CHAPTER – 2

PRIVITY OF CONTRACT AND OF CONSIDERATION

It is generally agreed that the modern third party rule was conclusively established in 1861 in *Tweddle v. Atkinson*\(^1\) In *Drive yourself Hire Co. (London) Ltd. v. Strutt*,\(^2\) Denning L.J said It is often said to be a fundamental principle of our law that only a person who is a party to a contract can sue on it. I wish to assert, as distinctly as I can, that the common law in its original setting knew to such principle. Indeed, it said quite the contrary. For the 200 years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract.

Denning L.J cited several cases to support his view. In *Dutton v. Poole*,\(^3\) a son promised his father that, in return for his father not selling a wood, he would pay £ 1000 to his father that, in return for his father not selling a wood, he would pay 1000 to his sister. The father refrained from selling the wood, but the son did not pay. It was held that the sister could sue, on the ground that the consideration and promise to the father may well have extended to her on account of the tie of blood between them.\(^4\) In

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\(^1\) (1861) 1 b & s 393; 121 ER 762.

\(^2\) (1954) 1 QB 250, 272.

\(^3\) (1678) 2 Lev. 210; 83 ER 523. This decision was supported, obiter, by Lord Mansfield in *Martyn v. Hind* (1776) 2 Camp 437, 443; 98 ER 1174, 1177.

\(^4\) The report discloses disagreement in the King's Bench during the argument, on the grounds that the daughter
Marchington v. Vernon.\textsuperscript{5} Buller J said independently of the rules prevailing in mercantile transactions,\textsuperscript{6} if one person makes a promise to another for the benefit of a third, the third may maintain an action upon it. In Carnegie v. Waugh.\textsuperscript{7} the tutors and curators of an infant, C, executed an agreement for a lease with A, for an annual rent to be paid to C. It was held that C could sue on the Instrument, even though he was not a party to it. In addition, there is a respectable line of 16th and 17th century authority allowing an intended beneficiary a right of action.\textsuperscript{8} These cases often involved similar facts. The fathers of a potential bride and groom would agree to pay a sum of money to the groom if he married, the bride's father subsequently reneging on the agreement. In several of these cases it was held that, not only could the groom sue to recover the amount promised, but that his father, the promisee, could not sue because he had no interest in performance.\textsuperscript{9}

In spite of these cases favouring actions by third party beneficiaries, it is not accurate to say that \textbf{the third party rule was entirely a 19th century innovation}. There were other 16th and 17th century cases where a third party was denied an action on the grounds that the promisee was

\textsuperscript{5} (1797) 1 Bos & P 101, n (c); 126 ER 801, n(c). This case was described as "but a loose note at Nisi Prius" by counsel in the interesting case of Phillips v. Bateman (1812) 16 East, 371; 104 ER 1124, 1129, where A, in the face of a run on a banking house, promised to support the bank with £ 30,000, whereupon note holders stopped withdrawing their money. When the bank subsequently stopped paying out, A was held not liable to an action individual holders of bank notes.
\textsuperscript{6} The case itself involved a bill of exchange.
\textsuperscript{7} (1823) 1 LJ (OS) KB 89.
\textsuperscript{9} Lever v. Heys Moo KB 550; 72 ER 751; also Levet v. Hawes Cro Eliz 619, 652; 78 ER 860, 891; Provender v. Wood Het 30; 124 ER 318; Hadves v. Levit Het 176; 124 ER 433. In an altogether different scenario in Rippon v. Norton Cro Eliz 849; 78 ER 1074, A promised B that his son would keep the peace against B and B's son (C). A's son thereafter assaulted B's son. B, alleging medical expenses and loss of the services of his son, failed in his action against A, even though he was the promisee. It was said that the son (C) was the person who should have sued, which he later did successfully: Cro Eliz 881; 78 ER 1106.
the only person entitled to bring the action. There were also cases where the reason given why the third party could not sue was because he was a stranger to the consideration, that is, he had given nothing in return for the promise. These cases typically involved the following facts. B owed money to C. A would agree with B to pay C in return for B doing something for A, such as working or conveying a house. A would not pay, and C would sue A. C would lose because he or she had given nothing for A's promise.

Thus, by the mid-19th century there appeared to be no firm rule either way in English law. The position was to be clarified in *Tweddle v. Atkinson*. The facts involved an agreement by the fathers of a bride and groom to pay the groom a sum of money, when the bride's father failed to pay, the groom sued unsuccessfully. Wightman J said that no stranger to the consideration could take advantage of a contract though made for his benefit. Crompton J said that consideration must move from the promisee.

The authority of *Tweddle v. Atkinson (1861) 1B & S 393; 121 ER 762*, was soon generally acknowledged. In *Gandy v. Gandy*, Bowen LJ said that, in spite of earlier cases to the contrary, *Tweddle v. Atkinson* was generally acknowledged. In *Jordan v. Jordan* (1594) Cro Eliz 369; 78 ER 616 (C gave a warrant to B to arrest A for an alleged debt. A promised B that, in return for not arresting him, he would pay the debt. C failed in his action, on the ground, interalia, that the promise had been made to B); *Taylor v. Foster* (1600) Cro Eliz 776; 78 ER 1034 (A, in return for B marrying his daughter, agreed to pay to C an amount which B owned to C. In an action by B against A, it was held that B was the person to sue, being the promisee). Bjourne v. Mason (1669) 1 Ventr 6; 86 ER 5; Crow v. Rogers (1724) 1 St. 592; 93 ER 719; Price v. Easton (1833) 4 B & Ad. 433; 110 ER 518. Although in the former two cases, the reason why C failed was because he was a stranger to the consideration, Price v. Easton contains seeds of more modern doctrine; whereas Denman CJ said that no consideration for the promise moved from C to A, Littledale J said that there was no privity between C and A.

