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Consideration and Privity of Contract: A Critical and Comparative Study in India and England

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ABSTRACT

Consideration is one of the most essential elements of a contract, be it under any law. Consideration means gaining something in exchange for a promise. It forms the major part of any contract, either under English law or Indian law. Privity of contract, on the other hand, is a major legal doctrine which is followed in almost every country.

This paper explores what is the meaning of consideration and privity of contract under English and Indian law respectively. It explores the comparison between the two along with judicial precedents to further explain the comparison. The paper analyses the role of consideration and privity of contract in today's context as well. As a conclusion, I proceed with a critical analysis and argue that the doctrines of consideration and privity of contract hold an importance in formation of every contract.

Keywords: *Consideration, Privity of Contract, meaning, comparison, critical analysis.*

I. INTRODUCTION

(A) What is a Contract?

Individuals in their daily lives enter into agreements which create legal obligations on a mutual basis. This legal intention gives rise to what is called a contract in the eyes of law. Section 2 of the Indian Contract Act 1872 states:

- (a) When one 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;
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
- (c) The person making the proposal is called the “promisor”, and the person accepting the proposal is called the “promisee”;
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained

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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;

- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement;
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;
- (g) An agreement not enforceable by law is said to be void;
- (h) An agreement enforceable by law is a contract;
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.²

Contracts are thus, enforceable by law and damages can arise due to breach of the same, the compensation of which can be demanded by the party who has suffered the damage. A Contract always consists of an offer, acceptance and consideration without which it becomes void and unenforceable in the eyes of law.

(B) What is Consideration?

Consideration has been classified to be an essential of forming a contract, in both Indian and English law. Without a consideration specified in the contract, the contract becomes void ab initio that is, void from the very beginning. There have been several case laws which will be further cited to support the statement that consideration is an essential of a contract. However, there are instances where a contract is still enforceable even without consideration, an example of which can be a gift made in earnest.

On comparing the Indian and English law, there can be several similarities as well as differences when it comes to law regarding consideration.

(C) What is Privity of Contract?

Privity of contract refers to when only the parties to a particular contract are able to have the power to sue the other party or be sued on breach of contract. A third party cannot enforce the any sort of liability, benefit or legal obligations in a contract to which he or she is not a part of.

Privity of contract in simpler terms pertains to a legal doctrine which confers rights and

² Indian Contract Act 1872 § 2, Acts of Parliament, 1949 (India)

obligations arising under a contract only on the parties to the contract, and not any other third party or agent, unless specified. However, there are certain instances where third parties are given the right to sue under a contract to which they are not a party. These are the exceptions to privity of contract for example, contracts which are formed for the benefit of a particular third party.

II. COMPARISON WITH RESPECT TO CONSIDERATION

(A) Consideration under Indian Law:

Consideration as defined under Section 2(d) of Indian Contract Act 1872 ³says, “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”.

A consideration or quid pro quo has to be lawful and not forbidden by the law. If the consideration as specified in the contract is deemed to be forbidden or illegal, the contract automatically becomes void and thus, unenforceable. The most commonly enforced definition of consideration was given in Currie vs Misa ⁴that a valuable consideration in the eyes of law consisted of some right, interest, profit, benefit for one party and detriment, loss, forbearance and responsibility suffered by another party. On analysing the simplest meaning, consideration simply means gaining something on behalf of an act or promise carried out.

Consideration must always move at the desire of the promisor as decided in the case of Durga Prasad vs Baldeo ⁵wherein it was held that the construction of the market was not at the desire only if it moves from the promisor and not from any third party.

Motive for a promise may not always be consideration, it can induce a promise to be made. In the case of Dwarampudi Nagarathamma vs Kuruku Ramayya ⁶, the Karta of a Hindu Undivided Family gifted his concubine a portion of property beyond cohabitation, was a motive and not consideration. The consideration should be considered as invalid since his actions had a motive to compensate for the past services.

