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Doctrine of Privity of Contract in India: Need of Codification

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ABSTRACT

The Doctrine of Privity of contract, which originated from English common law, asserts that only the parties to a contract can enforce a contract's terms or be bound by a contract's terms. In India, even though the Indian Contract Act, 1872 does not expressly provide for the privity of contract doctrine, courts have consistently employed it through judicial construction, resulting in both predictability and uncertainty. While the Act permits a third party to provide consideration for a contract, the doctrine requires that only contracting parties can enforce the contract, creating a doctrinal inconsistency. Courts have provided limited alternative remedies through judicial exceptions (such as trusts, family settlements and agents), but these exceptions are limited in scope and inconsistent. This article will examine the historical and statutory underpinnings of privity in India, as well as its judicial application and the increasing imperative for legislative reform. It will highlight both comparative lessons from other jurisdictions and the Law Commission of India and argue for a codified statutory provision that would permit a third party to enforce its contractual rights where the parties intended to confer a benefit to the third party. This will ultimately remedy this inconsistency and put Indian contract law more in line with commercial realities, while enhancing legal certainty, fairness, and doctrinal clarity.

I. INTRODUCTION

Doctrine of privity of contract refers to a fundamental principle of contract law that limits the enforceability of contractual rights and obligations to those who legitimately entered into a contract. The doctrine of privity of contract is sourced in common law principles along with judicial interpretation and has been accepted and has been applied in India to some extent, depending on its interaction with part of the Indian Contract Act, 1872. The doctrine is a rule, and though it is rigid in developing its doctrine, the doctrine has still had both academic and judicial criticism for its denial to adjust to commercial realities and its denial to adjust for equitable concerns.

This paper seeks to examine the doctrine of privity of contract applied in India in terms of its background, judicial interpretations, relation to consideration, comparison with English law,

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current exceptions, and critique related developments. The paper ends with recommendations and reform suggestions, highlighting the need for clarity in legislation due to continuing inconsistencies in judgments and current socio-commercial requirements.

II. DOCTRINE OF PRIVITY: MEANING AND SCOPE

This doctrine affirms that contracts are limited to the parties that consented to it in a contractual relationship. This reasserts the idea of autonomy and voluntary obligations in contracts. This principle is significant under the Indian Contract Act, 1872 in order to ensure that contracts stay private between those people who came to the agreement. This principle is called privity of contract, and which has two important consequences[2]:

- **Burden aspect:** Parties cannot, by their contract place liability or burden upon a third party. There is a logic to this rule—that, in fairness, you cannot place any contractual burden upon someone who is a stranger to a contract.
- **Benefit aspect:** A stranger to the contract cannot take benefits from it and cannot sue on the contract. This is similar to the doctrine of consideration which states that a person who is not party to consideration has no right to sue on the contract. This particular aspect of privity has been subject to much criticism.

Statutory Background[3]

Section 2(h) of the Indian Contract Act, 1872, provides that a contract is an agreement that is enforceable by law. Using Section 2(e) an agreement is defined as "every promise, and every set of promises, forming the consideration for each other." According to Section 2(d), consideration can be provided by the promisee or by any other person. The distinction here is important as, unlike Indian law, under English common law, consideration can only be provided by the promisee.

Although the Indian Contract Act does not contain a specific provision for the doctrine of privity, Indian courts have regularly adopted English common law principles, by judicial decisions, including privity. In *Jamna Das v. Ram Avtar (1912)*[4], the doctrine of privity was upheld, being guided by *Tweddle v. Atkinson (1861)*[5], and again asserted by the Supreme Court

[2] Jha, Vivek. *"The Doctrine of Privity of Contract under Indian and English Law."* Legal Service India, https://www.legalserviceindia.com/legal/article-8557-the-doctrine-of-privity-of-contract-under-indian-and-english-law.html. (Accessed 16 June 2025).
[3] Dr. L.R. Singh, supra n.7, pp. 3-4
[4] *Jamna Das vs Ram Autar Pande* (1916) ILR 38ALL209.
[5] *Tweddle v Atkinson* (1861) 1 B&S 393

in the case of *M.C. Chacko v. State Bank of Travancore (1969)*[6].

