in third parties and the problem is whether they have in fact done so. 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

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27 Kincaid 2 JCL 160.
30 Law Com. No. 242 Sec. 5 to 13.
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 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 it may have some other cause of action.

### 1.1.2 Privity of Contract under Indian Law

Indian Contract Act, 1872 is replica of British Law. In England, law of Contract may be divided in two classes—Simple Contract usual form of agreement between two or more parties, enforceable by the law. The Contract under seal where no consideration is required. In India only one form of Contract is accepted that is simple contract.

**The Indian Contract Act 1872** deals with general principles of the law of contract and certain specific contracts. It is to be, however, noted that the Indian Contract Act does not explicitly contain a single provision relating to the doctrine of privity of contract. Therefore, the position of the doctrine may be visualised in the light of various provisions of the Contract

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31 The Indian Contract Act, 1872.
For instance, Section 2 (h) of the Indian Contract Act, 1872 defines the term 'contract' in the form of an agreement. It states that "an agreement enforceable by law is a contract." In other words, a contract is nothing but a valid agreement. The 'agreement' has been defined under section 2 (e) of the Indian Contract Act, 1872. According to Section 2 (e) "Every promise and every set of promises forming the consideration for each other is an agreement." Thus, an agreement is a precondition to the contract. The agreement may be divided into two parts- 'promise' and 'consideration of the promise.' The term 'promise' has been defined under section 2 (b) of the Contract Act. According to section 2(b), "a proposal when accepted becomes a promise." Thus, finally, we find two terms – proposal and acceptance. The 'proposal' has been defined under section 2 (a) of the Contract Act and the 'acceptance' under section 2 (b) of the Act. According to section 2(a), 'when a person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.' Section 2 (b) of the Act says that 'when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.' It is evident that only that person can accept the proposal to whom the proposal is addressed. The proposal is generally regarded as a starting point of contract and on the other hand, an acceptance as its concluding point. The person who makes a proposal may be called the proposer, offeror or promisor and the person to whom a
proposal is made or who accepts the proposal may be said the acceptor, offeree or the promisee. Section 2(c) of the Act defines the term 'promisor' and 'promisee'. According to it, "the person making the proposal is called the 'promisor' and the person accepting the proposal is called the promisee."

It is obvious that an agreement can be enforced by law only when it fulfils essentials of a valid agreement prescribed by law. The essential conditions of a valid agreement are given in section 10 of the Contract Act, which provides that all agreements are contracts if they are made by the free consent\(^{32}\) of parties competent to contract\(^{33}\), for a lawful consideration and with a lawful object\(^{34}\), and are not expressly declared to be void.\(^{35}\) Section 2(h) read with Section 10 of the Contract Act, thus, affirms the well known phraseological expression that 'all the agreements are not contracts but all the contracts are agreements.' This expression reveals that a contract is nothing but a valid agreement.

(i) **Meaning of Privity of Contract**

The doctrine of privity of contract is a combined result of these two words, i.e. 'Privity' and 'contract'. Consequently, the doctrine means something private or secret about a contract or it means the privacy of a contract between the parties. The privacy of contract signifies a privacy or secrecy to terms of the contract. It means that only parties to the contract are bound to comply with the terms of the contract and third party is not

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32 Section 14 of the Indian Contracts Act, 1872 defines ‘free consent.’
33 Section 11 of the Indian Contracts Act, 1872 deals with ‘capacity of a person to contract’.
34 Section 23 of the Indian Contract Act, 1872 deals with ‘lawful consideration and objects of a contract.’
35 Section 20, 23, 24, 25, 26, 27, 28, 29, 36, 39, and 56 (1st Paragraph) of Indian contract Act, 1872 deals with agreements which are void as such are not enforceable.
bound to fulfill the contractual obligations. This means that only parties to a contract are entitled to enjoy benefits of a contract and no third party can claim the benefits of a contract because he has no concern with the contract.

Section 73 of the Indian Contract Act, 1872 that the party who suffers by breach of a contract is entitled to receive damages from the other party to the contract. In view of section 74 of the Act, it can be said that if a sum is named in the contract as the amount to be paid in case of breach of a contract, the party complaining of breach is entitled to receive a reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for. Section 75 of the Act provides that a person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through non-fulfillment of the contract. It follows from Section 73, 74 and 75 (which deal with consequences of breach of contract) that only that person is entitled to sue for breach of the contract who is a party to the contract and has suffered loss due to such breach. Consequently, a person who is not a party to the contract i.e. a stranger cannot, therefore, bring an action for breach of the contract.

(ii) Judicial Development of the Privity of Contract

In Jamna Das v. Ram Autar and others, the Privy Council rejected a stranger’s claim to enforce the contract against a contracting party. In this case, the owner of certain immovable property mortgaged the property and borrowed Rs. 40,000/- from the appellant. She (mortgagor) subsequently, 

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sold the same property to the respondent no.1 (Ram Autar Pandey) for Rs. 44,000/- (other respondents were his representatives). She allowed the purchaser to retain Rs. 40,000/- to redeem the mortgaged property. The plaintiff sued the defendants (purchaser) for recovery of this debt. Although, he got decree against other representatives but not against Ram Autar. He, therefore, made an appeal to the privy Council. The Privy council dismissed the appeal with costs. It is, thus, clear that the mortgagee failed to recover benefit of contract only because he was not a privity to the contract.

The Privity Council, in Nanku Prasad Singh v. Kamta Prasad Singh\(^3\) reaffirmed the privity rule and applied the rule laid down in Tweddle v. Atkinson\(^4\) in India. The defendants purchased certain immovable property which was mortgaged to the plaintiff. The mortgagor (seller) also sold them the right of redemption and for this purpose, the seller left that amount of purchase money with the defendants which was equal to the plaintiff’s debt. The plaintiff sued the defendants for this money. The Privy Council held that no personal liability was incurred by the purchasers, of the equity of redemption, to the plaintiff. It is clear from this view of the Privy Council that a purchaser of equity of redemption, who retained a portion of purchase money for paying off mortgage debt did not thereby become personally liable to the mortgagee. The reason was that the mortgagee was a stranger to the contract of sale and, therefore, he could not sue. It is be noted that in a similar case of Achuta Ram and

\(^3\) A.I.R. (1923) P.C. 54.
\(^4\) (1861) 1 B & S. 393.
Others v. Jainandan Tewari and others\textsuperscript{39} the Patna High Court followed the principle laid down in Jamna Das v. Ram Autar and others,\textsuperscript{40} and Nanku Prasad Singh.\textsuperscript{41} The Court in this case did not allow mortgagees' claim to enforce the contract against the purchaser because mortgagees were strangers to the contract.

Similarly, in Sabbu Chetti v. Arunachalam Chettiar,\textsuperscript{42} the Madras High Court recognised the doctrine of privity of contract and accordingly, a third party was not allowed to enforce the contract. In this case, a sale deed of certain property was executed by defendant no.1 in favour of defendant no. 3. The sale deed consisted of a direction of the vendor (defendant no.1) that the vendee (defendant no.3) would pay Rs. 1200/- to the plaintiff which he owed to the plaintiff. The vendee did not pay this amount. The plaintiff, thereupon, sued to recover this sum with interest and made defendant no.3 also a party. The Madras High Court held that the vendee was not liable because the plaintiff was a stranger to the contract and no trust express or implied was created by the sale deed in favour of the plaintiff. Their Lordships said that where a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by third party would not lie.

It is, thus, evident from this judgment that the Court emphasized the privity rule. But, at the same time it also accepted an exception to the doctrine of privity of contract. The exception was that if a trust was


\textsuperscript{40} I.L.R. (1912) 34 Alld. 63; L.R. 39 I.A. 7.

\textsuperscript{41} A.I.R. (1923) P.C. 54.
created in favour of a stranger, he could sue the contract.

However, in National Petroleum co. Ltd. v. Popat Mulji,\textsuperscript{43} the Bombay High Court followed the doctrine of privity of contract and did not allow a stranger's suit. But, the Court accepted the two exceptions trust and agency to the privity rule. In this case, the plaintiff was appointed by defendant no. 2 as a selling agent and deposited Rs. 1000/- as security with defendant no.2 which was to be returned to the plaintiff on termination of the contract. Some other money was also due to the plaintiff from the defendant no.2. Later on, an agreement was made between the defendant no. 1 and 2 and all the assets of defendant no.2 were assigned to the defendant no.1. The question before the court was whether the plaintiff was entitled to recover his dues from the defendant no.1. It was held that the plaintiff was not entitled to sue. The Court opined that a person, who was not a party to a contract was not entitled to sue on the contract except in the special cases i.e. a person in position of a cestui que trust or a principal suing through an agent.