(B) Consideration under English Law:

The doctrine of consideration is one of the most established doctrines in every common law country, including English law. The law regarding consideration in India mimics that of the

³ *Supra* n.1

⁴ Currie v. Misa (1875) L.R. 10 Ex. 153

⁵ Durga Prasad vs Baldeo, ILR [1881] 3 ALLAHABAD 221

⁶ Dwarampudi Nagarathamma vs Kuruku Ramayya, 1968 SCR (1) 43

English legal system, given that the doctrine of consideration has been an essential of a contract in English law. It has been evolving since a long time and the very first stages of development took place in the English legal system itself.

The definition given in *Currie vs Misa*⁷ is still widely followed even in English law. It is a well settled rule in English law that consideration must move from the promisee himself. The act or abstinence of doing a particular act must always move on the behalf of the promisor, as per the English law. The English law treats making of a promise as being part of a consideration. According to *Dunlop Pneumatic Tyre Co. vs Selfridge & Co. Ltd*⁸, in which it was said that an act or forbearance of one party, or promise thereof can be the price for which the promise is bought it is enforceable.

Consideration as outlined in Indian Law as well, means a price paid for an act or a promise or alternatively the quid pro quo. If A promises to pay B a definite sum on the delivery of a car, the definite sum would be the consideration for B in this case.

While the consideration can move from the promisee, it is not necessary that it moves to the promisor. The promisee may suffer a detriment on request from promisor while the promisor may not necessarily enjoy some benefit, for example giving up a job.

(C) Comparison:

The definition of consideration has a wider scope in the Indian Law than what is mentioned in English Law. Under the Indian law, consideration may move from a third party. However, he or she cannot sue for their own benefits. It is generally applied that third parties cannot sue except when the contract is expressly for their benefit. In English law, it is expressly mentioned that third parties cannot sue under a contract even for their own benefit.

Privity of consideration is not applicable under Indian law whereas for English law, privity of consideration is considered as valid. In Indian law, consideration may move even from a third party, it is immaterial from whom the consideration is moving whereas in English law, the consideration must move from the promisee himself.

III. COMPARISON WITH RESPECT TO PRIVACY OF CONTRACT

(A) Privity of contract in India:

Privity of contract in India came from the English principle of privity of contract as well. It relates to when a third party cannot sue under a contract. It has been generally applicable under

⁷ *Supra* n.2

⁸ *Dunlop Pneumatic Tyre Co. vs Selfridge & Co. Ltd*, [1915] UKHL 1 [1915] AC 847

the Indian Law. The rule was first applied in the case of Jamna Das vs Ram Avtar⁹ where it was enforced that a third party to a contract cannot sue or have legal rights under that particular contract.

If a contract has been entered into for the benefit of a third party, then that party's legal rights does not go beyond the right of enforcing the benefit he or she is entitled to. Privity of contracts occur between only those who are parties to a contract, especially in contracts of sale of goods and services.

Considering various provisions in the Indian Contract Act which do include the privity of contract implicitly, certain statutory and non – statutory exceptions to the doctrine are also accepted in the Indian context.

(B) Privity of contract in England:

Privity as evolved from English law itself, talks about how a stranger to a contract may or may not sue under it or have contractual obligations. Only the parties to a contract are allowed to sue under it in case of a breach. However, in recent times, even third party beneficiaries have been allowed to recover damages upon breach of contracts where the object of the contract was the benefit of that third party.

The law that is applicable in England is the Contracts (Rights of Third Parties) Act 1999. The rule of Privity of Contract was first established in the case of Tweddle vs Atkinson¹⁰ and was later reaffirmed in the above-mentioned case of Dunlop Tyres vs Selfridge Ltd¹¹ where due to the plaintiffs not being party to the contract, the action was considered to be failed.

There are numerous exceptions to this doctrine as well as limitations which are imposed on it. The doctrine is not considered to be absolute and has also been criticized numerous times.

(C) Privity of Contract: A Comparison

Since the doctrine of Privity of Contract has evolved from the English Law into the Indian Law, there are similarities in both of them. Both of the laws assert that a stranger to a contract does not have legal rights to sue under that contract. However, the scope of meaning of consideration being much wider in the Indian context than English law, the doctrine of privity of contract is much wider in Indian law than the English law. In India, a stranger can sue under a contract if the contract involves consideration or is in benefit of a third party specifically. However, the

⁹Jamna Das vs. Ram Avtar, (1911) 30 IA 7.