III. JUDICIAL APPLICATION IN INDIA

In general, the Indian courts have accepted the English approach to strict doctrine of privity and generally enforced obligations where the third party would not be able to enforce it. This approach was, in some ways, clearly articulated in the case of *Jamna Das v. Ram Avtar (1912)*[7] where the court stated that since the mortgagee was not a party to the agreement between the purchaser and seller, he had no rights to enforce. This decision reflects the strict application of the doctrine of privity in India, and the notion that only parties to a contract can have rights or obligations from it.

However, there have been multiple times, where the court has deviated from the strict application of privity laws in India. Notably, the decision in *Venkata Chinnaya v. Venkataramaya (1881)*[8], can be cited to demonstrate that the doctrine of privity of consideration has no application in India. In that case, the court affirmed that a contract can be enforced even if the consideration moves from a third party and recognized the validity of contracts for the benefit of third parties that provide consideration. This short decision strengthens the position that under Indian law, provided consideration exists, even if it is from a third party, the beneficiary may sue - this significantly distinguishes Indian law from English law and weakens the absolute force of the doctrine of privity.

Moreover, a more flexible approach was seen in Khwaja Muhammad Khan v. Husaini Begum (1910)[9], a case involving a Muslim marriage settlement. In this case the Privy Council permitted the bride to enforce a promise made by her father-in-law to pay her an exact sum of money. The bride was not a party to the contract but was a clear done and the court agreed to support the promise. The court acknowledged the peculiarities of family settlements in Indian society and the cultural value of these arrangements. While not directly challenging the privity rule, this judgment made a strong argument for dealing with families' and religions' arrangements in a more equitable way. The decision has not enjoyed widespread reference in subsequent judgments, but it remains a valuable reflection of the judiciary's willingness to consider exceptions in certain situations.

This conservative approach was maintained in *M.C. Chacko v. State Bank of Travancore*[10], a

[6] *M.C. Chacko vs State Bank of Travancore, Trivandrum* 1970 AIR 500
[7] Ibid 3.
[8] *Venkata Chinnaya Rau v. Venkataramaya Garu* (1881) 1 I.J. 137
[9] *Nawab Khwaja Muhammad Khan v Nawab Husain Begam* (1910) 37 I.A. 15
[10] Ibid 5.

landmark decision of the Supreme Court of India. The more limited approach to third-party rights in contracts in that case was formulated, and discussed, in the context of the issue whether a third party could enforce a contractual obligation arising out of a corporate communication. The Supreme Court went on to hold that the third party could not enforce that obligation, because it had no right because it was a stranger to that contract. The controlling principle was that enforceability of contractual rights, by third parties, is only permitted in extremely limited circumstances such as trust arrangements, family settlements, or in some statutory way. In upholding its earlier disposition, the Court noted that just like any large shift from that position should come from Parliament, not through the exercise of judicial 'activism'. Essentially, while the Supreme Court reiterated that consideration could move from a person other than the promisee under Indian law, enforcement of a contract is only available to those who are privy to it, unless the court recognizes an exception to that principle.

IV. DOCTRINE OF CONSIDERATION AND ITS INTERPLAY WITH PRIVITY

The doctrine of consideration is fundamental in determining whether contracts are enforceable. In English common law, the issue is straightforward: consideration must move from the promisee alone and cannot move from anyone else. This leads to a very strict doctrine of privity of consideration: third-party beneficiaries who cannot give consideration, and are not parties to the contract, cannot enforce the contract, even when the parties made the contract for their benefit. In contrast, Indian contract law does not take such a restrictive approach to consideration. Section 2(d) of the Indian Contract Act states that consideration may move from the promisee or any other person. On the face of it, section 2(d) dismantles the doctrine of privity of consideration in Indian law. This departure from the English position provides an avenue for third-party beneficiaries to enforce contracts, contingent on them providing consideration.