In Babu Ram Budhu Mal and Others v. Dhan Singh Bishan Singh and Others,\textsuperscript{44} the Punjab High Court rejected a stranger's claim on a contract. In this case, a landowner mortgaged certain land to the plaintiffs for certain money. He also mortgaged some portion of this mortgaged land to the defendants with direction that the defendants would pay the plaintiffs' mortgage-money. The plaintiffs sued for this money. The Court held that the plaintiffs were not entitled to sue. The Court said that the

\textsuperscript{42} A.I.R. (1930) Mad. 382.
\textsuperscript{43} A.I.R. (1936) Bom. 344.
privity rule is subject to some exceptions. Where a charge is created on a specific immovable property under marriage settlement or family arrangement or otherwise, or a trust is created in favour of a stranger, the privity rule does not apply. In such cases he is entitled to sue. The present case, however, did not create a trust. The Court further observed that the decisions in Jamna Das v. Ram Autar Pandey\textsuperscript{45} and in Nanku Prasad Singh v. kamta Prasad Singh\textsuperscript{46} were conclusive that the reservation of part of purchase money to pay a previous mortgage does not of itself create a trust in favour of that previous mortgage nor could the prior mortgage make the purchaser, personally, liable.\textsuperscript{47}

\textbf{M.C. Chacko v. The State bank of Travancore,}\textsuperscript{48} is an important case wherein the Supreme Court approved the doctrine of privity of contract and also defined probable exceptions to it. In this case, the appellant (defendant) was manager of the High Land Bank Kottayam. The High Land Bank used to borrow money through overdraft from another bank known as Kottayam Bank. The father of M.C. Chacko gifted his properties to his family members including M.C. Chacko. The gift deed provided that the liability, if any, (under guarantee) should be met by M.C. Chacko either from the bank or from his share in gifted property. The High Land Bank, actually did not repay the dent. The debt was also time-

\begin{footnotesize}
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\item \textsuperscript{44} A.I.R. (1957) Punjab 169.
\item \textsuperscript{45} I.L.R. (1912) 34 All, 63; L.R. 39 I.A. 7.
\item \textsuperscript{46} A.I.R. (1923) P.C. 54.
\item \textsuperscript{47} See also Chhangamal Harpal Das v. Dominion of India, A.I.R. (1957) Bom. 276. (In this case a mere consignee was not allowed to sue for damage to goods.)
\item \textsuperscript{48} A.I.R. (1970) S.C. 504.
\end{itemize}
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barred. The Kottayam Bank, on the basis of this gift deed, sued the High Land Bank and pleaded to held M.C. Chacko liable personally. The suit was decreed by the lower court. An appeal was made, against this judgment, in the Kerala High Court. At this stage the Kottayam Bank merged with the State Bank of Travancore. The High Court confirmed the judgment of the lower court. Thereupon, the present appeal was made to the Supreme Court.

The Division Bench of Supreme court consisting of Shah J. (afterwards C.J.) and J.K. Mitter J. allowed the appeal and held that M.C. Chacko was not liable. It observed that it is settled law that a person not a party to a contract cannot, subject to certain well recognised exceptions, enforce terms of the contract. The recognised exceptions are only two: firstly, a beneficiary under a contract which creates a trust in his favour can sue the contract act and secondly, a beneficiary under a contact, which is a part of a family arrangement can sue.\textsuperscript{49} It is clear from this judgment that the Supreme Court finally settled the doctrine of privity of contract and the two exceptions to it.

It is to be noted that the Supreme Court, in this case, approved the observation of Rankin C.J. in the case of \textit{Krishana Lal Sadhu v. Pramila Bala Dasi}.\textsuperscript{50} The Court in its judgment referred to the statement of Lord Haldane given in \textit{Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co.}

\textsuperscript{50} A.I.R. (1928) Cal. 518. (It is erroneous to suppose that in India persons who are not parties to a
that except in the case of a beneficiary under a trust or in the case of a family arrangement no right can be enforced by a person who is not a party to a contract.

The principle laid down by the Supreme Court in **M.C. Chacko v. State Bank of Travancore**\(^{52}\) was again reaffirmed by the Full Bench of the Supreme Court in **P.R. Subramaniam Iyer v. Lakshmi Ammal and other**.\(^{53}\) In this case, debt borrowed from plaintiff from plaintiff to finance the business of grandfather of the deceased executants who had executed a promissory note. After death of executants his business devolved on his widow. The business was being managed by her son. The widow and son also died. The assets devolved on the heirs who were ten in number. The appeal was dismissed. Delivering the judgment of the Supreme Court Hegde J. held that the plaintiff (appellant) could not have a personal decree against the defendants as they were not parties to promissory note. There was no privity of contract between the plaintiff and the defendants no. 1 to 9. The rule laid down in **M.C. Chacko v. State Bank of Travancore**\(^{54}\) has been followed by various High Courts in a number of cases.\(^{55}\)

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\(^{51}\) (1915) A. C. 847.


In **Sobhagmal Kataria etc. v. State of Rajasthan & Others** petitioners purchased a tractor trailer and got them registered as an articulated vehicle i.e. one vehicle. An 'articulated vehicle' has been defined under section 2(2) of the Motor Vehicles Act, 1988 as a tractor to which a semi-trailer is attached. The Registering Authority imposed tax treating them as one vehicle. An objection was raised by the Accountant General of Rajasthan against decision of Registering authority by which it treated tractor-trailer as one vehicle. The Accountant General was of the opinion that tractor-trailer were the two separate vehicles. Thereupon, the Registering Authority again charged tax treating tractor trailer as two vehicles. Hence, the present writ petition was brought.

The Court held that tractor trailer were one vehicle the Accountant General had no authority or jurisdiction in the matter in view of the privity of contract between the petitioners and the Registering Authority in respect of Certificate issued by it and once the Registering Authority having forgone its right to claim the tax twice over the vehicle by reason of having issued the registration certificate for one vehicle only, which is specific in its terms, it is not open to the respondents to take a contrary stand before this Court which per-se is illegal, without jurisdiction and contrary to law. The possibly of third party's action was examined.

In **Rakhma Bai vs. Govind Moreshwar** [1904]6 Bom. LR 421. The third party's action was firmly established in **Nawab Khawaja Muhammad**

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Khan v. Nawab Hussaini Begum. The Privy Council firmly established an exception to the doctrine of privity of contract and allowed an action by a stranger to the contract. The facts of the case were that on Oct. 25, 1877, the appellant executed an agreement with the respondent's father. By this agreement he agreed that in consideration of respondent's marriage with his son (both, bride and bridegroom were minor at the time) he would pay to the respondent Rs. 500/- per month in perpetuity for her kharch-e-pandan (betelbox or betel leaf expenses) from the date of marriage i.e. from the date of her reception. He also charged his property in Agra and Dholpur with this money and mentioned that in case of his death his heirs or representative would pay the money out of these properties. The arrear of the money was claimed by the plaintiff after separation from her husband. Her suit was dismissed by the lower court. The Allahabad High Court allowed the appeal. Against the judgment of the Allahabad High Court the defendant made an appeal to the Privy Council. Discussing the appeal their Lordships held that the agreement executed by the defendant specially charged immovable property for allowance and therefore, he was bound to pay to the plaintiff. She was the only person beneficially entitled under it. Although she was not a party to the agreement, she was clearly entitled to proceed in equity to enforce her claim.

The decision of Khwaja Muhammad Khan's case was followed by the

57 (1910) 37 I.A. 152. See also Daropati v. Jaspal Raj (1905) P.R. 172. Where Punjab High Court enforced wife's claim for money promised by her husband with her father.
Calcutta High Court in case of Deb Narayan Dutt v. Chunni Lal Ghosh.\textsuperscript{59}

In this case the defendants No.1 to 4 borrowed Rs. 300/- from the plaintiff. As a security to this debt they executed a registered bond and also deposited with the plaintiff a pattah of immovable property to create a charge. After sometime they transferred their whole property to defendant No. 5. The contract (transfer deed) contained a clause that the defendant No. 5 would pay off plaintiff's debt out of consideration money (of Rs. 2000). But the defendant No. 5 did not pay off the debt. Hence, the plaintiff brought this suit. His suit was dismissed by the lower court. Against the judgment of lower court the plaintiff made an appeal to the High Court. The appeal was allowed and the defendant was held liable. The Court held that there was no contract between the defendant and the plaintiff. But, the plaintiff was, under the circumstances, a 'cestui que trust.' The contract was for his benefit. So he could sue.\textsuperscript{60}

However, in Khirod Bihari Dutt v. Man Govind and others\textsuperscript{61} a third party's claim on a contract was enforced. The court said that where a contract requires a party to pay certain sum of money to a stranger, and the party liable to pay, makes an acknowledgement of such sum to the stranger, he is bound to pay to the stranger. In the above case, the plaintiff was unsufructuary mortgagee of the Zamindar. A contract was made between tenant and sub-tenants of a land whereby the sub-tenants

\textsuperscript{58} (1910) 37 I.A. 152.
\textsuperscript{59} I.L.R. (1913) 41 Cal. 137.
\textsuperscript{60} I.L.R. (1913) 41 Cal. 137, at 144, 145 as per Jenkins. C.J. See also Mangal Sen and other v. Muhammad Husain and another, I.L.R. (1915) 37 All. 115. It was a similar case but the Allahabad High Court did not allow stranger's claim.
of the land agreed to pay the tenant’s rent to the landlord. Accordingly, the sub-tenants (defendants) used to pay the rent directly to the land-lord and the same was accepted by the landlord. The plaintiff (mortgagee) was held entitled to sue upon the contract made between tenant and sub-tenants. The plaintiff’s suit was maintained on the ground of acknowledgment or estoppel. But, the Court said that unless a trust was created in favour of a third party or the defendant seemed an agent of third party, the claim of third party could not be enforced. The court, further, said that the facts of the case constituted a trust or agency. The Madras High Court, expressed similar view and enforced a stranger’s claim on a contract in certain other cases.