¹⁰ Tweddle vs Atkinson, (1861)1 B & S 393

¹¹ *Supra* n.7

same is not followed in England.

In one of the recent cases of *KPM Builders Pvt. Ltd. vs National Highways Authority of India*¹² in 2010, the Court had held that there was no privity of contract between the appellants and NHAI. It had not entered into any contract with the appellants nor owed any duty or obligation towards them. Thus, the appeal was dismissed as having no merit. Hence, it is necessary that privity of contract be proved between the parties. In *Utair Aviation vs Jagson Airlines Limited*¹³, it was decided that there did exist privity of contract between the two petitioners and the respondent.

In *Gandalf IT Ltd. and Ors. Vs Revenue and Customs*¹⁴, a case from England, again privity of contract was a disputed question. The question was whether privity of contract existed between the taxpayer and the fraudulent trader. In *Mrs. K. Davis vs Paystream My Max Ltd*¹⁵, one of the recent cases, privity of contract was considered to be fundamental and whether it existed between the respondent and the Digital Gurus. She, not being a party to a contract cannot enforce privity of contract.

In *Oriental Insurance Company Limited vs Smt. Chinnathai*¹⁶, it was said that there was no privity of contract between the deceased and the owner of the vehicle. The Court had awarded compensation.

Thus, there have been cases where privity of contract has been established and cases where the Court dismissed that privity of contract ever existed, in both England and India.

IV. LEGISLATIVE FRAMEWORK/AMENDMENTS/ COMMITTEE REPORTS

(A) Committee Report

13th Law Commission Report (Contract Act, 1872), Ministry of Law, Government of India, September 1958¹⁷

- The report talks about developments in law till that period, scope of revision in the Indian Contract Act 1872.
- The report examines the Doctrine of Consideration and Privity of Contract along with examination of proposed changes in the provisions of the Act.
- The commission through its recommendations has tried to simplify and modernise the

¹² *KPM Builders Pvt. Ltd. vs National Highways Authority of India*, Civil Appeal No(s). 3300-3301 of 2008

¹³ *Utair Aviation vs Jagson Airlines Limited*, (2012) 129 DRJ 630

¹⁴ *Gandalf IT Ltd. and Ors. Vs Revenue and Customs*, [2014] UKFTT 742 TC

¹⁵ *Mrs. K. Davis vs Paystream My Max Ltd*, [2022] UKET 2602377/2021

¹⁶ *Oriental Insurance Company Limited vs Smt. Chinnathai*, 2019 (2) TN MAC 335 (Kar.)

¹⁷ Ministry of Law, 13th Law Commission Report (Contract Act, 1872), Ministry of Law (September 1958)

provisions according to the relevant current times.

- It talks excessively about doctrine of Consideration and how limitations on it can curb cases to be executed properly. It examines the doctrine since past times and since it isn't relevant, recommends it to be struck down or limited.
- The commission recommends that consideration should also be valid for implied contracts and the words 'express or implied' be added to the section after the word 'promise'. Offer should be allowed even without consideration in cases where offer is valid only for a definite period which becomes void for want of consideration.
- It examines as to why a contract cannot be valid if the parties have honest legal intentions and should be allowed to contract if they have a cause and no consideration.
- The commission report addresses the need for change and proposes an indication of modernization in the provisions according to the current context.
- To be at par with other common law countries, especially England, it is imperative that the recommendations of the commission which emphasizes on modernization is superfluous with needs of the future. The changes are relevant and necessary in light of future development.

(B) Legislative Framework:

Contracts (Rights of Third Parties) Act, 1999¹⁸

- The Act extends to rights of third parties wherein they could enforce their rights according to their needs.
- It almost extends to every type of contract except employer contracts, carriage of goods contracts, negotiable instruments etc.
- It talks about rights of third parties when it is expressly mentioned or the contract confers the right on a third party.
- The Act, however, does not provide an exception where third parties should not be subject to burden in a contract where they are not the original party.
- The Act further elaborates on limitations relating to third parties and enforceability of contracts.