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12 *Tweddle v. Atkinson (1861) 1B & S 393; 121 ER 762*.
13 The earlier cases allowing children to be considered a party to their father's consideration were considered obsolete. Dutton v. Poole (1678) T Raym 302; 83 ER 156, being a decision of the Exchequer Chamber could not be overruled by the Queen's Bench, but was nonetheless not followed.
(1861) 1B & S 393; 121 ER 762, had laid down "the true common law doctrine". In Dunlop Pneumatic Tyre Co Ltd. v. Selfridge & Co Ltd., the House of Lords accepted that it was a fundamental principle of English law that only a party to a contract who had provided consideration could sue on it. Despite several attempts by Dunning LJ to allow rights of suit by third party beneficiaries, the House of Lords reaffirmed the general rule in Midland Silicones Ltd. v. Scruttons Ltd.

2.1 THEORIES OF CONTRACT

The rule privity of contract is equally applicable in India as even in England. Besides, the above the discussion of Doctrine of Privity of contract. There is various theories regarding the basis of contract have emerged from time to time. In this Chapter it is proposed to examine the applicability of these theories to the doctrine of privity of contract.

2.1.1 THE WILL THEORY (OR INTENTION THEORY OR CLASSICAL THEORY)

The 'Will Theory' is regarded as the oldest theory of contract. According to this theory, the law enforces a contract only because will or intention of the parties to a contract should be respected. By giving effect to a contract the law, therefore, respects the will of the parties to the contract. As we know 'consensus ad-idem' or meeting of minds of parties to a contract is the basic requirement of a contract, the court of law proceeds in accordance with the intention of parties of the contract, the

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14 (1885) 30 ChD 57, 69.
15 [1915] AC 847.
court of law proceeds in accordance with the intention of parties to the contract. Every person who is competent to contract possesses freedom to signify his willingness, to do or not to do something, either expressly or impliedly. Being privileged with such freedom if both the parties to a contract express their intention to do or to abstain from doing something, there seems no reason as to why such contract cannot be enforced by a court of law unless the object or consideration of the contract is unlawful. Savigny, Pollock and Salmond are the main supporters of this theory. According to them the agreement of wills or meeting of minds is the first essential of a contract.

The second factor which is helpful in giving recognition to the ‘will theory’ is the concept of liability. A contract gives rise to liability commonly known as contractual liability. Such a contractual liability is supposed to be created by means of intention. The parties to a contract are bound by their respective contractual liabilities because they have expressed their willingness to discharge such liabilities. In other words, ‘the contract is binding because the parties intend to be bound, it is their will or intention, which creates the liability’. The whole model is suffused with the idea that the fundamental purpose of contract law is to give effect, within limits of course, to the intention of the parties. It is their decision, and their free choice, which makes the contract binding, and determine its interpretation and its result in the event of breach. There are several reasons for applicability of this theory.

17 [1962] AC 446 (Lord Denning dissenting)
18 On the basis of sections 2 (a) and 2 (b) and 2 (h), The Indian Contract Act, 1872.

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The first reason is the protection of public interest. The public interest appears to affect the contract in two ways; the ideology is based on public interest. That is to say that although the contract is, limited to its parties, its ultimate impact is, generally, on society as a whole. Secondly, the public interest may require that a contract should be enforced not by its parties but also by every member of society. No doubt, the first aspect of public interest is logical but the second aspect appears to be illogical.

The reason is that if every member of society is allowed to enforce a contract, the very sanctity of the contract will be shattered and a substantial difference between public interest and interest of parties to a contract (i.e. private or individual interest) will be abolished causing a big damage to the parties' '(individual's) interest'.

The second basis for enforcement of a contract under 'will theory' lies in the interest of its parties. A contract is enforced because it is in the interest of the parties and not because it is in the interest of the public. The contractual rights and duties are assets of parties and, therefore, they hardly care for public interest. A contract which confers benefits upon a third party is enforced under this theory because the parties intend to do so and not because it is in the interest of the public. The parties would never like that the contract which they had made should be enforced by any member of society.

The third reason for enforcing a contract is the common interest of the promisee and the third person. In such contract, the promisee agrees

with the promisor to confer benefit upon a third person. The third person (i.e. a stranger to contract) is also directly interest as contractual benefit is agreed to be conferred upon him. There seems to be no reason why third person should be deprived of such benefit.

However, the above theory has been criticised by Cohen Morris R3 on the following grounds: First, the 'will theory' ignores the 'objective aspect' of a contract. It emphasises only the 'subjective aspect', whereas both the aspects of a contract are equally significant for enforcing a contract. It is well-known that subjective theory or subjective aspect of a contract gives effect to intentions of parties to the contract which they had in their minds at the time they made the contract. The court enforces a contract according to the wishes of the parties which were in their minds at the time of formation of the contract.

Secondly, an intention is a fiction, it is not a real thing. It can only be inferred from the conduct of the parties and the existing circumstances. It is, therefore, possible that the inference about intention may be erroneous. Therefore, it is possible that the inference about intention may be erroneous. There are occasions when a party to a contract may be held liable even for those consequences which he did not, in fact, foresee. For example, if consent of a party is obtained by misrepresentation, the party guilty of misrepresentation is held liable, although his intention is innocent. Such liability is mainly based on the legal presumption that a person must intend natural consequences of his act. Thirdly, the legal implication of this theory is that the stranger on whom benefit has been agreed to be conferred is bound to accept the benefit even though he does
not want to receive. That is, the third person is bound by the wishes of the parties to the contract; he is deprived of his freedom of choice to accept or reject the benefit.