Again, in **Rana Uma Nath Baksh Singh v. Jang Bahadur** the Privy Council enforced a third party’s claim on a contract. In this case, a Hindu Talukdar named Sir Sheoraj Singh and father of the defendant (appellant) made the defendant his successor of all the property by executing an instrument. In consideration of it, the defendant agreed with his father by executing a second instrument to pay Rs. 30,000/- to Jang Bahadur and Rs. 20,000/- to Bam Bahadur and one village to each on their attaining majority, provided they remained obedient. Jang Bahadur and Bam Bahadur were two illegitimate sons on defendant’s father (born to a concubine Mst. Sarwar). Jang Bahadur attained majority before Bam

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64 A.I.R. (1938) P.C. 245.
Bahadur. The defendant refused to pay him the agreed money and the village on the ground that Jang Bahadur failed to remain obedient as he did not come to pay compliments to the defendant on the occasions of Hindu festivals such as Holi, Diwali and Dashera.

The Privity Council held that the two instruments should be read together and the obligations undertaken by the defendant were the terms upon which his father was surrendering to him immediately all his property. Moreover, the amount and the village promised to the plaintiff intended to come out of the property surrendered. In these circumstances, the instrument created a trust in favour of the plaintiff. Hence, the plaintiff was entitled to a decree. It is clear from this judgment that a third party beneficiary was allowed to enforce his claim on a contract to receive contractual benefit promised to him.  

The question of enforcement of a third party’s right on a contract creating a charge in his favour again came for consideration before the Privy Council in Mst. Dan Duer v. Mst Sarla Devi. In this case, a partition deed was executed among members of a joint Hindu family. Accordingly, the husband, Nidhan Singh, of the respondent (plaintiff) was given two villages subject to a charge for maintenance of Mst. Sarla Devi. Nidhan Singh borrowed Rs. 40,000 from Drigpal Singh (husband of appellant) and mortgaged him the two villages. Subsequently, when he

65 Jnan Chandra Mukherjee v. Manoranjan Mitra and others, A.I.R. (1942) Cal. 251 (where a reverse judgment was delivered and the plaintiff (creditor) a stranger to the contract could not enforce the contract for receiving his debt).
could not repay this debt he sold these two villages to Drigpal Singh. Both Nidhan Singh and Drigpal Singh died intestate. The plaintiff (respondent) filed a suit for her maintenance out of the sold property. The Privy Council held that the partition award creating the charge for maintenance of respondents was valid. The claim was, thus, enforced by the Court and the respondent was held entitled to receive the maintenance amount from the appellant irrespective of the fact that Drigpal Singh did not know of the charge when he purchased the villagers. It is to be noted that in this case the Privy Council has reaffirmed its earlier judgment in Nawab Khawaja Muhammad Khan v. Nawab Husaini Begaum.67

During the post-independence period we find a definite change in the judicial attitude which can be illustrated through a number of cases. In N. Devraje Urs v. Ramakrishniah68 the plaintiff constructed a house for a lady. She sold the house to the defendant without paying the plaintiff the construction cost. She left a part of purchase money with the defendant with a direction that the defendant, though made a part payment but did not pay the whole sum. The plaintiff sued for remaining part of the money. The Court held that the plaintiff was entitled to recover the amount.

In Veramma v. Appaya69 a stranger's action was again allowed by the Andhra Pradesh High Court. In that case, there was a family dispute over certain house and vacant site. A compromise was made. Under terms

67 (1910) 37 I.A. 152.
of the compromise the defendant agreed with the plaintiff's husband to transfer the house and vacant site to the plaintiff. It was also agreed that in lieu of this agreement, the plaintiff would maintain her father till his death. The defendant failed to perform his promise. The plaintiff sued to enforce the contract. The Court held that the defendant was liable. The Court said that the plaintiff was a beneficiary under the compromise arrangement and thus, a trust was created in her favour. So she was entitled to specific performance of the arrangement.\(^{70}\)

Recently, in **Ramesh Kumar Singh and Anothers vs. Kristo Sao and another 2008 T.A.C. Chhattisgarh**. It has been held that Insurance Co. is liable to pay compensation in respect of third party risk. **New India Assurance Company Ltd. vs. Nandram Prajapati and Another 2008 T.A.C. 443 (M.P.).** It was held that deceased was a third party and entitled to claim **Seeniwasan vs. Peter Jabaraj and anothers A.I.R. 2008 S.C. 2052**

**Transfer of property Act 1882 Sec. 52 Civil P.C. (1908) Q1, R 10(5) –** Lis pendens applicability sale by agreement holder to third party, suit for specific performance against agreement holder, further sale made by third party during suit is not invalid.

**ICICI Lombard General Insurance Co. Ltd. vs. Vinod Bhai Hirabhai Vadhar AIR 2009 (Guj.) Motor Vehicle Act, 1988 Sec. 147** liability of insurer, Act policy concerning risk of third parties also. It would

\(^{70}\) For similar decision see Chaudhary Amir Ullah and another v. Central government (Through the Secretary Indian Posts and Telegraph Departments) and another (1959) A.L.J. 271 the plaintiff was held entitled to sue for compensation for loss which occurred due to non-delivery of an insured article by the post office.
include risk cause by death or injury to pillion riders.

**National Insurance Co. at Godhra vs. Shabbir Mohammad Kunj and others A.I.R. 2009 (Guj.) Motor Vehicle Act, 1988 Sec. 149**

third party risk- liability of Insurance Company occupants of private vehicles are third parties in the eye of law. Death or bodily injury to such persons would entitled them to claim compensation from insurers even without any additional premium by owners of private vehicles.

The doctrine of privity is still applicable in India. Although, the Indian Contract Act, 1872 does not contain any specific provision which deals with the doctrine of privity of contract, the doctrine is implicit in several provisions\(^{71}\) of the Contract Act. It is also clear from the judicial decisions that the doctrine of privity of contract was approved by Privy Council.\(^{72}\) Most of the Indian High Courts also followed the decisions of the Privy Council and did not enforce a stranger's claim to a contract. The opinion of the High Court is divided on the point. But, the Supreme Court, finally, established the doctrine of privity of contract.\(^{73}\) However, the Supreme Court has held that the doctrine of privity of contract has two exceptions. First, a beneficiary under a contract which creates a trust can sue the contract and secondly, a beneficiary under a contract involving a family arrangement can enforce the contract. It is to be noted that these exceptions to the privity rule were also accepted by the Privy council\(^{74}\) in

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\(^{71}\) Section 2(a), 2(b), 2(c), 2(d), 2(g), 2(h), 2(i), 10, 37, 38, 73, and 192, The Indian Contract Act, 1872.


\(^{74}\) Khawaja Muhammad Khan v. Husaini Begum, (1910) 37 I.A. 52; Rana Uma Nath Baksh Singh v.
India before independence. But, it was the leading case of M.C. Chacko v. State Bank of Travancore\textsuperscript{75} where the doctrine of privity of contract and exception to the doctrine were finally settled by the Supreme Court.

1.1.3 Privity of Contract in other Common Law Countries

The doctrine of privity is peculiar to the other common law countries. The number of countries recognise the rights of third parties to the contract. \textbf{Scotland, France, Germany, Italy, Austria, Spain, Portugal, Netherland, Belgium, Luxembourg, Greece}. Even in the \textbf{United Kingdom}, the contract (Rights of Third Parties) Act 1999 provides for enforcement of contractual terms by third parties.

(i) United Kingdom

The Contracts (Rights of Third parties) Act 1999 reforms the privity rule so as to enable contracting parties to confer a right to enforce the contract on a third party.

This Act gives a two-limbed test for the circumstances in which a third party may enforce a term of a contract. The first limb is where the contract expressly so provides. The second limb is where the term purports to confer a benefit on the third party, unless it appears on a true construction of the contract that the contracting parties did not intend to have the right to enforce it. The third party need not be in existence when contract is made (namely, unborn child, future spouse, company not yet

\textsuperscript{75} Jang Bahadur, A.I.R. (1938) P.C. 245.
The right of the third party for enforcement of the contract is subject to the terms and conditions of the contract. The parties to the contract are free to limit or place conditions on the third party's rights, for example, requiring him to enforce the right only by arbitration. A third party seeking to enforce his rights as above is entitled to all the remedies which are available to a person bringing a claim for breach of contract (damages, injunctions, specific performance or other relief). Thus, the normal rules about the remedies apply to such claims, namely, causation, remoteness, duty of mitigation etc. The third party can take advantage of exclusion or limitation clauses in the contract.

Where a third party has a right under the contract, the contracting parties cannot (unless the express term of the contract enable rescission or variation of the contract without third party's consent), rescind or vary the terms of the agreement in a way which affect the third party's rights without the consent of the party, if: The third party has communicated his assent to the term to the promisor; or The promisor is aware that the third party has relied on the term; or The promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it. Parties may also expressly provide that the consent of the third party would be required only in specified

circumstances. The Act confers on the court or an arbitral tribunal to dispense with the third party’s consent if the consent cannot be obtained because his whereabouts are unknown, or he is incapable of giving consent, or where it cannot be reasonably be ascertained whether he has in fact relied on the contractual term. While dispensing with the consent, the court or tribunal may impose condition, including a condition requiring payment of compensation to the third party.

Subject to an express term excluding any defence, set off or counterclaim, the promisor can rely on any defence or set off arising out of the contract and relevant to the term being enforced, which would have been available to him, had the claim been by the promisee. He can also set up any defence or set-off, or make any counter-claim (not arising out of the same contract), where this would have been possible had the third party been a party to the contract. Where a proceeding is brought against a third party, he can set up any of the defences mentioned above, including that of a term purporting to exclude liability, provided he could have done so had he been a party to a contract.