¹⁸ Contracts (Rights of Third Parties) Act 1999

(C) Amendments:

Indian Contract Act, 1872

- 13th Law Commission Report recommended that a new provision be added in the Act in Section 37A which would be similar to Contracts (Rights of Third Parties) Act 1999 in England which would accord benefits to third parties.
- If a contract directly mentions a third party, then the contract has to be enforceable in the name of the third party, and allow defences which are given to original parties.
- If a contract mentions benefits of a third party, then the contracting parties cannot alter or terminate the contract, since it could affect rights of third parties.

V. CRITICAL ANALYSIS

Both doctrine of privity of contract and consideration have been essential elements which have evolved over time, in contract law. However, strict application of the doctrine of privity of contract as well as consideration can prove to be a little difficult since it has scope of causing injustice to persons who have been affected honestly. The relevance of consideration is still very much apparent where even now, contracts are widely dependent on mutual consideration. In India, consideration can be furnished by anyone since privity of consideration is not applicable while in England, it's the opposite. Only the party to a contract can furnish the consideration. In some ways this can be considered to be an equitable as well as inequitable step. While it can be equitable to restrict the contract to the parties, it can be inequitable in cases where it becomes inevitable for a third party to furnish the consideration. Such circumstances can arise in commercial contracts where there are possibilities of a third party furnishing the consideration on behalf of the parties.

Doctrine of consideration ensures that contractual liability be determined. However, the Courts have also reiterated in the past that consideration cannot be the only way to determine contractual liability no matter how dominant and essential consideration is in Contract Law. The Courts when required bent the requirements for consideration and fit them to make rules which made contracts without consideration or privity of consideration enforceable in Courts of law.¹⁹

The doctrine of privity of contract was formed to protect the rights of parties who are contracting so that third parties cannot sue. However, over time it became inequitable in certain cases not to grant the respite to third parties who have been affected or for whose benefit the contracts

¹⁹ Ashwary Sharma, Considering Consideration in Indian Law (May 2018)

were entered into. In Indian law itself, the meaning of the doctrine still has a much wider scope than what is present in English law. The English law has a much narrower concept of what privity entails due to a narrower concept of consideration. In the current context, it is somewhat imperative that privity of contract is given importance along with necessary limitations in cases where it becomes difficult to limit contractual rights to the parties itself. In the current context, there can be instances where a third party can wrongly enforce his or her rights under a contract. Thus, having limitations on the doctrine is a necessary provision made in contract law.

The concept of privity of contract has been considered to be a sort of bedrock of common law. Nevertheless, with certain changes in consumer patterns and commerce, there should be certain changes made to the rules which would guarantee restitution to the aggrieved along with being a strict rule which is accommodating to various changes. Warranty claims have been a growing concern for need of such amendments.²⁰ It has come under serious attack for the refusing to acknowledge the rights of third parties. In a lot of instances, the exceptions mentioned under privity of contract like law of agency, partnership, assignment of contractual rights and liabilities etc., is not always followed according to need.

A lot of the countries like New Zealand, Australia including England have already reviewed their laws regarding privity of contract and consideration. Amendments have been made in UK in Contracts (Rights of Third Parties) Act 1999 which governs law with respect to third parties or stranger to contracts.²¹

Some of the criticisms which privity of contract is bound to receive is that the benefit on which the third parties rely on to regulate their affairs, might cause them injustice if they are not entitled to that particular benefit. It can lead to frustration of contracts in the sense that when parties want to confer some benefits on third parties but are unable to do so, the sole purpose of the contract stands defeated. It becomes difficult for the third party or a stranger to receive compensation due to doctrine of privity when they suffer some sort of damage due to breach of contract. There have been various amendments regarding covering up of such loopholes, which make the doctrine still somewhat vulnerable.