**Fourthly**, the ‘will theory’ does not support the doctrine of privity of contract. It requires simply the meeting of minds of both the parties to the contract. The intention must be expressed in unambiguous terms. However, mere meeting of minds is not a contract: it is something more (i.e. despite meeting). A third person under this theory is, therefore, entitled to sue for breach of a contract. It is submitted that the above criticism is correct. Mere subjective aspect of a contract is not the basis for enforcement of a contract. A contract is enforced mainly on two grounds.

**Firstly**, because it can be fitted into legal framework. **Secondly**, because the same circumstances exist at the time of performance of contract which existed at the time of its formation. But, if the circumstances existing at the time of constitution of a contract change their course due to certain events, the contract may become impossible or unlawful to be performed. In such cases, the ‘will-theory’ cannot be relied on. It, therefore, follows that the disapproval of the doctrine of privity of contract by ‘will-theory’ is not based on sound logic.

**2.1.2 THE PROMISE THEORY (OR COMMON MAN’S THEORY)**

The promise is an essential element of a contract. If a promise is
valid and supported with lawful consideration, it is enforced by law. It is also notable that every one in society may have an expectation that the person for whom he has done something, will also do something useful to him. So is the expectation when a promise is made. The promise who has done something for the promisor may naturally think that the promisor will also fulfill his promise. Such expectation arises not only in mind of the promisee but also in the mind of a common man. The opinion of a common man is that when the promisor enjoys the benefit of the promisee’s act, he should be bound by his promise. In case the promisor is spared of his promise the promisee will suffer loss due to no fault of his own. No doubt, a valid promise is enforced by law. Such enforcement is in conformity with expectations of a common man of society. That is why, this theory is also known as 'Common Man’s Theory'. Kant, supporting this theory opines that the duty to keep one's promise is one without which a rational society would be impossible. This theory also finds favour with Dean Roscoe Pound as he says that promises constitute modern wealth and that their enforcement is, thus, a necessity of maintaining wealth as a basis of civilization. So, all promises, in course of business, should be enforced. One may ask why should promises be enforced? The simplest answer lies in the logic that 'Promises are sacred per se'. It means if a promise is not performed society will condemn such non-performance.

No society can appreciate a refusal of the promisor to discharge his obligation. The promises are founded on mutual trust and cooperation of

25 However, Section 25 of the Indian Contract Act, 1872 deals with an agreement which is enforced even in absence of consideration.
the parties. Therefore, to break a promise is to outrage the high hopes of
the promise as well as of society and to abuse the confidence that the
promisee and society may normally repose in the promisor. In other
words, the breach of a valid promise is discouraged not only by law (by
grant of appropriate remedy) but also by a civilized society.

A perusal of this theory reveals that it does not approve of the
doctrine of privity of contract. The result is that a promise made for benefit
of a third person should be performed with the same spirit in which it was
made. The third person may expect that the promise would be performed.
Such expectation of the third person is just like the expectation of the
promisee. Society as a whole recognises this kind of convention with
notions that the beneficiary should not be restrained from receiving benefit
of contract promised to him unless he shows disrespect to the promisor.

Cohen Morris R. 27 criticises the 'promise theory' on the following
grounds:

Firstly, the 'promise theory' makes it clear that the promisor must
keep his promise. But, what is really tenable is that only valid promises
are enforceable by law. Those promises which are invalid cannot be
enforced. Secondly, the element of individual autonomy and trust is
stressed more by this theory than the element of purpose or object of the
promise. The expression 'individual autonomy' means that every person is
free to make promise of his choice and the word 'trust' signifies that the
promisee and society trust the promisor and hope that the promise would

26 H.I.R. Vol, 46, at 553.
be performed. By performing his promise the promisor respects individual autonomy and trust but neglects the purpose of the promise. Here it is necessary to distinguish between 'individual autonomy' and 'individual obligation'. The expression 'individual autonomy' is wider than an 'individual obligation' as the former forms the basis of the latter. An 'individual obligation implies an obligation which an individual (i.e. promisor) is bound to fulfill. The promisor thinks that in case he does not perform his promise, the promisee as well as society in which he lives will consider such failure as an attempt to abuse bonds of trust and an established convention of society which requires performance of an obligation at any cost.

Thirdly, it is well-known that freedom to contract extends to freedom to 'substitute a new contract at the place of old one or rescind or alter the original contract.' However, this theory affects the freedom to change the original contract, for it compels the promisor to perform his promise. Fourthly, this theory does not make any distinction between a proposal intending to create legal obligations (e.g. commercial proposal) and a proposal which generally does not intend to create legal obligations (e.g. a proposal involving family or social arrangement such as to invite a person at dinner or to see a movie).

Finally, one would hardly wish to live in a completely rigid society. Which does not exempt the promisor from performing those promises which are invalid. It is submitted that the criticism is correct. All the promises cannot be enforced by law. Only valid promises are enforceable.
by law. A promise whose object or consideration is unlawful\textsuperscript{28} cannot be enforced by law. This theory also rejects the principle of 'substitution rescission or alteration' of a contract which is permitted by the Indian Contract Act.\textsuperscript{29} It may be said that the 'promise theory' is a weak theory. This theory does not support the doctrine of privity of contract in so far as it permits a stranger to sue on a contract.