Where the promisee has recovered damages (or the agreed sum) from the promisor in respect of either the third party’s loss or the promisee’s expense in making good that loss, the court or tribunal shall reduce may award to the third party for taking account of the sum already recovered. This protects the promisor from double liability. The Act does not affect any existing right or remedy of the third party. A third party shall not be
treated party to a contract for the purposes of any other Act or instrument made under any other Act. The third party is treated as a party to an arbitration agreement between the promisor and the promisee as regards the disputes between him and the promisor, and he is able not only to enforce his right to arbitration, but is also bound to enforce that right by agreement.

The Act does not impose any obligation or restraint on the Crown. It is an enabling measure allowing the parties to the contract, including the Crown, to confer enforceable rights on third parties.

(ii) Western Australia

Section 11 of the Western Australian 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.

(iii) Queensland

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 perform any acts that may be required of him by
the terms of the promise. Defences normally raised against an action to enforce a promisory duty can be raised by the promosor against the beneficiary.

(iv) New Zealand

The New Zealand Contracts (Privity) Act 1982, does not limit enforceability by a beneficiary to express promiss 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 promises benefiting the third person after he has materially altered his position in reliance on the promise, or has obtained judgment or award on the promise.

The UNIDROIT principle provides that a contract is binding upon the parties. It does not; however prejudice any effect which that contract may have in respect of third parties under the applicable law. Nor does it purport to deal with effects of evidence and termination of a contract on the rights of third parties. However, certain statutory and non-statutory exceptions to the doctrine are accepted in India as well.

1.1.4 The Contrary view on Privity of Contract

In England, the rule of "privity of contract" which means that a stranger to contract cannot sue has taken firm roots in the English
Common Law. But the principle has been generally criticised. In 1937, the Law Revision Committee, under chairmanship of Lord Wright, also criticised the doctrine and recommended its abolition. In this Sixth Interim Report the committee stated:

Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise against the third party any defence that would have been valid against the promisor. Lord Justice DENNING has also criticised the rule in a number of recent case, in one of which his Lordship observed: It the privity principle has been never been able entirely to supplement another principle whose roots go much deeper. The principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the Court will hold him to it, not only at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the writes.

In the subsequent case of Beswick v. Beswick 1968 A.C 58 the Court of Appeal adopted the same approach. B was a coal merchant. The defendant was assisting him in his business B entered into transferred to the defendant. B was to be employed in it as a consultant for his life and after his death the defendant was to pay to his widow an annuity of 5 per week, which was to come out of the business. After B’s death, the
defendant paid B's widow only one sum of 5. the widow brought an action to recover the arrears of the annuity and also to get specific performance of the agreement.

In held that she was entitled to enforce the agreement. Thus the plaintiff was allowed to enforce the agreement in her personal capacity, although she was not a party to it and it was considered not necessary to infer a trust in favour of the plaintiff. Lord DENNING MR concluded with the words:

Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or, if he refuses to join by adding him as a defendant. In that sense, and it is a very real sense, the third person has a right arising by way of contract. He has an interest which will be protected by law. The observations to the contrary ... are in my opinion erroneous. It is different when a third person has no legitimate interest, as when he is seeking to enforce the maintenance of prices to the public disadvantage, as in Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd.(1915) A.C. 847. or when he is seeking rely not on any right given to him by the contract, but on an exemption clause, seeking to exempt himself from his just liability. The case shows that a reform, as was recommended by the Brisish Law Revision Committee in 1937, is long overdue and if Parliament takes any step in this respect that would hardly be revolutionary.
But the House of Lords did not approve the approach adopted by Lord DENNING MR and found for the plaintiff on a different ground. Lord REID said that the plaintiff "in her personal capacity has no right to sue, but she has a right as administratrix of her husband's estate to require the appellant to perform this obligation under the agreement". Lord PEARCE put it like this: "The estate (though not the widow personally) can enforce it."

In some earlier cases also the House of Lords showed no preference for Lord DENNING's approach. For example, in Scruttons Ltd. v. Midland Silicones Ltd. (1960) 2All ER 737 (CA), referring to the argument that the orthodox view which crystallised a century ago in Tweddle v. Atkinson (1861) and finally established in Dunlop v. Selfridge (1915) should be rejected, Viscount SIMOND said that "certain statements which appear to support it in recent cases such as Smith v. River Douglas Catchment Board and White v. John Warwick & Co. Ltd. must be rejected. If the principle of jus quaesitum tertio is to be introduced into our law, it must be done by Parliament after a due consideration of its merit and demerits". His Lordship emphasised that "the law is developed by the application of old principles to new circumstances. Therein lies its genesis. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament."

In India also there has been a great divergence of opinion in the courts as to how far a stranger to a contract can enforce it. There are
many decided cases which declare that a contract cannot be enforced by a person who is not a party to it and that the rule **Tweddle v. Atkinson 1861** is much applicable in India as it is in England. But there is no provision in the Contract Act either for or against the rule. The Privity Council extended the rule to India in its decision in **Jamna Das v. Ram Avtar I.L.R. 1912**.

A borrowed Rs. 40,000 by executing a mortgage of her Zamindari in favour of B. Subsequently she sold the property to C for Rs. 44,000 and allowed C, the purchaser, to retain Rs. 40,000 of the price in order to redeem the mortgage if he thought fit. B sued C for the recovery of the mortgage money, but he could not succeed because he was no party to the agreement between A and B.

Lord MACNAUGHTAN, in his very short judgment, said that the undertaking to pay back the mortgage was given by the defendant to his vendor. "The mortgage has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt."

Thus, where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by the third party will not lie. Similarly, where on a lease of certain muafi land, the lessees undertook, as between themselves and their lessor, to be responsible for the payment to the zamindar of certain sums which the muafidar was primarily bound to pay,
it was held that the zamindar could not enforce this covenant by a suit against the lessees. In still another case, the plaintiff this covenant by a suit against the appellant for his salary on the basis of an agreement entered into by the plaintiff with another person.

In *Krishan Lal v. Promila Bala 1928*, RANKIN CJ observed however, there is nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of 'promisor' and persons who are not parties to a contract can be permitted to sue thereupon.

Consequently, a Hindu assured's wife's action to recover the money due under her deceased husband's policy was rejected because she, though a nominee under the policy, was not a party to the contract between the deceased and the insurance company and no interest passed to her merely because she was named in the policy. There is, however, another line of thinking also which is mainly based upon an observation of the Privy Council in *Khawaja Muhammad Khan v. Husaini Begam 1910*, their Lordships observed:

In India and among communities circumstanced as the Mohammedans, among who marriages are contracted for minor by parents and guardians it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts.

This statement has been taken by some High Courts as laying down
the rule that the Indian Courts are not bound by the rule in Tweddle v. Atkinson 1861 accordingly, it has been observed by the Madras High Court. There is ample authority for the proposition that in this country, and indeed in a certain class in England where a contract is made between 'A' and 'B' for the benefit 'C', 'C' is entitled to sue the defaulting party. It is unnecessary to cite authorities, but the principle is firmly established for this country by the decision of the Privy Council in Khawaja Mohammad Khan v. Hussaini Begum 1910 37 I.A 152. Similarly, the Calcutta High Court observed. There is no any specific provision in the Indian Contract Act, which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit. Again, JENKENS CJ said another important case. We now have ample authority for saying that the administration of justice in British India is not to be in any way hampered by the doctrine laid down in Tweddle v. Atkinson 1861. In Muhammad Khan v. Hussaini Begum 1910 37 I.A 152.

**Supreme Court upholds privity**

The Supreme Court of India has expressed itself in favour of the rule in Tweddle v. Atkinson 1862. In M.C. Chacko v. State Bank of Travancore' 1970 SC 504, SHAH AG. CJ (afterwards CJ) endorsed the statement of RANKIN CJ in Krishan Lal Sahu v. Promila Bala Dasi A.I.R. 1928 and after referring to the observation of Lord HALDANE in Dunlop v. Selfridge 1915 AC 847, said:
The Judicial Committee applied that rule in Khawaja Muhammad Khan v. Hussaini Begum 1910 37 I.A 152 in a later case, Jamna Das v. Ram Autar I.L.R. 1912, the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage could not be enforced by the mortgage who was not a party to the contract. It must therefore be taken as well-settled that except in the case of a be enforced by a person who is not a party to contract. Two aspects of the doctrine of Privity of Contract. The first aspect is that no one but the parties to the contract is entitled under it. Contracting parties may confer rights or benefits upon a third party in the form of promise to pay, or to perform a service or a promise not to sue (at all or in circumstances covered by an exclusion or limitation clause). But the third party on whom such right or benefit is conferred by contract can neither sue under it nor can rely on defenses based on the contract.

The second aspect of the doctrine is that parties to a contract cannot impose liabilities on a third party. A person cannot be subject to the burden of a contract to which he is not a party. It is the counterpart of the proposition that a third party cannot acquire rights under a contract. This rule, for example, also bars a person from being bound by an exemption clause contained in a contract to which it is not a party, so that a contract between A & B cannot impose a liability upon C. However the doctrine is not absolute; it operates under certain limitations – both statutory and non statutory.
1.2. CONCEPT AND EVOLUTION OF PRIVITY OF CONSIDERATION

According to professor Hening’s study, history showed how the rich legacy of beneficial rights recognized in debt was slowly squandered in assumpsit over the next 200 years. In complete contrast, Steljar’s recent history argues that the 17th century cases history in assumpsit represented a “clear and confident progression” towards recognition of the beneficiary’s right in contract. The progression was interrupted, however by the case of Bourne vs Mason (1669) and hence forwarded the beneficiary is special position became obscured. Holdsworth’s interpretation of these events was for more careful and balanced. He maintained that the restrictive doctrine “consideration must move from the promisee” received some recognition by the courts of the 17th century, but that was not firmly grasped due three disturbing influences.