Yet this progressive departure of Indian law, from restricting contractual obligations to parties to the contract, is undercut by its equally firm adherence to the doctrine of privity of contract. Even where a third person provides valid consideration – something which is expressly included in Section 2(d) –they are still unable to enforce their right to sue, purely on the basis that they were not a party to the contract. This creates a fundamental contradiction in the Indian law of contract. While a stranger's consideration may be valid, the enforcement of the contract by that stranger will not be valid in most circumstances.

This tension between the rules arises in a number of judicial decisions, where the third-party consideration was accepted by the courts, but nevertheless an application of the doctrine of

privity foiled an enforcement action. This inconsistency implies the existence of a theoretical gap; either the law must recognize the right of a stranger to sue where they provide valid consideration or revert to English law where only a promisee can provide a consideration for a promise and fully enforce their contract. The present position in Indian law is a halfway house without the coherence of the approaches taken in neither position.

Upon close examination, this is reflective of a formalist allegiance to English common law principles, even where the statute clearly departs from them. In an effort to preserve the doctrine of privity, the Indian courts have prioritized that doctrine to the detriment of equity and commercial reality. More importantly, by maintaining a doctrine of privity, the Indian courts have passed on opportunities to develop a body of contract law that more accurately reflects the socio-economic realities of India, which often includes third party benefits or family arrangements. In principle, a contract made for the benefit of a third party—where the third party has provided consideration or relied on the promise to their detriment—should be enforceable by the third party in a contractual scenario. Refusing such a person enforcement merely because of privity defeats both the legislative intent.

V. EXISTING EXCEPTIONS IN INDIAN LAW[11]

In spite of the strictness with which the privity doctrine is applied, Indian jurisprudence has created a number of exceptions to lessen the chances of injustice. These exceptions permit third parties to enforce contracts under certain circumstances. The first exception is trusts, where a beneficiary can sue to enforce the trust even though the beneficiary was not a party to the contract. A similar example of this exception in practice is with family settlements or arrangements, such as the arrangement of marriage expenses or maintenance obligations. In *Khwaja Muhammad Khan v Husaini Begum*[12], the court enforced a family arrangement of this kind and considered the wife to be a beneficiary. Trust and family arrangements may not be strict contracts, however courts still provided beneficiaries with the ability to sue. In the context of property transactions, a contract may be a covenant and run with the land, in which case the covenant may bind, or benefit, third party assignees. Finally, with respect to statutory exceptions, certain statutes will usually prevail as an exception to privity. Examples may be in a consumer protection statute, or a labor code.

[11] Dr. L. R. Singh, supra n.7, pp.195-212.
[12] Ibid 8.

VI. NEED FOR STATUTORY PROVISO AND CODIFICATION OF DOCTRINE OF PRIVITY[13]

Perhaps, one of the pressing issues in Indian Contract Law, is the lack of a statutory authority to confirm or deny the doctrine of privity in its current restrictive form. The Indian courts have, ad hoc, attempted to fill the legislative vacuum by garnering reliance on English common law principles and authorities by which have been categorized under and related to "justice, equity and good conscience"[14]. Of course, there is nothing consistent or doctrinal clear about relying on English law to address the lacuna left by the absence of statutes, as the **13th Law Commission Report (1958)** states, dealing with English law to aid filling in the statutory gaps left by the various Indian legislation does not contribute anything to certainty or simplicity in the law. Statutes that would articulate or codify a legitimate framework about privity of contract in a way that incorporates India's socio-economic realities and the evolution of its judicial system, would provide a more reliable approach to codifying the contracts law to attain a reasonably predictable and principled suite of contract law.