\textbf{2.1.3 THE EQUIVALENT THEORY (OR BARGAIN THEORY)}

The 'Equivalent Theory' states that only those promises should be enforced which contain their equivalent from the promisee's side. Unless the promisee has done or abstained or promises to do something which forms consideration in response to promisor's promise, it would be unjust to hold the promisor liable. Therefore, a promise must contain some 'quid pro quo' i.e. its equivalent. The necessity of consideration for a promise lies in the very simple reason that when, for instance, A has given or done something of value to B, B should also do something in lieu of it. If B fails to do something in return for A's work or promise, it would be unfair to enforce B's claim against A. it is so because in such a case one party of a contract bears the whole responsibility and the other party enjoys the fruits of the contract without paying even a penny for doing something of monetary value. That is, one party to the contract will have only right while the other only duty. This seems illogical. A rationale society may prefer enforcement of a bargain to an agreement. A 'bargain' means an agreement for exchange value, that is, an agreement where both the parties

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\textsuperscript{28} Section 23, The Indian Contract Act, 1872.  \\
\textsuperscript{29} Section 62, The Indian Contract Act, 1872.
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do something for each other.

In other words, a bargain is such an agreement which consists of consideration or is an agreement where one party has purchased or promises to purchase the promises to purchase the promise of the other party. This theory is also known as 'Bargain Theory'. The Bargain theory appears to be a combination of will (or intention) and consideration. In other words, this theory is a combined result of 'will-theory' and consideration. As the equivalent theory stresses on the need of consideration for enforcement of a promise, it can be submitted that it favours the doctrine of privity of contract. Since a stranger to a contract neither does something for the promisor nor promises to do something, he is not allowed by this theory to enjoy contractual benefits. The central idea behind the doctrine of consideration is that of 'reciprocity'.30 Although in the past there has been a controversy over the necessity of consideration for a contract, in the nineteenth century it became a rule that the consideration is almost a utility of a contract. The position of consideration may further be elaborated.

Under the English law there are two kinds of contract- the contract **under seal or specialty** and the **simple contract**. A 'contract under seal' is required to be made in some special form. The most common example is that of a deed. The deed must be printed or written. It must also be signed31 and sealed and then delivered to the promisee. Before delivery the deed must contain an expression "signed, sealed and

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31 Section 73, The Law of Property Act, 1925.
delivered." The conveyance of a legal estate in land is normally, required to be made by a deed.\(^{32}\) Similarly, a gratuitous promise (i.e. a promise without consideration) is also required to be made in a particular form. It is pertinent to mention that a 'contract under seal' does not require consideration for its validity.

**On the other hand a 'Simple contract'** is one which may be made even orally. It is also called as a 'Parol Contract.' But, it does not mean that a simple contract can never be in writing. There are certain contracts viz., a bill of exchange, promisory note, contracts of marine insurance, hire purchase, loan agreement and a bill of sale, which must be made in writing. Even a written contract without a seal falls in the category of parol contract. It is to be noted that a 'simple contract' requires consideration.

In view of the Indian Position one is tempted to agree with the criticism made by Cohen Morris R. In India also there are certain agreements which are valid, although they are without consideration. For example, a promise of gift for natural love and affection, a promise to compensate for something done voluntarily and a promise to pay a time-barred debt, are without consideration but can be enforced by law.\(^{33}\) Similarly, a contract of agency is a good contract but it does not need consideration for its validity.\(^{34}\)

### 2.1.4 THE INJURIOUS (RELIANCE THEORY )

This theory is a combined result of three elements: promise, reliance and injury. Therefore, if the promisee proves these three elements, he

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32 Section 52 and 54, The Law of Property Act, 1925.
33 Section 25, The Indian Contract Act, 1872.
according to this theory, becomes entitled to sue the promisor for breach of
the promise. It is noted that loss (to the promisee) and obligation (of the
promisor) are inseparable under this theory. If there is loss, there will be a
remedy. This theory tends to clarify that a contract is created for obligation
and the natural expectation is that the obligation will be discharged. The
promisor is, thus, bound to perform the obligation undertaken by him.
This theory does not support the doctrine of privity of contract.
Consequently, if third party proves his reliance on the promise made in his
favour and loss on account of breach of such promise, he can sue the
promisor for the breach of the promise.

The above theory is criticised by jurists\(^\text{35}\) on the following
grounds:

**Firstly**, it is not necessary that reliance of the promise may always
be reasonable. There should be some test to ascertain reasonableness of
the promisee's reliance. The most suitable test for this purpose is the test
of a reasonable man. That is, if it can be proved that had a reasonable
man been in the same circumstances where the promisee is, he would have
relied on the promise, the promisee's reliance should be treated reasonable.
Then the question may, naturally, arise as to who is a reasonable man? A
reasonable man is, generally, described as a man who shows average
competence in the work for which he is engaged. **Secondly**, every damage
resulting from non-performance of the promise is not actionable; the
remedy is available only for direct loss (i.e. the loss which, naturally, arises
in usual course of thing). Thus, this theory does not make any difference

\(^{34}\) Section 185, The Indian Contract Act, 1872.
between an actionable damage and non-actionable damage. **Thirdly**, mere reliance is not the basis of compensation. For instance, in case of written or oral contracts, the reliance of the promisee plays a small role. The promisee’s claim is enforced by the law because of breach of contract and not because the promisee relies on performance of the promise.