The three interfering ideas were

(a) the equitable conception of consideration, which raised the possibility that love and natural affection were sufficient to ground an action in assumpsit;

(b) that holding that a person not a party to an agreement could take the benefit in the actions of debt and account and

(c) the contemporary perception that benefit to the promisor counted equally with detriment to the promisee as a valid consideration.
Holdsworth’s account, however, is ultimately unsatisfactory in two respects. He made the incorrect assumption that the proposition “Consideration must move from the promisee” was the equivalent of a parties only principle, so that the birth of the latter principle was erroneously put as early as the 17th century. The two rules are only logically, dissimilar but historically discounted. The parties only rule was not recognized in assumpsit before the 19th century. Furthermore, the consideration maxim was not encountered in that form until the 19 century. Thus, it is not clear that either rule was recognized as early as Holdsworth.

Lord Denning in a series of vigorous opinions has claimed that the English position against third party beneficiary action was an invention of the 19th Century that did not become ‘rooted’ in English law until the year 1861. Historically, he argues, the courts of common law in the 17th and 18th centuries had repeatedly enforced promises made in favour of a sufficiently “interested” third party.77 Principle of our common law. As a rule is has no great history. In fact it is a modern and largely academic rational for a group of cases running from Bourne vs Mason (1669) to Tweddle vs Atkinson (1861) or that were decided wholly on the principle that Consideration must move from the promisee.78

78 J.A. Andrews, Section 56 Revised (1959) 23 Conveyancer and Property Lawyer, 179, 188, 189.
There is insufficient recognition that the consideration rule and the parties only rule are two different rules and they have different content and different history. The case of Tweddle vs Atkinson (1861) is continually mistaken as the source of the parties only rule, as if the year 1861 was the bench mark for the strict modern rule found in Dunlop vs Selfridge 1915 AC 847. It is clearly an error to use old privity references in 16th and 17th century cases as sign posts of the antiquity of the parties only rule.

1.2.1 Privity of Consideration under English Law

The doctrine of consideration, in the sense in which it is known in English Law, was formed about middle of the fifteenth century. But the roots of this doctrine are to be traced in the remote past.

The doctrine of consideration shows that society was much advanced and that law had given its sanction to the promise.

(i) Origin and Meaning of Privity of Consideration

The question whether privity of Contract embodies a single requirement or consists of two independent base has become a major point of controversy. Under the monist view the parties only formulation neatly states the full objection to the beneficiary action, because the consideration question is subsumed. Samuels maintains that any further distinction is not “useful” and “non existent” because, no one can be a party to a contract and yet a stranger to the consideration.

The nonobvious promise in this statement resides in the word “contract” which the monist defines narrowly in the sense of bargain Even
when a donee beneficiary receives a promise directly, he has not regarded as a party to a “contract” but rather a party to a gratuitous promise. Thus, if B promises A and C that if A delivers 100 to him he will in turn deliver 50 to C, C can not enforce B’s promises though he was a party to it. The beneficiary cannot be party to a bargain or contract unless he himself gives consideration.

The Monist and Dualist Schools

The monist, therefore, does not really dispense entirely with the issue of consideration. The monist tendency, however, is not what is novel here. In previous centuries lawyers were always monist because they started the full objection solely in terms of consideration, while suppressing a parties only objection through the use of fiction. The novel tendency in modern analysis is to invert the rule and state the objection without the use of the consideration doctrine.

The dualist view, on the other hand, openly segregates the two ideas and maintains that each independently accounts for the refusal of the beneficiary action. Thus Scammell has said that “even if the rule of privity were reversed by the courts, few plaintiffs would be assisted, because of the rule that consideration must more from the promisee\(^79\) yet this result does not necessarily follow from the rule, for a priori, in every binding contract, consideration has in fact moved from the promisee, even when the

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beneficiary action is denied. Pollock pointed to this fallacy many years ago. It has laid down in the thesis that consideration must move from the promisee, and it is sometimes supposed that infringement of this rule is the basis of the objection to allowing an action upon a promise made for his benefit who seeks to maintain an action on the promise is not the promisee.\textsuperscript{80} It seems, therefore, that the differences between these two theories should not be exaggerated. The full objection at English law has become the two fold restriction that only a contracting party who has furnished consideration may enforce a contract.\textsuperscript{81} These requirements are overlapping and interdependent, and it makes no substantive difference whether the consideration element is directly articulated or initially incorporated into the very meaning of “party to a contract”. The historical challenge raised by the monist/ dualist formulation is to trace the rise the these independent objections and to explain how, when, and why, this modern conjunction came about.\textsuperscript{82} At the point, the roles of monist and dualist reversed. Before then, the monist view point stated the privity rule in terms of consideration” Consideration must move from the plaintiff”. The monist did not advert to a parties only notion except as a procedural

\begin{thebibliography}{99}
\bibitem{80} Sir Fredrick Pollock, Principles of Contract at Law and in Equity, erd Amer ed. By Willistone (Baker Voorhis 1906)
\bibitem{81} The duality was clearly expressed in the writing of certain 19th Century jurists see E.H. Bennett “Consideration moving from third person” \textit{g} Harv. L. Reu 233 (1895) (“A want of privity as to both the promise and the consideration certainty seems to be an insuperable obstacle to an action, upon the strict principles of Common law”) Edmundson vs Penny (1845) 2 past 335 (Gibson CJ) “The plaintiff must unit in his person both the promise and the consideration of it in order to recover”)
\bibitem{82} Clearly, the English position grow stricter when the test of privity became a dualism in the late 19th Century.
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formality.

The Formative Period

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',

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83 See R. Flannigan, Privity the end of an era (Error 103 L.Q. R. 564, 568 (1987)
84 Furmston’s view, for example, is that “there is difference between the doctrine of privity of contract and the rule that consideration must move from the promise “H is able to state categorically that is the rules are identified M.P. Furmston, Return to Denlop vs. Self widge 23 Mod. L. Rev. 373, 382, (1960)
85 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 promisee
86 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.
consideration, meaning judgement of the Court of Justice. In the judgements of Common Law the use of the words 'it is considered' is very frequent.

The present dimensions of the English concept of consideration were laid down by the court of Exchequer in *Curie Vs Misa 1875*. The question when the doctrine was originated has been subject of academic dispute and there are roughly few theories to its source, which have been discussed as

**The Interest Theory**

The case of *Hadvas vs Levit (1632)* presents a clear illustration of the interest theory. Thus *Hadvas vs Levit (1632)* stood for the proposition that the “interested beneficiary occupied so strong and preeminent a position that even a promisee seeking an action indamages against the promisor might be consulted A contemporary commentator abstracted this rule from the case. And so it is said, that where a promise is made to a second person to perform something to a third person that hath an interest in the cause, in this case he to whom the promise is to be performed and not whom it is made shall have the action. The line drawn by Huttoh, J, between the interested and uninterested beneficiary related to the compensatory function of assumpsit.

The application of his distinction to the facts in the Hadvas’s case logically explains the decision. The father was viewed as an in appropriate plaintiff his compensable interest appeared nominal and nebulous. When
he attempted to state his loss in tangible form, he could only plead that the defendant is breach of promise made it for him to pay the married couple greater maintenance than would otherwise have been necessary. This was an unconvincing allegation since the father was not under a legal obligation to provide such maintenance. The son’s loss by contrast was concreate. He had married on the strength of the dowry promises. In taking a wife, he (or his father) had probably bargained for the stipulate sum, and he had parted with a certain freedom or fore closed an alternative alliance perhaps to the lady he actually preferred. Such detriments associated with undertaking marriage were already recognized at common law as a form of valuable consideration.

This immediately suggests that interest and “Consideration” could easily have been regarded by the judges as similar, even identical ideas in many contexts, and it is tempting to ask whether the recovery given in Hadvas could have been justified on the basis that the beneficiary had provided consideration to the defendant.

Illustrations

There were other cases in this period that gave recovery to the “interested” beneficiary and each seems based upon the contemporary purpose of the action. In Levett vs Hawes (1599) a father brought assumpsit upon a promise made directly to him that marriage money would be paid of his son. The court was of opinion that the action ought to
have been brought by the son “for the promise is made to the son’s use and the ordinary covenants of marriage are with the father to stand seised to the son’s use; and the use shall be changed and transferred to the son, as if it were a covenant with himself and the damage of non performance thereof is to the son.

**Rippon vs Norton (1602)** the defendant’s son, Richard, assaulted the wounded the plaintiff and his son, walter. Thereafter plaintiff complained to the justice of the peace and required surety of the peace. The defendant, however, promised that if plaintiff would not proceed further with his complaint then he, Richard’s father, would guarantee that his son would keep the peace and not assail plaintiff or his son in the future. Notwithstanding the defendant’s promise his son Richard later assaulted Walter and wounded him. Plaintiff brought assumpsit and recovered a verdict of £ 20 for the cost of curing his son and his lost service.

In **Brand vs Lisley (1610)** the plaintiff beneficiary was a creditor of W for 100 W delivered certain goods to the defendant equal to and in satisfaction of his debt to plaintiff. The plaintiff made demand upon defendant for payment and the defendant requested forbearance and promised to pay by a certain day. Plaintiff’s action is assumpsit resulted in a verdict which was affirmed. The court found that the plaintiff had an

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87 CRO Eliz 654  
88 Cro Eliz 849
interest in the goods in defendants hands and that the defendant had received consideration.

