



INDIAN JOURNAL OF  
LEGAL REVIEW

VOLUME 4 AND ISSUE 3 OF 2024

INSTITUTE OF LEGAL EDUCATION



## INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Free and Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 4 and Issue 3 of 2024 (Access Full Issue on – <https://ijlr.iledu.in/volume-4-and-issue-3-of-2024/>)

### Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

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## DIFFERENCE BETWEEN INDIAN CONTRACT ACT AND ENGLISH CONTRACT LAW

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**BEST CITATION** – MR. RUSHIKESH K. PATIL, DIFFERENCE BETWEEN INDIAN CONTRACT ACT AND ENGLISH CONTRACT LAW, INDIAN JOURNAL OF LEGAL REVIEW (IJLR), 4 (3) OF 2024, PG. 418-431, APIS – 3920 – 0001 & ISSN – 2583-2344.

### Abstract

*Difference Between Indian Contract Act and English Contract Law. The legal systems of India and England share a historical connection rooted in colonialism. The Indian Contract Act of 1872 was influenced by English contract law, a legacy that shapes the contractual landscape in both jurisdictions. Currently, Indian contract law and English contract law coexist, each with its nuances. While India’s legal framework has evolved with amendments, English contract law continues to be a benchmark globally. The present status reflects a dynamic interplay between tradition and adaptation in contractual regulations. The research delves into the comparative analysis of Indian Contract Law and English Contract Law. It aims to unravel the similarities, differences, and evolving dynamics between these legal frameworks governing contractual relations in two distinct jurisdictions. (Research Problem) Gray areas persist in understanding how cultural, historical, and socio-economic factors influence the interpretation and application of contract law in India and England. The need for this research arises from the potential conflicts and challenges people face when navigating contracts across these jurisdictions. The existing legal infrastructure adequately addresses the challenges arising from the divergent historical, cultural, and economic contexts of India and England. Potential disparities may require a more nuanced and context-specific approach to ensure fairness and efficacy. Possible reforms include harmonizing certain aspects of contract law to facilitate smoother cross-border transactions, providing clearer guidelines for dispute resolution in international contracts, and fostering a mutual understanding of legal principles between the two jurisdictions. These reforms aim to enhance legal certainty and promote cross-border business interactions. The research aims to foster a deeper understanding of the legal intricacies between Indian and English contract law, recognizing their shared history and contemporary differences.*

**Keywords:** Comparative Analysis, Contract Law, Cross-border Transactions, Legal Frameworks, Reforms, Shared History

### 1. Introduction

In the globalized landscape of commerce and trade, legal systems play a pivotal role in shaping the dynamics of business relationships and transactions. The intricacies of contract law, in particular, serve as the cornerstone for regulating agreements and ensuring the smooth functioning of economies. This research embarks on a journey through the legal realms of two prominent jurisdictions—India and England—aiming to unravel the

nuances that differentiate their respective contract laws.

At first glance, both Indian and English contract laws share historical ties rooted in the common law tradition. However, the evolutionary paths they have traversed over time have led to distinctive legal frameworks, influenced by cultural, societal, and economic factors unique to each jurisdiction. This paper seeks to delve into these variations, providing a comprehensive analysis that sheds light on the

divergences in contractual doctrines, principles, and enforcement mechanisms.

The Indian contract law system, primarily encapsulated in the Indian Contract Act of 1872, draws inspiration from English common law. Nevertheless, it has evolved to accommodate the complexities of a diverse and dynamic society. India's legal landscape is characterized by a blend of ancient traditions, codified statutes, and judicial precedents, creating a multifaceted approach to contract regulation. As we navigate the labyrinth of Indian contract law, we will explore the intricacies of key concepts such as offer and acceptance, consideration, and the doctrine of privity, illuminating the unique features that distinguish it from its English counterpart.

As we embark on this comparative analysis, it is crucial to recognize that the convergence and divergence of legal systems have profound implications for international businesses, legal practitioners, and scholars alike. By dissecting the intricacies of Indian and English contract laws, this research endeavours to contribute to a nuanced understanding of these legal landscapes, fostering greater clarity and coherence in cross-border commercial transactions.