### 2.1.5 RELATION THEORY

**Prof. Ian Mac Neil is the propounder of this theory.** He recognises reality of relationship in contract. He thinks so because the contracts are not always accurately characterised as discrete transactions. According to him the transaction are affected by the prior and ongoing relationships of the parties. They are independent of social or other economic relations. A discrete transaction is detached from others i.e. it affects the parties and not society. He advises that any contract law system, necessarily, must implement certain norms. For example, it should permit and encourage participation in exchange, promote reciprocity, provide limited freedom for exercise of choice and so on and so forth.

**Further,** a contract law system reinforcing discrete contract transactions adds two goals: (i) enhancing discreteness and (ii) enhancing presentation.³⁷ This theory does not support the doctrine of privity of contract as the privity doctrine is quite unrelated to social needs. It is, however, submitted that this theory suffers from certain weaknesses.

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³⁷ To Prof. Ian Mac Neil ‘Presentation’ is a way of looking at things in which a person perceives the effect of the future on the present. (1987) 103 L.Q.R. at 588.
Firstly, the contracts are not always the result of past and future relationship between the parties. Contracts may, sometimes, be constituted between persons totally unknown to each other prior to formation of the contract. Secondly, in each and every case, it is difficult to foresee the effect of future on the present or the effect of the present on the future. Thirdly, the basic function of law is to examine contractual obligations (i.e. whether they are enforceable) and not the past or future relationships.

2.1.6 THE ECONOMIC THEORY

The 'Economic theory' emphasizes that justice should not be costly. No one should be debarred from seeking justice merely on the ground of poverty. The effect of this theory is that a stranger to a contract is entitled to sue upon the contract to receive benefits of the contract provided (i) the contract is valid, (ii) the contact is such that the promisee can enforce it specifically. The doctrine of privity of contract, according to this theory is expensive, especially, when the contract tends to confer benefit on a stranger. According to privity rule if this contract is intended to be binding.

Drawbacks of this theory

It is on the basis of possibility of extra cost in enforcing stranger's claim that the economic theory does not appreciate the doctrine of privity of contract. However, the 'economic theory' is also not free from weakness.

Its first drawback is that sheer economic considerations cannot

serve the ends of justice. The court may examine the desirability of benefit wished to be conferred on a stranger to the contract, its legality and its impact on society as a whole. **Second** drawback is that the doctrine of consideration receives no reasonable response from this theory. The stranger gives no consideration even then he is entitled to maintain his action, under this theory, for breach of contract. **Third** drawback is that this theory also lays more emphasis on the right of the third person than on offer and acceptance, while offer and acceptance are the two fundamental elements of a contract. It is pertinent to mention that the third does not make an offer or acceptance, but he can acquire benefit of the contract.

### 2.1.7 SOCIAL THEORY

The distinguished **American Jurist, Roscoe Pound**, is the propounder of Socio-legal school. The 'social theory' of contract is based on the tenets of sociological school of law. This theory provides no justification for doctrine of privity of contract.

It advocates enforcement of the claims of a stranger to a contract mainly for two reasons:

**Firstly** to provide relief to him and **secondly** to safeguard social interests and promote good economy. Society wishes that when a contract is entered into, it should be performed. Therefore, if certain benefit under a contract is to go to a person, who is not a party to the contract, it must be given to him. The parties to the contract are really interested that it must be performed. **Further**, if the promisee's planning (under contract) is completed, the social purpose will also be served. The awarding of
damages for breach of the contract aims inter-alia to discouraging the breach of promise and encourages fulfillment of the promisee's will and consequently social planning may also be completed. Therefore, if once it is settled that a contract is enforced from the viewpoint of social interests, it will become evident that third party, to whom benefit of contract is promised, is entitled to sue the contract. The social theory, thus, does not respect the doctrine of privity of contract. It allows the third party to enforce his claim for the benefit promised to him, for it is in the better interest of society as well as that of the third person.

**The 'social theory' may be criticised on the following scores**

**Firstly** the theory gives more importance to the social interests than to the individual interests. **Secondly** in the process of emphasising the social interests, the interests of parties may, somethings, suffer adversely. That is, in the course of this process injustice may be done to the interests of parties to the contract. **Thirdly** social demands may not always be genuine as some promises may be enforceable by law and some may not. **Fourthly** the third person is bound to accept the contractual benefits. This affects a his freedom of choice (to accept the benefits or not to accept the benefits). **Fifthly** the concept of consideration under a contract is also debunked by this theory. That is to say that, a stranger is allowed to sue on contract without giving consideration. It may be said that even in spite of the above weaknesses, the 'social theory' is very useful in the present scenario because by allowing a stranger (beneficiary) to reap contractual benefit, it aims at striking a balance between social interest and individual interest.
2.1.8 THEORY OF UNCONSCIONABILITY

This theory suggests that the promisor should not be placed in a position where he can abuse his own promise i.e. refuse to perform his promise. Such conduct of the promisor would cause injustice to the third party (beneficiary). This theory indicates that if once a promise is benefit of contract. The promisor should be bound to the beneficiary (i.e. the stranger) in the same way as he is bound to the promisee. According to promisor is not bound to perform his promise to give benefit to the stranger. This, in other words, implies that the promisor is free to retain made the promisor must perform it; the third party must acquire the benefit which he has promised to give to the stranger. However, this theory make it amply clear that the retention of benefit of contract, promised to be conferred on the stranger, by the promisor is unconscionable. The theory of conscionability, thus, does not justify the doctrine of privity of contract.