In *Dela Bar Vs Gold* (1662) the plaintiff is ‘agent’ leased a share of a ship to wood and Wood subleased to Gold. Wood defaulted on his rent and plaintiff’s agent, seeking payment from Wood assests in defendant’s hands, agreed to forbear in consideration of defendant’s promise payment ended inconclusively, but Windham J discussed recovery for plaintiff in terms of the interest theory.

In *Corny & Curtis vs collidou* (1674) the defendant’s mother had been taxed by the plaintiffs, the church wardens at deeping for repair to the Church, and failing to make payment, her mother had been excommunicated at their prosecution. The daughter went to the Bishop and promised that if he would absolve her mother, then she (the daughter) would pay the taxes. The Bishop granted absolution but the daughter did not pay the taxes and to Church wardens made her a defendant and, recovered a verdict. The Court held pr curiam infavour of plaintiff applying the simple brocard. He that interest in the promise shall have the action.

**Beneficiary’s Interest Distinct from the Promisee Consideration.**

The examples set forth suggest that common law courts in this period had conceived the motion that the consideration for the defendant’s promise could be distinguished from the external interest of the beneficiary. In *Rippon Vs Norton*, (1602) consideration did move from the beneficiary’s father to the defendant without the father’s promise not to prosecute it is
not to be supposed that the defendant would have been bound ab initio under the action of assumpsit, yet the beneficiary (his son) had a superior stake in the defendant’s promise to guarantee the peace. If follows that the beneficial interest was a notion independent of the requirement of consideration, and formed a distinct basis for allowing the action in the non promisee’s name.

**The collapse of interest into consideration**

By the late 17th century the interest theory had practically vanished. Its effectively ended around 1680. There is no direct evidence to tell us why the judges stopped relying upon the interest theory but the reasons may parallel the puzzling “breach of continuity” that contract historians have found in tracing the consideration doctrine itself. By that is meant the inability to trace the steps by which that doctrine made transition in assumpsit’s movement from tort to contract. There remains unaccountable gap between the damages in tort due for non performance or miss performance, and the contractual notion denoting the detriment inducing the promisor’s performance.

In professor Fifoot’s words, “between the tortious and contractual aspects of assumpsit’s, a gulf is fixed across which no logical bridge can be built. The detriment sustained by the promises to induce the promisee may be only a penny. In a real sense the interest theory presents a similarly

89 The “breach of continuity theory was first described in Sir John Salmond, “The History of Contract (1887) 3 C.O.R. 166 172,178. See also C.H.S. Fifoot, History and Sources of the Common Law, 397 (Stevens 1949)
baffling and perhaps historically related problem, namely to explain how the interest of the beneficiary, seen as an external material element, melded into the artificial contractual element that induced the promise.

The Benefit Theory

The notion of benefit, which made its debut in assumpsit in the early 17th Century, provided a broad basis for the beneficiary action. The source of the benefit idea lies in the expression “Use” of “Oeps” which was taken over from the actions of debt and account. As Pollock and Maitland’s research demonstrates the word “Oeps” or use or used in the debt and account cases simply meant a benefit and this did not connote either the later Chancery trust, the division between the equitable and legal title, or the Civil Law uses. On the same principle contracts made by a servant ad opus his master were said to be for the master’s benefit, and this was sufficient to permit the master’s action. When this older idea was applied to the beneficiary action in assempsit, manner, it was transformed from the notion associated with quid pro quo in the action of debt.

Clearly the attitude of this period towards promises of gifts contracts with modern law, which views contracts basically interims of commercial exchange. The 16th and 17th Century case show that gifts, Marriage contracts family agreements, etc. were enforceable in assumpsit, even though these agreements would not be viewed by modern standards as part of the world of commerce. The commerce distinction between creditor
and a donee beneficiary was not so clear in that day. Assumpsit was only a minor commercial remedy at that time. The important commercial transactions, Professor Thorne tells us, were handled by the self executing medienal forms and consequently the run of commercial cases by passed the common law courts. Furthermore, it was perfectly compatible to say that in a gift situation consideration was a requisite to bind the defendant to the promisee but that the donee’s benefit provided the rational when he, even though a “stranger” to that promise, should be able to enforce it.

**Illustrations**

An early application of this theory came in *Provender v Wood* (1628). The plaintiff brought assumpsit for breach of a promise made to his father to pay plaintiff £ 20 upon marriage to the defendant’s daughter. Recovery was put by *Yelverton and Richardson, J.J.* upon the ride ground that “the party to whom the benefits of a promise accrews, may bring his action.

Then in 1649, Chief Justice Rolle is reported to have said in the per curiam case of *Disborne Vs Denabie* that “it matters not from whom the consideration move but who hath the benefit thereby. The facts were that A and B were under an obligation to pay £ 20 to C when he should reach the age of 21 A made B his executor, then died, and B assigned assests to D

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90 Deering vs Carringdon (1701) Viner Ab, Assignment (3)
92 1649 Rolle Ab 30, 31, P 15
from whom he secured a promise that D would pay £ 120 to C when the
came of age. It was held, on the benefit principle, that C, who by then was
of age could have an action “surle Case” against D, though no
consideration came from C. A third application of this theory came in the
case of Starkey vs Mill (1651)\(^93\) this case is briefly reported by style, it is
also abridged by Rolle, and there is a report in manuscript by charles
Cremer of Gray’s Inn that gives a different and more accurate account.

The promise in law doctrine was the 17\(^{th}\) century answer to the
promisee (or parties only) objection and this is the first reported case in
which this device for overcoming the objection was applied. The objection
had been a source of some controversy in the 15\(^{th}\) and 16\(^{th}\) Century
beneficiary cases, and earlier courts vacillated on the question to a degree
almost in consistent with a serious regard for stare decisis. Sprat vs. Agar
(1658) That the benefit rationale in fact extended this far is confirmed by
the later case of Sprat vs. agar 1658, a leading case.

The declaration stated an action in assumpsit by Henry Sprat
against the executrix of John Agar. Upon a communication of marriage
between the plaintiff and the daughter of Sir Thomas Lockier, a certain
John Agar had promised Sir Thomas Lockier that in consideration for his
consent to the marriage, that he, John Agar, would settle certain lands
after his death upon the plaintiff. Thereafter the consent was given and the
marriage took place. Yet John Agar, in, breach of his promise, made a will

\(^93\) Starkey vs. Mill/165/ Style 296.
devising all his lands to his wife and heirs and made her his executrix. Plaintiff obtained a verdict and damages of £1300.

Upon defendant’s notion in arrest of judgement, the court first resolved that an action could lie against John Agar’s executrix upon this “Collateral promise.” Secondly the court resolved. That though the promise was made to Thomas Lockier yet because it was to the benefit of the plaintiff he may well have the action. These two points were resolved without argument. But the 3rd and principal point was whether notice ought not to be alleged given to John Agar of the consent of Thomas Lockier, which is not alleged and the marriage without consent binds not him in his promisee.

In 1658, consideration had not been the reason given for the beneficiary’s right to sue. His right to sue had been decided without argument on the basis of the benefit rationale. Consideration given had only been the reason why the promisee himself might home sued and why notification to the promisor would have been necessary if, he had sued. But by 1669, consideration had replaced benefit as the rationale for the beneficiary’s right to sue.

Beyond sprat vs. Agar, the remaining traces of the benefit theory become fragmentary.\textsuperscript{94} At the turn of the 18th Century, one writer fashioned the following principle. And so generally in all cases any one for whose use, or for whose benefit a promise is made may have an Action for

\textsuperscript{94} Possibly relevant is Green vs Horn (1693) Comb. 219 an action in covenant, where it was stated in King’s bench "The plaintiff may take the benefit of it, though not mentioned as party if I oblige
the breach of this promise, although the promise were (not?) made to him but to another.\textsuperscript{95}

Thereafter, no further case reference to the theory are made until a dictum by Butler, J. in 1787\textsuperscript{96} and an agreement by \textbf{Sergeant Le Blancin}\textsuperscript{1797} We must, for a time, look at the state of law in its infancy. From a simple society, there has emerged the complexity of great commercial enterprise. The rude requirements of our ancestors have given place to the complex demands of a highly civilized society. This doctrine was formed by gradual process to suit the requirements of the people. Hence it is not right to expect one process, working in one direction only. The spirit of adventure, economic progress and the stern common sense of lawyers and judges have contributed largely to the unique position which the doctrine occupies in the legal system of the world.

\textbf{(ii) Judicial Development of Privity of Consideration}

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 quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as for example under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personal. The House of Lords has reaffirmed the rule in several

\textsuperscript{95} \textit{TRADES-MAN’s LAWYER}, Supre an 19, at 16, See also, \textit{Anonymous Style 6} (1647).

\textsuperscript{96} Independent of the rules which may prevail in Mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it March in gton vs Vernon (1787) cited in 1B P 98 101, note. (6).

\textsuperscript{97} “If a promise be made to A for the benefit of B. B may maintain an action on that promisec” Co. of Feltmarks vs Qavis (1797) 1 B & P. 98, 101.
cases, in **Beswick v. Beswick (1968) AC 58**. Be a coal merchant agreed to transfer the business to his nephew in return for a promise by the nephew to employ him as ‘consultant’ during his lifetime, and after his death, to pay an annuity of 5 a week to his widow. On B's death, the nephew failed to pay the money to the widow. She brought an action against him in per personal capacity as the beneficiary of the contract, and also in her capacity as administrator of her deceased husband’s estate.