## 2. Difference Between Proposal and Offer

The term "proposal" has been defined in Section 2(a) of the Indian Contract Act, 1872 as follows;

### ➤ Section 2: Interpretation Clause

*(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<sup>730</sup>*

The term 'proposal' used in the Indian Contract Act is synonymous with the term 'offer' used in English law. The willingness

to do or to abstain from doing something, i.e., the proposal or the offer may be made with a view to obtaining the assent of the other party thereto.

For example, A's willingness to sell his radio set to B for Rs. 500 if B accepts to purchase the same, amounts to proposal by A for the sale of the radio set.

## 3. Interpretation of Contract

Section 10 of Indian Contract Act defines essential elements for valid contract. Let's take look at it;

### ➤ Section 10: What agreements are contracts:

*All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void<sup>731</sup>.*

Section 10 of the act mentions about what agreements are contracts. It states that all the agreements are contracts if they are made

- by a free consent of parties
- that are competent to contract,
- for a lawful consideration and
- for a lawful object, and
- are not expressly declared to be void.

Indian contract act and English Contract Law are different on some of the elements of competence of parties like minor's agreement, past consideration, privity of contract, etc., Let's look at them one by one;

## 4. Capacity To Contract with Respect to A Minor's Agreement

One of the essentials of a valid contract, mentioned in Section 10, of the Indian Contract Act, 1972, is that the parties to the contract should be competent to make the contract.

<sup>730</sup> S. 2 (a), The Indian Contract Act, 1872

<sup>731</sup> S. 10, The Indian Contract Act, 1872

➤ **Section 11: Who are competent to contract<sup>732</sup>:**

*Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.*

It means that the following three categories of persons are not competent to contract:<sup>733</sup>

1. A person who has not attained the age of majority, i.e., one who is a minor.
2. A person who is of unsound mind;
3. A person who has been disqualified from contracting by some law.

Although the above stated categories of persons are not competent to contract, yet they may sometimes be making some bargains, taking some loans, or be supplied with some goods by third parties, or be conferred with some benefits; etc. The position of such persons in such like situations is being discussed below

**A. Who Is a Minor According To Statutes**

A person who has not attained the age of majority is a minor. Section 3 of the Indian Majority Act, 1875 provides about the age of majority. It states that

**a. Indian Majority Act, 1875:**

➤ **Section 3: Age of majority of persons domiciled in India:**

*(1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.<sup>734</sup>*

a person is deemed to have attained the age of majority when he completes the age of 18 years, except in case of a person of whose person or property a guardian has been appointed by the Court, in which case the

age of majority is 21 years. In such a case the majority does not arise till the completion of 21 years of age by the ward, and it is immaterial, whether the guardian dies or is removed, or otherwise ceases to act. In England, the age of majority is 18 years.

**b. Family Law Reform Act, 1969 (United Kingdom)<sup>735</sup>**

➤ **Section 1: Reduction of age of majority from 21 to 18.**

*(1) As from the date on which this section comes into force a person shall attain full age on attaining the age of majority eighteen instead of on attaining the age of twenty-one; and from 21 to 18. a person shall attain full age on that date if he has then already attained the age of eighteen but not the age of twenty-one.*

**B. English Law: The Doctrine of Restitution**

According to English law, if a minor has obtained undue benefit in any transaction, he is required to restore back the benefit so received by him, under the equitable doctrine of restitution. Under the doctrine he is asked to restore back the exact things taken by him. It is applicable only to goods or property received by a minor so long as they can be traced, and are still in his possession. Since it is difficult to identify money and to prove whether it is the same money or different one, the doctrine does not apply to money. Even as regards goods or property, if the same have been consumed or transferred and are no more traceable, the doctrine of restitution does not apply there.