The above theory, may be criticised on the following grounds:

Firstly, the requirement of consideration is ignored by this theory, whereas, the reality is that except in certain cases the element of consideration is an essential of a contract. Secondly, the theory is a clear interference with freedom of choice of the stranger (i.e. beneficiary). That is, a stranger has the freedom of accepting or not accepting the contractual benefit. But, under this theory he is bound to accept the benefit. But, under this theory he is bound to accept the benefit. Thirdly, the elements of offer and acceptance of a contract are not given due consideration under this theory. Though the third party does not signify his intention to accept the contractual benefit, he is treated at par with the contracting parties.
Fourthly, the theory is also an encroachment upon judicial discretion. The court is bound under this theory, to enforce the stranger’s claim against the promisor.

2.1.9 REASONABLENESS THEORY

According to this theory when parties to a contract are unequal in bargaining power (i.e. one is stronger and the other is weaker in bargaining) and the stronger party enters into a contract with the weaker party with an unreasonable or unfair or unconscionable term favourable to him, the court will not enforce it.

This theory was propounded by the Supreme Court of India in Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly. In this case a company carrying on business of maintenance and running of river services entered into a scheme of arrangement with Central Inland Water Transport Corporation Ltd., a Government Company owned by the Central Government and two State Governments. The scheme was approved by the High Court and the company was dissolved by the order of the High Court. The officers of the company accepted the job with the Corporation. Later on, those officers were terminated from service by the Corporation without assigning any reason under the Rule 9(i) of the Central Inland Water Transport Corporation Ltd. Rule 9(i) empowered the Corporation to terminate service of a permanent employee without assigning any reason and by giving three month’s notice in writing.

39 A.I.R. (1986) S.C. 1571. (Note : There were two similar petitions before the Court. Both were tagged together and disposed of simultaneously by the single judgement. They were : (1) Central Inland Water Transport Corporation Ltd., and another v. Brojo Nath Ganguly and another, and (2) Central Inland Water Transport Corporation Ltd., and other v. Tarun Kanti Sengupta and others.

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or by paying him the equivalent of three months basic pay and dearness allowance in lieu of such notice. The Supreme Court held that the Rule was ultra vires Art. 14 and Directive Principles of State Policy contained in Articles 39(a) and 41 of the Constitution. Delivering the judgement their Lordships of the Supreme Court relied on the observation of lord Denning M.R. in an *English case, Gillespie Brother & Co. Ltd. v. Roy Bowles Transport Ltd.*

The Supreme Court also held that a bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to weaker party. But, gross inequality of bargaining power together with terms unreasonably favourable to the stronger party may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful choice, no real alternative or did not, in fact, assent or appear to assent to the unfair terms. For the purpose of ascertaining what terms are fair, the Supreme Court said that all the provisions of the contract must be taken into account. This theory makes it clear that gross inequality of bargaining power between parties to a contract, together with terms unreasonably favourable to the stronger party will make the bargain unconscionable. It is because 'taking disadvantage of oppressed people in not included under section 23 of the Contract Act.'

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40 (1973) 1. Q.B. 400 at 415, 416.

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This theory is a good theory in the field of contract. It protects the legitimate interests of the promisee. At the same time it allows the promisor to receive reasonable benefits from the contact. The stronger is prevented from oppressing the weaker party. This theory has a great impact on the socio-economic structure of the country. The weaker section of society is poor and illiterate. A large number of laborers or other employees are working in factories, companies etc. There is every likelihood that they may be oppressed by their employer. The theory of reasonableness laid down by the Supreme Court of India will surely help the employees and protect their interests and thus, promote the national interest. It is evident that this theory does not seem to prevent a stranger to receive contractual benefits promised to him. But, for this purpose, it is necessary that the promisor while promising to give certain benefits to the stranger must not be oppressed.

2.1.10 THEORY OF DISTRIBUTIVE JUSTICE

According to this theory there should be fair distribution of wealth among all the members of society. The economy should not be controlled by a few big business houses. Every person in society should be given wealth according to his capacity and needs. If it is done, there will be a fair distribution of wealth among members of society. The Supreme Court in its judgment in the case of Central Inland Water Transport Corporation v. Brojo Nath Ganguly has approved of this theory. The court has held that according to the doctrine i.e. distributive fairness and justice in the possession of wealth and property can be achieved not only by taxation but also by regulatory control of private and contractual transactions even
though this might involve some sacrifice of individual liberty. In envisions the removal of economic inequalities and rectification of the injustice resulting from dealings or transactions between unequals in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon principals of socio-economic equality. That is, wealth should be taken from each according to his capacity and given to each according to his needs.

This theory is in accordance with the direction of Art. 39 of the Constitution of India. Art. 39 directs the State to frame its policy in such a way that men and women equally have right to adequate means of livelihood and the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment and there is equal pay for equal work for both men and women. A stranger is, although not a party to a contract, he is a member of the same social community to which parties to the contract belong. Therefore, if two members of society by constituting a contract agree to give certain benefits to the stranger, they should be supposed to strengthen the fabrics of distributive justice. Consequently, reaping of contractual benefits under this theory is just. It is submitted that this theory encourages the contract-making process for the purpose of a fair distribution of wealth among members of society. But, at the same time, it does not prevent the parties to the contract to confer benefits on other members of society, because acting so, the parties would promote fair distribution of wealth and lessen inequalities in society and as a consequence, national integration and brotherhood will receive a boost.
The above discussion reveals that there is a weak theoretical justification for the doctrine of privity of contract. The only theory which favours the rule is the 'bargain or equivalent theory'. All other theories do not support the rule of privity of contract. The requirement of consideration for a contract\textsuperscript{43} reflects the idea of the 'bargain theory'. It may, therefore, be submitted that these theories lend more support to a stranger's claim than to the application of doctrine of privity of contract.