The House of Lords held that she was not entitled to enforce the obligation in her personal capacity, but she was able to sue as administrator of the estate, i.e. as her deceased husband’s personal representative.

**Price v. Easton 1833** and **Tweddle v. Atkinson 1861** might seem to rest solely on the rule that consideration must move from the promisee and it has been argued that the privity rule is really no more than an application of the doctrine of consideration. However, in **Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd 1915**. Lord Haldane clearly distinguished the two and the balance of authority supports the existence of two distinct rules of consideration and privity.\(^{98}\) The two rules reflect two logically separate issues of policy.\(^{99}\) The first primarily associated with the privity doctrine, relates to who can enforce a contract. The second primarily associated with consideration concern the types of promises that can be enforced.

\(^{98}\) Vandepitte v. Preferred Accident Insurance Corp. of New York 1933.

\(^{99}\) Law Revision Committee, 6th Interim Report 1937.
Consideration in all cases must move from the promisee. The meaning of this rule seems to be that the matter of the Consideration must be given, done or suffered by the promisee himself or if by a third party at the request and by the procurement of the promisee and as an agreed equivalent for the promise.

Where consideration moves from two persons, it is not necessary that both should be joined as plaintiffs in an action brought to enforce a promise made to one of them. A person who is not a party to the Consideration cannot sue on the contract. But there are exceptions. The general rule is that a contract is binding on the parties only and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. Wightman J. said "It is now established that no stranger to the Consideration can take advantage of a contract, though made for his benefit". "Some of the old decisions appear to support the proposition that a stranger to the Consideration of a contract may maintain an action upon it if he stands in such a near relationship to the party from whom the Consideration proceeds that he may be consideration a party to the Consideration. The strongest of those cases is that cited in Bourne v. Mason (1660) in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of

100 Leake, Contracts (439-440) and S. 398. Viner’s Abridgement (1791). 201-386; Comyn’s Digest (1822), Vol. 1, 283-337.
101 Jones v. Robinson (1874) 1 Exch. 454.
money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the Consideration can take advantage of a contract although made for his benefit. The rule seems to import no more than is necessarily implied in the conception of a Consideration as an essential part of the agreement.  

Love and affection had been consideration sufficient to yest the use as early as 1504 when it was said that a grant to a brother was made on good Consideration, for the elder brother is bound by the Law of Nature to aid and comfort his younger brother as the father is bound to his sons. The principle that Consideration must be a detriment moving from the promisee is constantly applied in Common Law by holding that the right to maintain an action of assumpsit on the contract resides in the person from whom the Consideration moves. The recognition of this principle in a Court of Common Law carried with it the further consequence that no person other than the one from whom Consideration moved could maintain any action at all. A person for whose benefit a contract is made, if he is a stranger to the Consideration cannot maintain an action upon it Langedell\textsuperscript{104} says: "A binding promise vests in the promisee and in him alone, and has a right to compel performance upon the promise. If a promise is made to one person for the benefit of another, it is quite clear that the promisee can maintain action only in his own name but for his

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\textsuperscript{103} Leake, Contracts p. 431; Pollock, Contracts p. 223.
\textsuperscript{104} Contracts s. 62.
\end{flushright}
own benefit. If the person for whose benefit the promise was made could also sure, the promisor would be liable to be sured twice on the same cause of action. In truth a binding promise to A to pay $100 to B confers no right upon B in law or in equity. It confers an authority upon the promisor to pay the money to B but A may revoke it any time."

In Sprat v. Agar\(^1\) A promised B that if the daughter of B would marry, A's son, he would settle certain lands upon them. Held that the son had a right to sue the mother-in-law in virtue of the wife's right because Consideration moved from her. Exception was in case of privity of blood between the person from whom the Consideration moves and the beneficiary was held sufficient to enable such a person to sure\(^1\). This was approved in Dutton v. Poole (1688). The Consideration of love and affection was discussed in Sharington v. Strotton (Plowden, 298). Seroggs C. J. said: "There is such an apparent Consideration of affection from the father to his children for whom nature obliges him to provide, that the consideration and promise to the father may well extent to the children". The general principle that a stronger to the Consideration cannot recover on a promise for his benefit was laid down in Price v. Easton, 4B and Ad. 433. Easton promised X that if X would work for him, he would pay a sum of money to Price. Price did the work and on Easton's failure to pay the money sued him. Held that the could not recover because he was not a party to the contract. Lord Denman C. J. said: "The plaintiff did not show any Consideration for the promise moving from him to defendant."

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\(^{105}\) 1658 3 Cro. 619.
\(^{106}\) Bourne v. Mason 1660 (1 Ventr. 6)
Littledale J. said: "No privity is shown between the plaintiff and the defendant." Taunton J. said: "It was consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between X and the defendant." Patterson J. said: "There was no promise to the plaintiff alleged." Dutton v. Poole 1678 2 Lev., 210 decided that where A made a binding promise to X to do something for the benefit of the son or daughter of X, the nearness of relationship would give a right to action to the person interested. But this is no longer law. In **Tweddle v. Atkinson**\(^\text{107}\) was stated that it is now established that no stronger to the Consideration can take advantage of a contract though made for his benefit. The rule limiting the right to bring assumpsit to the person from whom the Consideration moves is without an exception. In **Cavalier v. Page**\(^\text{108}\) Cavalier v. Page 2 the action was brought against the owner of a dilapidated house who had contracted with his tenant to repair it, but failed to do so. The tenant's wife who lived in the house and was well aware of the danger was injured by an accident caused by the want of repair. Held the wife being a stranger to the contract had no claim for damages against the owner.

Lord Macnaughton quoted Erle C.J.’s remarks in **Robbins v. Jones** (1863): "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud a part, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any." Lord Atkins said: "It is

\(^{107}\) (1861) 1 P. and S. 393.
\(^{108}\) 1906, A.C. 428, 4529, 432.
well established that no duty is at law cast upon a landlord not to let a house in a dangerous or dilapidated condition, and further if he does let it while in such condition, he is not thereby rendered liable in damages for injuries which may be sustained by the tenant, his (tenant's) servants, guests, customers or others invited by him to enter the promises by reason of the defective condition. In Cameron v. Young the wife and children of the tenant of a dwelling-house are not entitled to recover damages from the land-lord for loss and injury through illness caused by the insanitary state of the promises 'because they were not parties to the contract of tenancy' and Cavalier v. Page (1906 A.C. 128) was followed.

The idea that a stranger should be permitted to sue has been favoured by eminent judges. Rolle C.J. decided that when a father gave to his son goods on condition that the son should pay twenty pounds to another, an action could be brought against the son by that third person. Lord Holt and Lord Mansfield approved this right. The historical explanation of this rule that none but those in privity with Consideration can maintain an action on the promise is the direct result of the original idea of assumpsit. The original idea was to give redress for damages incurred by the non-fulfillment of a deceitful promise. The person who has suffered the detriment is allowed to sue upon breach of the promise. This rule is a procedural one and is peculiar to the action of assumpsit's. The rule that a stranger to the Consideration cannot maintain assumpsit’s does not mean that the promissory does not owe any legal duty to the person for

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109 Lane v. Cox 1897, 1 Q. B. 415.
110 908 A.C. 176, Per Lord Robertson pp. 179-82.
111 In Starkey v. Mill (1651) style 296.
whose benefit the contract is made. He owes a duty to the stranger. The contractual duty exists and we must admit that the duty is one owing to such third person. The remedy by action of assumpsit’s is not as broad as the limits of contractual liability. The deficiency of remedial law under the Common Law system of actions is very clearly seen in this case.

The action which the stranger brings on the promise made for his benefit is not an action of assumpsit on the contract, but an action on the case in the nature of assumpsit. Person\textsuperscript{112} says the obligation on which a stranger is permitted to sue is not an assumptual obligation created by the contract, but is an obligation in the nature of an assumpsit created by law on the facts of the case. Here we see the idea of the breach of the law of quasi contract\textsuperscript{113}.

In the Law of Insurance, the Consideration (premium paid) moves from the assured but the promise evinced by the policy binds the assurer to make payment to a third party. In all jurisdiction the beneficiary is allowed to sue at Law and in two cases only was this end accomplished by Statute. In England by The Married Woman's Property Act, 1882,\textsuperscript{114} it is enacted that a married woman may effect a policy of insurance upon her own life or on the life of her husband for her separate use; and a policy of insurance by a married man on his own life if so expressed on its face may inure as a trust for the benefit of his wife and children, etc.

1.2.2 Privity of Consideration under Indian Law

In the rules relating to enforceable agreements, the consideration

\textsuperscript{112} Book I, pp. 466-468.
\textsuperscript{113} Keener, Quasi Contracts (1893), p. 307-390.
\textsuperscript{114} 45 and 46 Vict. C. 75, s.11.
was the one amongst the very fundamental areas. A promise which is otherwise tenable but devoid of consideration was made unenforceable at law, it is the consideration which infused life to it.

(i) Meaning of Privity of Consideration

"Sec. 2 Clause (d) of the Contract Act widens the definition of consideration so as to enable a party to the contract to enforce the same in India in certain cases in which the English law would regard the party as recipient of a purely voluntary promise and would refuse him of a right of action on the ground of Nudum pactum. Howsoever, there is nothing in Sec-2 to encourage the idea that contract can be enforced by a person who is not party to a contract but this notion is rightly excluded by the definition of 'promisor' and 'promisee'."