**a. Leslie vs. Sheill:**

The case of *Leslie v. Sheill*<sup>736</sup> explains the doctrine. In this case, the defendant, a minor, falsely misrepresented himself to be a major, and obtained two loans of £ 200 each from the plaintiffs, who were

<sup>732</sup> S. 11, The Indian Contract Act, 1872

<sup>733</sup> *Capacity To Contract Under Indian Contract Act, 1872*, LawCorner, available at <https://lawcorner.in/capacity-to-contract-under-indian-contract-act-1872/>, last seen on 16/03/2024

<sup>734</sup> S. 3, Indian Majority Act, 1875

<sup>735</sup> S. 1(1), Family Law Reform Act, 1969 (United Kingdom)

<sup>736</sup> *Leslie Vs. Sheill*, 3 KB 607 (1914, House of Lords)

money-lenders. The plaintiffs brought an action to recover £ 475, being the amount of loan taken and interest thereon. It was held by the Court of Appeal that the money could not be recovered. If that were allowed, that would amount to enforcing the agreement to repay loan, which is void under the Infants' Relief Act, 1874.

It was explained that the object of the doctrine of restitution is to restore back the ill-gotten gains taken by the minor, rather than enforcing the contract. If a minor is asked to pay money which cannot be traced and which he no more possesses, it would amount to enforcing the agreement. Where the question of repayment is there, the doctrine of restitution does not help, or as stated by Lord Sumner, "Restitution stops where repayment begins."<sup>737</sup>

### C. Indian Law: Compensation by a minor

It has been noted above that in England restitution, that is, the restoring back the property by a fraudulent minor is permitted, if the property can be traced. According to *Leslie v. Sheill*<sup>738</sup>, the money by obtained by a minor cannot be recovered from the minor as the same cannot be traced. If a minor is asked to pay back the money, it may mean enforcing contractual obligation against a minor, which the law does not permit.

The question which has arisen in India is, how far a minor can be asked to restore back the benefit wrongly obtained by him under a void agreement? Can a minor be asked to pay compensation to the other party?

In India, the question of compensation under the following two kinds of provisions has arisen before the Courts:

1. Whether a minor can be asked to pay compensation Sections 64 and 65, Indian Contract Act for the benefit obtained by him under a void agreement? under

2. Whether a minor can be asked to pay compensation in Whether the provisions contained in Sections 39 and 41, Specific Relief Act, 1877?

#### a. Compensation under Sections 64, 65 and 70, Indian Contract Act

The question, whether a minor can be asked to pay compensation to the other party, under Sections 64 and 65, Indian Contract Act had arisen in *Mohori Bibee v. Dharmodas Ghose*.

#### *Mohori Bibee v. Dharmodas Ghose*<sup>739</sup>

Dharmodas Ghose, a minor, mortgaged his property in favour of a moneylender, Brahmoo Dutt, against the loan of Rs 20,000. Dutt's attorney, acting on behalf of him, was aware of Ghose's minority. Ghose, through his mother and guardian, sued Dutt claiming that the mortgage was void due to his minority. The Court of First Instance held in Ghose's favour, and on appeal, the High Court of Judicature at Fort William upheld that decision. Before the appeal to the Privy Council, Dutt died and the proceeding was continued by his heirs.

While discussing this case, it has already been noted that in this case the Privy Council had held that the question of compensation under Sections 64 and 65, Indian Contract Act, arises where the parties are competent to contract, and these provisions do not apply to the case of a minor's agreement. The matter came for consideration before the Law Commission of India. The Law Commission disagreed with this interpretation put to Section 65 by the Privy Council. In its view compensation under Section 65 be allowed, even if the invalidity of new agreement is because of the fact that a party is incompetent to contract. It has recommended that an Explanation be added to Section 65 to indicate that the Section is applicable where a minor enters into an agreement on the false

<sup>737</sup> Leslie Vs. Sheill, 3 KB 607 (1914, House of Lords)

<sup>738</sup> Ibid

<sup>739</sup> Mohori Bibee v. Dharmodas Ghose, (1903) UKPC 12

representation that he is a major. In spite of the above stated recommendation by the Law Commission, no amendment has been made in the Act so far.