2.2 PRIVITY OF CONSIDERATION AND THIRD PARTY RULE

Presence of consideration is one of the essential for a valid contract, the general rule in Indian contract Act is that "an agreement without consideration is void"\textsuperscript{44}. The doctrine of consideration has got multidimensional significance, under the contractual obligations in Indian welfare state. The doctrine of consideration has been economic, social, political, and has not been devised or arranged by any one individual, but slowly evolved by the needs of generations. The examination of various legal systems exhibits the fundamental idea of doctrine of consideration in them. The study of different legal system clearly shows the great similarities in thought. It appears to be uniformity inspite of different modes of expression of the doctrine of consideration where commerce has been practiced on large scale of consideration has been very clearly embodied in contractual jurisprudence of its legal system.

The theory that consideration is an essential part of contract had

\textsuperscript{43} Sections 2(d), 23 and 25, The Indian Contract Act. 1872.

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been assailed in many quarters. Prof. Holdsworth considered the doctrine "As something of a anachronism" and added the requirements of consideration in its present shape prevent the enforcement of many contracts, which ought to be enforced, if the law really wishes to give effect to the lawful intention of the parties to them, and it would prevent the enforcement of many others, if the judges had not used their ingenuity to invent consideration. But the invention of considerations, by reasoning which is both devious and technical, adds to the difficulties of the doctrine." Mulla in his treatise of the transfer of properly act rightly points out that "consideration" is used in the definition of gift in the same sense as in the Indian contract Act and excludes natural law and affection; In Madras case Natisan J pointed put: "Motive must not be confused with the consideration. A desire to carry out the wishes of deceased or a person to when the alienor was respect would not amount to consideration." Marriage may be a sacrament under Hindu law, law that does not militate against the existence of a contract for the marriage. Normally the reciprocal promise to marry would be consideration is not opposed to public policy or in any manner illegal." The court observed that if a person contracted a marriage would be valuable consideration with in the meaning of the terms under sec. 2(d) of the Indian Contract Act. 1872.

Consideration means something in return for the promise. It may be either some benefit conferred on one party or some detriment suffered by

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44 Sec. 10 Indian Contract Act.
46 5th Edn. P. 772.
the other. In the words of Lush J. in Currie Vs Misa\textsuperscript{48} "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Definition under the Indian contract Act is a rational definition, the purpose is to emphasize the simple fact that consideration is some act, done or promised to be done at the desire of the promisor. It also avoids the practical difficulties created by the English theory of consideration as consisting of Act which is beneficial to the one party or detrimental to the other. The Indian Contract Act simplifies the matter by saying that any kind of act which is done or undertaken to be done at the desire of the promisor is sufficient consideration. Drive yourself Hire Co. (London) Ltd. vs. Strutt (1954) DENNING, LJ suggested that the doctrine never arose until 1861. It is ear 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. The Madras High Court in Chinnaya vs. Ramaya 1882. The Samual Vs. Ananthanatha, 1883, 6 Mad. 351. The court could have easily allowed the plaintiff to recover annuity, as consideration given by "any other person" is equally effective.

\textsuperscript{48} (1975) L.R. 10 Ex. 153 at 162.
2.2.1 RELATION BETWEEN CONSIDERATION AND THIRD PARTY RULE

The relation between the doctrine of consideration and the third party rule has long been debated. The rule that only a party to a contact can enforce it and the rule that consideration must move from the promisee could be distinguished in policy terms: the third party rule determines who can enforce a contract; while the rule that consideration must move from the promisee determines the types of promises that can be enforced. The rules are distinct is supported by authority\(^49\) and by the Report of the Law Revision Committee\(^50\) although it has been questioned by some academics.\(^51\) Reform of privity is not possible without reforming consideration. The reform of privity involves the importance attached to consideration.

2.2.2 CONSIDERATION MUST MOVE FROM THE PROMISEE

The maxim "consideration must move from the promisee" was essentially used in this first sense of consideration being a necessary requirement for a valid contract. It include the following two passages: "two of the central questions of policy in the law of contract are: (i) which promises are legally enforceable; and (ii) who can enforce them? The first question is associated with the doctrine of consideration; the second with

\(^49\) See, eg. Tweddle v. Atkinson (1861) 1 B & S 393; 121 ER 262; Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd. [1915] AC 847, 853. See also Kepong Prospecting Ltd. v. Schmidt [1968] AC 81, 826.

\(^50\) The Law Revision Committee, Sixth Interim Report, (1937) para 37. See further above, paras 4.2-4.4.

the doctrine of privity." The third party rule, i.e. that third parties cannot enforce contracts made for their benefit, can be reformed without prejudicing the rule that consideration must move from the promisee. Certainly once one has interpreted the maxim that consideration must move from the promisee as meaning merely that consideration is necessary, one can see that, at a formal level, there is no difficulty in reforming privity without altering the need for consideration. That is, one can insist that, provided there is a contract supported by consideration (or made by deed), it may then be enforceable by a third party beneficiary who has not provided consideration. The maxim "consideration must move from the promisee" can also be used to mean, and is probably generally understood to mean, that, even though the promise is supported by consideration, the consideration must move from the plaintiff. That is, the party seeking to enforce the contract must have provided the consideration. A reform allowing a third party to sue would achieve nothing, or almost nothing, unless there was also a departure from the rule that a plaintiff could not sue a contract if it has not provided consideration. The rule that consideration must move from the promisee and the rule of privity that only a party to a contract can enforce it are so closely linked that the essential dispute is whether they are distinguishable at all; whether, in other words, there are two rules or one.