Keeping in view the social changes and its orientation and importance in legislations, it is imperative that the judicial precedents and amendments reiterate that. The Courts especially in India, have interpreted these laws liberally in the favour of the third parties more than the English Courts, as the judicial precedents and laws have mentioned. Doctrine of consideration

²⁰ Sankalp Jain, Rule of Privity of Contract: Study in English and Indian Context (July 2014)

²¹ Ashalika Pandey, Doctrine of Privity of Contract Under Indian Law: Should it Be Abolished in Toto or Subject to Certain Proviso? (April 2013)

and privity of contract, hence, has its advantages wherein it protects the parties from injustice and has its disadvantages wherein it can cause repercussions for third parties as well. Thus, when the doctrines are critically analysed, it is examined that while they are essential elements of a contract, there are still loopholes to be covered which the judges have sought to cover.

VI. CONCLUSION

When Doctrine of Consideration and Privity of Contract is analysed and talked about, it is imperative to take into consideration its importance and determining factor in Contract Law and for any commercial purpose. Even though consideration in Indian Law has a much wider scope than English Law, consideration in India is still confusing and subject to amendments. Being the only determining factor for contractual liability can be disadvantageous in some instances. Thus, carrying out reforms in this regard in today's context can prove to be a fruitful development for Contract Law.

When it comes to privity of contract, the rule that only the parties to a contract can sue under the contract is a pretty sensible rule. However, it can cause inconveniences for third parties who rely on these contracts for honest entitlement of benefit or regulation of their affairs. The availability of the exceptions to privity of contract is not always fruitful since it too is not applicable in certain cases.

The Doctrine of Privity was taken from the English Law to ensure that strangers cannot enforce rights under a contract. However, the law in England has proved to be more rigid than that in India. Hence, with time, exceptions have evolved to ensure that in certain cases even third parties can enforce the rights, in times when it became inequitable for third parties to be deprived of such contractual rights.²² These exceptions too have been subject to criticism and demand amendments as mentioned in suggestions.

Lastly, even though the Doctrine of Consideration and Privity of Contract form a very significant part of Contracts and determination of contractual liability, they have still been subjected to greater interpretation by judges. The Law has tried to maintain a fine balance between a strict approach to enforcement of the law and further interpretation in a liberal and just manner to ensure that significance of the law remains intact and still serves the purpose of causing justice.

²² Nishant Kumar, *Doctrine of Privity of Contracts in India and England*, Volume III, IJLLR (2021)

VII. REFERENCES

(A) Articles –

- Nishant Kumar, Doctrine of Privity of Contracts in India and England, Volume III, ILLR (2021)
- Sankalp Jain, Rule of Privity of Contract: Study in English and Indian Context (July 2014)
- Ashalika Pandey, Doctrine of Privity of Contract Under Indian Law: Should it Be Abolished in Toto or Subject to Certain Proviso? (April 2013)
- Ashwary Sharma, Considering Consideration in Indian Law (May 2018)

(B) Statutes and Committee Reports -

- Contracts (Rights of Third Parties) Act 1999
- Indian Contract Act, 1872
- Ministry of Law, 13th Law Commission Report (Contract Act, 1872), Ministry of Law (September 1958)

(C) Case Laws –

- Utair Aviation vs Jagson Airlines Limited ,(2012) 129 DRJ 630
- Gandalf IT Ltd. and Ors. Vs Revenue and Customs , [2014] UKFTT 742 TC
- Mrs. K. Davis vs Paystream My Max Ltd , [2022] UKET 2602377/2021
- Oriental Insurance Company Limited vs Smt. Chinnathai ,2019 (2) TN MAC 335 (Kar.)
- Jamna Das vs. Ram Avtar, (1911) 30 IA 7.
- Tweddle vs Atkinson, (1861)1 B & S 393
- Dunlop Pneumatic Tyre Co. vs Selfridge & Co. Ltd ,[1915] UKHL 1 [1915] AC 847
- Currie v. Misa (1875) L.R. 10 Ex. 153
- Durga Prasad vs Baldeo, ILR [1881] 3 ALLAHABAD 221
- Dwarampudi Nagarathamma vs Kuruku Ramayya, 1968 SCR (1) 43
- KPM Builders Pvt. Ltd. vs National Highways Authority of India, Civil Appeal No(s). 3300-3301 of 2008