Section 70 of the Indian Contract Act, 1872 recognizes quasi contractual liability to compensate a person at whose cost some benefit has been enjoyed. According to that provision, where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or restore, the thing so done or delivered. The question which arises is: Can a minor, who has enjoyed the benefit as contemplated under Section 70, be required to pay compensation under that provision? It has been held that Section 70 cannot be invoked against a minor.<sup>740</sup>

In this context, it has been observed:

*“The minor is excluded from the operation of Section 70 for the reason that his case has been specifically provided for by Section 68.... Besides, in the case of a minor, even the voluntary acceptance of the benefit of work done or thing delivered which is the foundation of the claim under Section 70 would not be present, and so, on principle, that Section cannot be invoked against a minor.”<sup>741</sup>*

It is submitted that the above stated interpretation is neither logical nor in consonance with the provision contained in Section 70. Section 70 deals with every “person”, which would include a minor, and moreover, there is nothing in the Indian Contract Act, which prevents the case of a minor being covered both under Sections 68 and 70 of the Act.

### **b. Compensation under Specific Relief Act, 1963**

Whether a fraudulent minor can be asked to pay compensation in view of provisions of Sections 39 and 41, Specific Relief Act, 1877, came in for consideration in some cases. Before discussing the case, the relevant provisions may be noted:

#### ➤ **Section 39: When cancellation may be ordered<sup>742</sup>**

*Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled*

#### ➤ **Section 41: Power to require party for whom instrument is cancelled to make compensation<sup>743</sup>**

*On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.*

In Mohori Bibee's case<sup>744</sup>, the minor had applied for the cancellation of the mortgage deed, executed by him, under Section 39, Specific Relief Act and the Privy Council considered the question of compensation to be paid by him under Section 41 of that Act. It was held that since in this case the loan had been advanced to the minor with the full knowledge of his minority, the question of payment of compensation to such a money-lender did not arise.

<sup>740</sup> Landmark Judgments on Contract with a minor, iPleaders, available at <https://blog.iPLEaders.in/landmark-judgments-contract-minor/>, last seen on 18/03/2024.

<sup>741</sup> Mohori Bibee v. Dharmodas Ghose, (1903) UKPC 12

<sup>742</sup> S. 39, Specific Relief Act, 1877

<sup>743</sup> S. 41, Specific Relief Act, 1877

<sup>744</sup> Mohori Bibee v. Dharmodas Ghose, (1903) UKPC 12

## 5. Past Consideration

Past consideration means that the consideration for any promise was given earlier and the promise is made thereafter. It is, of course, necessary that at the time the act constituting consideration was done, must have been done at the desire of the promisor.

For example, I request you to find my lost dog. After you have done the same, if I promise to pay you Rs. 100 for that, it is a case of past consideration. For my promise to pay you Rs 100 the consideration is your efforts in finding my lost dog and the same had been done before I promised to pay the amount. In this case the consideration has been given at my request, because it is only when I requested you that you found the dog. This constitutes valid (Past) consideration under Section 2(d), and therefore the promise is enforceable.

The words “has done or abstained from doing”, in Section 2(d) of the Contract Act, 1872, according to Pollock and Mulla<sup>745</sup> “declare the law to be that an act done by A at B’s request, without any contemporaneous promise from B, may be consideration for a subsequent promise from B to A.”

### A. Indian Position [Section 25(2)]

Indian Contract Act recognizes only such consideration which has been given at the desire of the promisor, rather than voluntarily. If consideration has been given voluntarily, it is no consideration. For example, if my dog has been lost and without any request from me to find the same, you voluntarily find the dog and deliver the same to me. This is a case of past services rendered voluntarily. In case I promise to pay Rs. 100 to you after you have rendered these services, the question which arises in such a case, can such an agreement be enforced?