Judicial decisions, including *Darlington Borough Council v. Wiltshire Northern Ltd. (1995*)[15] have emphasized the need to uphold the reasonable expectations of the parties to a contract. *In Steyn LJ*'s view, the law of contract ought to give effect to the legitimate expectations of the parties to the contract. If the contract intends, in clear terms, to confer a benefit on a third party, there can be no rationale or policy justification to refuse – for similar types of cases – to hold the third party who will benefit from the contract to enforceable rights under the contract.

Strict adherence to the privity rule has yielded unjust outcomes, particularly in a complex relational and commercial society such as India. Legal uncertainty and fragmentation characterize the law as it stands in India today, with reliance upon judicial exceptions made ad hoc, not with reference to a systematic legislative scheme. Many of those exceptions, i.e. trusts, agency, family settlements, do not amount to a comprehensive way of describing all of the situations where benefits are intentionally conferred onto third parties. In addition, the judicially carved exceptions focus upon abstract equitable doctrines rather than identifiable contractual principles thus creating additional confusion for both lawyers and non-lawyers alike.

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[13] 13th Law Commission Report of India (Contract Act,1872) ,1958, para 3, available at http://lawcommissionofindia.nic.in/1-50/Report13.pdf (Last visited on 10 June 2025)

[14] Sharma, Priyesh. "Treatment of 'Doctrine of Privity' by Indian Judiciary." Mondaq, 11 June 2013, https://www.mondaq.com/india/contracts-and-commercial-law/243778/treatment-of-doctrine-of-privity-by-indian-judiciary. (Accessed 10 June 2025).

[15] *Darlington Borough Council v. Wiltshire Northern Ltd.* (1995) 1 WLR 68.

The Law Commission offered four models for reform, each with different levels of structural change[16]

(a) Judicial development to avoid the doctrine of privity in specific cases.

(b) Legislative exceptions to privity in specific situations.

(c) A general legislative provision that would allow third parties to enforce rights when it is clear that a contract has been made for their benefit.

(d) Large-scale reform with a legislative scheme describing the range, limits, and enforcements of contracts.

While judicial innovation has progressed (particularly in family law or contracts with trusts, etc.), it has done so in a piecemeal or inconsistent way. A general legislative provision would provide the dual benefit of predictability and flexibility as it would acknowledge commercial contract and public-private arrangements in which there are third-party beneficiaries becoming more common.

Critics of codification maintain that doctrines like privity can be best developed through case law judicial reasoning and tacit knowledge[17] conveyed - a cohesion of thought[18] if you will in the law. This may have value in an academy, but in a legal culture that seeks clarity in statute, it provides very poor guidance. The evident codification of the majority of core legal subjects in India-law of property, torts and criminal law - provides a basic structure for the law to build upon and continue to develop. There appears to be no good reason the doctrine of privity to be such exception. Moreover, partial codification of consideration in Section 2(d) of the Indian Contract Act already shows some departure from the rigid English orthodoxy. It acknowledged that consideration might move from a third party, suggesting an awareness of a third party's potential to hold a right. Nevertheless, without a corresponding right to enforce such contracts, this provision only partially comes into effect. Hence, the codification of a right to enforce third-party beneficiary contracts would be a logical extrapolation of the principle set forth in section 2(d).

Furthermore, in many common law countries, the limits of the privity doctrine have been

[16] Pandey, Ashalika. *"Doctrine of Privity of Contract Under Indian Law: Should It Be Abolished in Toto or Subject to Certain Proviso?"* SSRN Electronic Journal, 7 Apr. 2013, ssrn.com/abstract=2246273. (Accessed 16 June 2025).

[17] "Tacit Knowledge." Cambridge Dictionary, Cambridge University Press, https://dictionary.cambridge.org/dictionary/english/tacit-knowledge. (Accessed 12 June 2025).