2.2.3 THE JOINT PROMISEE

A difficult linked issue is how we should deal with the question as to whether a joint promisee can sue even though it has not provided consideration in a contract not made by deed. In other words, how should
we deal with the so-called ‘joint promisee exception’?\[^{52}\] That present English law on joint promisees is not entirely clear. However, it seems likely that an English court would apply the approach of the High Court of Australia in **Coulls v. Bagot’s Executor & Trustee Co. Ltd.**[^{53}\] In that case, four members of the High Court suggested that a joint promise could sue despite not having provided consideration[^{54}\] (although Windeyer J suggested that one could regard B as having provided consideration on behalf of C).[^{55}\] Barwick CJ explained that the justification for this exception to the need for consideration to move from the promisee was that the promise had been made to C and consideration for the promise had been provided, albeit by B not C. This approach is reminiscent of the view of the Law Revision committee in 1937. Having cited the joint promisee example given above, the Committee continued, "We can see no reason either of logic or of public policy why A, who has got what he wanted from B in exchange for his promise, should not be compelled by C to carry out that promise merely because C, a party to the contract, did not furnished the consideration".\[^{56}\]

It is clear that C should have the entitlement to sue A. Indeed, given reform of the privity doctrine, it would be absurd if this were not so: that is, it would be absurd if a joint promisee had no right to enforce the contract

\[^{52}\] This point is left unclear in the legislation enacted in, eg. New Zealand and Western Australia.
\[^{54}\] On the facts the majority (Mc Tiernan, Taylor and Owned JJ) considered that Mrs Coulls was not a promisee so that this joint promisee exception did not come into play. Barwick CJ and Windeyer J dissented taking the view that Mrs Coulls was a joint promisee.
\[^{55}\] In his powerful article, "Consideration and the joint Promisee" [1978] CLJ 301, Coote argues that, in a bilateral contract, C can only be regarded as having provided consideration if it has undertaken an obligation to A.
\[^{56}\] Sixth Interim Report (1933) para 37. See para 4.3, note 11 above.
whereas a third party (to whom the promise has not been given or made) would have that right. The much more difficult question, however, is what should be the precise rights of enforcement of the joint promisee (who has not provided consideration)? And, in particular, should such a joint promisee be regarded as a third party, the advantage of treating such a joint promisee as a third party is that the absurdity referred to above would be avoided.

But there are at least two possible disadvantages of this approach. The first is that it is arguable that a joint promisee should have a more secure entitlement to sue than (other) third parties on the basis that the promise was directly addressed, or given, to him. On this basis, the joint promisee should not have to satisfy the test of enforceability laid down in the proposals and ought not he be caught by the provisions allowing variation or cancellation without his consent. The second disadvantage, and in a sense cutting the other way from the first disadvantage, is that precisely because the promisee is a joint promisee—and is therefore closely connected with the other joint promisee vis-a-vis the promise—it is arguable that traditional rules on joint creditors should apply and some of these rules (for example, requiring joinder of the other joint creditor to any action and allowing one joint creditor to release the promisor provided not in fraud of the other) differ from the proposals for third parties.

It is therefore considered that a joint promisee who has not provided consideration should not count as third party within reforms. This approach is adopted in the confident expectation that, particularly in the light of the reforms, the English courts will avoid the absurdity referred to
above by accepting the 'joint promisee exception' so that a joint promisee who has not provided consideration will not be left without a basic right to enforce the contract. It is recommended by the British Law Commission. Without prejudice to his rights and remedies at common law, a joint promisee who has not provided consideration should not be regarded as a third party for the purposes of the reform.

2.3 REFORM OF PRIVITY OF CONTRACT AND OF CONSIDERATION

It is not possible to reform privity without reforming the consideration. The argument that a reform of privity does relax the importance of consideration rests on the proposition that a third party who has not provided consideration, and should be afforded no better rights than a gratuitous promisee. The fact that someone else has provided consideration for the promise is an irrelevance vis-a-vis the claim by the third party. The reform not only affords a third party's rights than a gratuitous promisee, but also allows the claim of the third party, who has provided no consideration.

This is a hypothetical example. A wants to give a car to C that he is buying from B and also wants to assure C, in advance, that the car will be his. In a first situation, in addition to its contract with B, A makes a gratuitous promise to C. In a second situation A insists on a term of the contract with B being that the car should be delivered, and title should pass, to C. A informs C of that contract for his benefit. It is argued that the
position of C, and the justice underpinning whether C can sue A in the first situation or B in the second situation for failure to deliver the car, is indistinguishable. But according to our proposed reform C would be able to sue in the second situation, subject to satisfying the test of enforceability, but not in the first situation. True adherence to consideration would appear to dictate that the contracting parties should be free to change their intentions at any time. The reform 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.

The requirement of consideration within the area of third party rights may represent a relaxation of the importance of 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 recognition of such exceptions, allied to academic criticism of the requirement of consideration (in its classic sense of there needing to be a requested counter-performance or counter-promise), the doctrine of consideration may be a suitable topic for a future. But for the present requirement of consideration to the limited extent necessary to give third parties rights to enforce valid contracts in accordance with the contracting parties' intentions. The Contracts (Rights of Third Parties) Act 1999 enable the parties to make it enforceable by a third party, it enables a third party...
both to sue to enforce a positive provision in the contract. The Act thus removes the limit on the autonomy of the parties represented by the first limb of the privity rule. The third partner’s right are thus derived from the parties intention embodied in the contract, but third parties’ right are distinct from the rights of the party which are preserved.