Though under the Act consideration need not necessarily move from the promise, 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. Section 25 of the Indian Contract Act "an agreement made without consideration's void."

Fazaladdin vs. Panchanam Dar A.I.R. (1957) Cal. 92. The Calcutta High Court has observed in this case that "Consideration is the price of a promise, a return or quid pro quo, something of value received by the promisee as inducement of the promisee."

In Section 2(d) of the Indian Contract Act, 1872 consideration
defined as follows: "When, at desire of the promisor, the promisee or any other person has done or abstained from doing, something, such act or abstinence or promise is called a consideration for the promise." There is two main ingredients in Section 2(d). At the desire of the promisor

An Act or abstinence which is to be a consideration for the promise must be done or promised to be done in accordance with the desire of promisor an act shall not be a good consideration for the promise unless it is done at the desire of the promisor.

Consideration by promisee or any other person

The definition of consideration is Sec. 2(d) the promisee or any other person. It means therefore, that as long as there is a consideration for a promise, it is immaterial who has furnished it. It may move from the promisee, or if the promisor has no objection, from any other person. It has been adopted by the Court of King's Bench in Dutton vs. Poole 1678 2


Drive yourself Hire Co. (London) Ltd. vs. Strutt (1954) DENNING, LJ (1954) 1 Q.B. 250, suggested that the doctrine never arose until 1861. It is clear in Section 2(d) of the Indian Contract Act, that it is not necessary that consideration should be by the promisee. A promise is enforceable if there is some consideration for it and it is quite immaterial whether it moves from the promisee or any other person.

(ii) Judicial Development of Privity of Consideration

"When at the Desire of the Promisor, the Promisee or any other Person has done or abstained from doing or does or abstains from doing or
promises to do or to abstain from doing something, such act or abstinence or promise is called a Consideration for the Promise”. Contract.Act (IX of 1872), Sec. 2 (d). The definition has a wider meaning that in English Law. The act or forbearance which is essential in consideration must be done at the desire of the promisor. If is done at the instance of a third party or without the desire of the promisor, it is not Consideration.

Kedar Nath vs. Gorie Mohamed 866 ILR 14 Cal. 64. The Municipality of Howrah wanted to raise money by public subscription for the purpose of a town hall and appointed several commissioners to form the committee. Defendant promised to pay Rs. 100 towards that object. The Commissioners, including the plaintiff gave a contract to build the hall. The defendant did not pay his subscription, and the contract for sued him for the same. The Court decided that the defendant was liable because there was Consideration for the promise. The Subscribers knew that the contract was given on the faith of their promises to pay the stated sums. In fact, the plaintiff in giving the contract to build the hall was acting at the desire of the defendant. If no contract has been entered into and liability had been incurred, the promise would have been considered without any Consideration and consequently would have been void.

In Indian Law the Consideration may proceed from the promissee or any other person. This extended meaning restores and extends the doctrine of several cases decided before 1688. The Case of Dutton vs. Poole (1688) is good law in British India. In that case the whole Consideration moved from the father, and on the son giving a promise to the father to provide for his sister, the father abstained from felling the timber and in consequence the estate deceased to the son as heir with the timber. The court decided
that owing to the near relationship between the plaintiff (daughter) and the part who gave the value (father), the plaintiff was deemed to be party to the Consideration. In other words, a stranger to the Consideration could be regarded as a party to it, owing to close relationship with the person from whom the Consideration moved.

The Madras High Court in **Chinnaya vs. Ramaya 1882**. The court could have easily allowed the plaintiff to recover annuity, as consideration given by "any other person" is equally effective.

The principle that the consideration may also be given by a stranger was affirmed in the leading case of Venkata Chinnaya Rau Garu v. Venkata Ramaya Garu and others. In this case, Lakshmi Venkanna Rau, a lady made a gift of her estate to the defendant Chinnaya Rau, her daughter by a registered deed. She directed her to make annual payment of Rs. 653/- to her brothers, (the plaintiffs) and their descendants until she gave them a village yielding the same income. The gift deed contained this direction. She gave such direction because she was paying Rs. 653/- annually to her brothers till the gift was made. On the same day, the defendant executed an agreement in favour of the plaintiffs to carry out her mother's direction. However, the defendant did not pay the stipulated amount. The plaintiffs sued for breach of contract. Thus, briefly stating, the defendant promised to pay Rs. 653/- to the plaintiffs, but the consideration to this promise was given by the plaintiff's sister. That is the plaintiffs were although a party to the contract they were strangers of the consideration.

The Madras High Court dismissed the appeal and held that the

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115 I.L.R. (1882) 4 Madras 137.
plaintiffs were entitled to sue. In Indian law nearness of relationship is not a matter of importance. The Act states that Consideration may proceed from a third party; and it is not necessary that the third party should be related to the contract. In Samuel v. Ananthananth (1883, 6 Mad. 35) the fact swere that the administratrix of the property of the deceased person agreed to pay one of the heirs of the deceased a share of the estate, if a promissory note were made for a barred debt due to a creditor of the estate. The note was executed according to the promise in favour of the creditor and handed over to the administratrix. The creditor sued the heir on the note. The Court decided that there was Consideration for the heir’s promise to the creditor and the action was allowed. In this case the creditor and administratrix were strangers. Part payment by a third party may be good consideration for the discharge of the whole of the debt. This was held in Hirachand Punamchand v. Temple 1911 2 KB 330, 331 CA.

Fanindra Roy v. Kachheman bibim AIR 1918 Cal. 816 that consideration received by two mortgagors was good enough to bind all the four who executed the mortgage deed. This was follows by A.P. High Court in Andhra Bank v. Ananthanath, AIR 1991 A.P. 245. It was held that – all the joint promisors executing a promisorry note liable though consideration was handed over to only one of them.

The High Court of Madhya Pradesh in Gopal Co. Ltd. v. Hazari Lal Co. AIR 1963 M.P. 37. The Court received English authorities and said "From those decisions it appears that the second agreement brings into existence a new contract between different parties and therefore a promise to do a thing which the promisee is already bound to do under a contract with third party can be good consideration to support a contract.
Indermal v. Ram Prasad, AIR 1970 (M.P.) 40. Where a person who
had agreed to execute a sale deed, when a third party promised to give him
a promissory note for 30,000 held that the promise for the consideration.
Though consideration may proceed from a third party according to the
terms of Sec.(2) clause (d), yet a third party to the agreement cannot
maintain a suit. In M.D. Seal Vs A.R.A. Armugam Chettyar 1935, A
mortgaged his launch to B. By an agreement B was to defray the expenses
of running it and a clerk to be appointed by A was to be paid his salary by
B. As he was a third party to the contract his suit was held as not
sustainable. Rankin C.J. stated the position in Krishnna Lal Sadhu Vs
Pramila Bala Dasi. Rangnekar J., of Bom. H.C. expressed the same opinion in the case
of National Petroleum Co. Ltd. v. Popat Mal ji (1936) 50 Bom. 954.
Though under the, Indian Contract, 1872 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.

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

116 AIR 1935 Rang 35.
117 AIR 1928 Cal 518.
118 Dittar Vs Rutlasam 90 EC 1000.
contract, and that of consideration is about the type of promises which can be enforced. Two different factual situations may arise. The plaintiff may be a party to an agreement without furnishing any consideration. A, B and C all be signatories to an agreement whereby C promises A and B to pay A and B to pay A 100 if B will carry out work desired by C. There may be another case where the person wishing to enforce a contract may not be a party to the agreement at all. B and C may make an agreement whereby B promises to write a book for C and C promises to pay 100 to A. Under the English law, A cannot sue C in both the cases. But does he fail in the first case because the consideration has not moved from him and in the second because he is not privity to the contract. The fundamental assumption of the English law is that a contract is a bargain; if he takes no part in the bargain. In the second of the above two cases, a is a stranger to the contract. But he is equally a stranger in the first; he is a party to an agreement but he is not party to a contract. It is true if the doctrine of consideration were abolished the problem of privity will remain as in other continental legal systems. But as long as consideration is an essential feature of the English Law, it would seem to be seem to immaterial whether a person is forbidden to sue on the ground that he has given no consideration or on the ground that he is stranger to the contract. These are but two ways of saying the same thing.

It was controversial whether the rule that consideration must move from the promisee and the doctrine of privity of contract were fundamentally distinct or whether they are merely variations of a common theme. In the other English cases, the two rules have always led to the same result. But Lord Haldane in Dunlop Pneumatic tyre Co. Ltd. V.
Selfridges & Co. Ltd. 1915, distinguished between the two:

In the English Law 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.

Under the Indian Contract Act, 1872 consideration may move from the promisee or any other person. In the first of the situations given above, A can sue C because the consideration for C's promise has been provided by B, who is 'any other person' according to this definition, and C is a party to the agreement. Although consideration for an agreement may proceed from a third party, a stranger to an agreement cannot sue upon it. There is, however, nothing in s 2 to allow a stranger to a contract to enforce it. In Keeping Prospecting Ltd. v. Schimdt, 1968 AC 810, 1968, 2 WLR. 55.

The Privy Council considered the provisions of provisions of s 2(d) of the Malaya Contracts Ordinance (the same as in this Act) and held that the provision gave a wider interpretation to the definition of 'consideration' which applied in England, particularly in that it enabled consideration to move from another person than the promisee, yet did not affect the law relating to enforcement of contracts by third parties. On the contrary, para (a), (b) and (C) of s 2 supported the English conception of a contract as an
agreement on which only the parties to it could sue.

**CONCLUSION**

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.