[18] Claremont Graduate University, Writing & Rhetoric Program.' *An Introduction to Cohesion & Coherence in Academic Papers'*. 11 Nov. 2021, Claremont Graduate University Writing & Rhetoric. my.cgu.edu/writing-rhetoric/wp-content/uploads/sites/9/2021/11/CGU-CWR-Cohesion-Coherence-Handout.pdf (Accessed 10 June 2025).

recognized inadequacies, which have been responded to with codified reform. The UK was at the forefront of reforming the rigidities of the privity doctrine with the enactment of the *Contracts (Rights of Third Parties) Act, 1999*[19], which allows third parties to enforce contractual terms only if the contract expressly purports or intends to benefit a third party. Australia has attempted statutory reform of privity in the occasionally amended provisions in Queensland and Western Australia, and the privity reforms of *New Zealand's Contracts (Privity) Act, 1982*[20], and *Singapore's Contract (Rights of Third Parties) Act, 2001* [21]are based in the pragmatics of commercial continuity and equitable outcomes. Even in Canada, including New Brunswick, certain provinces have moved legislatively to recognize the rights of third parties. Collectively, these developments represent in a global sense that when privity of contract is overly unassailable, it produces unreasonable and inequitable outcomes and does not recognize the practical and substantive complexity that characterizes most legal transactions. The proliferation of specific statutory provisions across these jurisdictions seems to identify the consensus that effective contract enforcement can only be achieved through statutory codification, following a recognized policy of clarity, predictability and fairness, rather than the infrequent judicial trailblazer of privity as an exception to enforceability.

In summary, formalized legislation on exceptions to privity or the introduction of a general enabling provision for third-party beneficiaries is not only desirable but an essential, since it would also align Indian contract law's statutory purpose, global development and realities of contracting. The doctrine of privity must change - not merely through doctrinal maneuvering, but through meaningfully legislative reform.

VII. CRITICISM AND CONCLUSION

Doctrine of privity is often criticized for producing results which often conflict with the reasonable expectations and intentions of the parties to the contract, and for denying third-party beneficiaries the ability to enforce the terms of contracts expressly made for their benefit, and for creating a legal fiction that ignores the commercial and social reality where contracts operate. Privity is also too rigid, and the result can be injustice - excluding remedies for persons who may have relied on or suffered from the breach of contract, which was clearly intended as a benefit to them. In these cases, while the promisee (who may not suffer any actual damage)

[19] United Kingdom, Parliament. Contracts (Rights of Third Parties) Act 1999. Legislation.gov.uk/ukpga/1999/31/contents (Accessed 16 June 2025).
[20] New Zealand Parliament. Contracts (Privity) Act 1982. 1982. New Zealand Legislation, https://www.legislation.govt.nz/act/public/1982/0132/latest/DLM63971.html. (Accessed 16 June 2025).
[21] Singapore. Contracts (Rights of Third Parties) Act 2001. Chapter 53B, revised ed. 2024. Singapore Statutes Online, https://sso.agc.gov.sg/Act/CRTPA2001 (Accessed 16 June 2025).

is entitled to sue, the true aggrieved party has no rights. This undermines the restitution principle, and the fairness that should be expected from contract law.

Furthermore, the doctrine has also grown increasingly incongruous with the frequent existence of exclusions or exceptions created by judges, (e.g. trusts, family arrangements and agency). While these exclusions are intended to diminish the harshness of the rule, they contribute further to the confusion and complexities of the law and practice in applying it. In the context of increasingly complex commercial transactions, sub-contracting chains, and the use of standardized form consumer contracts, the rule of privity is seen to have been inappropriately applied and is widely viewed as outmoded. The doctrine is ill-equipped to meet the demands of the contemporary legal context with the modern demands of substantive justice and fairness in enforcement of genuine contractual intentions in contracts which were more simplistic and whose relations between parties were less complicated than those today.

To sum it up, although there has been judicial creativity that have formed exceptions to soften the harshness of privity, these creative approaches are not unambiguously designed and can have inconsistency in a rule-based legal regime. Legislative change, with a more comprehensive approach, could not only establish the parties' intentions in a contract, but also, would make sure that third parties' rights are protected in a fair, predictable and principled way, and a distinct shift to a more fair and modern regime contract law in India.

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