It has been noted above that rendering of such voluntary services does not

constitute valid consideration to support the promise in terms of Section 2(d) which requires consideration to be given at the promisor’s request. A valid contract is, however, created in such a case also because the situation is covered by Section 25(2) of the Indian Contract Act, 1872, which is an exception to the rule that an agreement without consideration is void. The provision is as under;

#### ➤ Section 25: An agreement made without consideration is void unless:

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, something which the promisor was legally compellable to do.<sup>746</sup>

The point may be further explained by the following illustrations:

- (i) A finds B’s purse and gives it to him. B promises to give A Rs. 50. This is a contract.<sup>747</sup>
- (ii) A supports B’s infant son. B promises to pay A’s expenses in so doing. This is a contract.<sup>748</sup>

### B. English Law Regarding Past Consideration

According to English law, passed consideration is no consideration. A promise in lieu of a past act is deemed to be only expression of gratitude for the benefit already received, rather than any consideration motivating the other side to make the promise.

#### a. Re Mc-Ardle

The case of *Re Mc-Ardle*<sup>749</sup> explains the point. In that case, in accordance with the will of a father, his five children were entitled to an equal share in a house after their mother’s death. During the mother’s lifetime one of the testator’s sons and his wife lived in that house. At that time the wife made some improvements in the house, incurring an

<sup>746</sup> S. 25, Indian Contract Act, 1872

<sup>747</sup> Illustration (c) to Section 25, Indian Contract Act, 1872

<sup>748</sup> Illustration (d) to Section 25, Indian Contract Act, 1872

<sup>749</sup> *Re Mc-Ardle*, Ch 669, (1951, House of Lords)

<sup>745</sup> Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 41 (9<sup>th</sup> ed, 1972)



expense of £ 488. Subsequently, all the five children, who were to inherit the house, signed a document in her favour stating that “in consideration of your carrying out certain alterations and improvements to the property, we hereby agree that the executors shall repay to you from the said estate, the sum of £ 488 in settlement of the amount spent on such improvements.” On the mother’s death, the promise claimed £ 488 from the executors on the strength of the above promise, but except her husband all the other promisors refused to pay. It was held by the Court of Appeal that since the expenditure had been incurred before the document was signed, the consideration was past and therefore the promise could not be enforced.

#### **b. Past consideration at the promisor’s request**

Past consideration though given prior to the promise, but at the request of the promisor, is deemed to be a good consideration for the promise. It is deemed that when the previous request was made, the promisor had in mind his promise which he expressed afterwards. The previous request and the subsequent promise are not considered to be independent of one another but part of the same transaction. The authority for this point is the case of *Lampleigh v. Brathwait*.

#### **Lampleigh v. Brathwait<sup>750</sup>**

Thomas Brathwait, the defendant, who was held guilty of having committed a murder, requested Lampleigh, the plaintiff, made efforts to secure the pardon, going from one place to another, at his own expense. In consideration of these efforts, the defendant promised to pay £ 100 to the plaintiff. The question was, whether the plaintiff had a legal right to recover this amount. It was held that the plaintiff had a right to enforce the promise and recover the said amount because for this promise the consideration, in the form of efforts

by the plaintiff to obtain the pardon, had been there at the earlier request of the defendant.

On the question of past consideration, there is not much difference between Indian and English law. Indian law recognizes past consideration, when the same has been given “at the desire of the promisor.” English law although as a general rule does not recognize past consideration, but if the exception created by *Lampleigh v. Brathwait*<sup>751</sup>, is read along with the general rule, there also it means that an act done at the instance of the promisor even before the promise is made, constitutes a good consideration for the promise. Past act done voluntary is no consideration either in India or England. In India, however, such a promise in lieu of the past voluntary services is enforceable because of the exception mentioned in Section 25(2), which declares such an agreement valid even if it is without any consideration. There is no such provision in English law.

#### **6. Agreement without Consideration:**

Section 25 of the Indian Contract Act, 1872, as a general rule, declares that an agreement without consideration is void. The Section, however, mentions the following three exceptions to the general rule:

##### **A. Position of Indian Law**

➤ Section 25: An agreement made without consideration is void unless

- (1) *It is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other; In any of these cases, such an agreement is a contract.*<sup>752</sup>

##### **a. Promise due to natural love and affection [Section 25(1)]**

When the promise is made in favour of a near relation on account of natural

<sup>750</sup> *Lampleigh v. Brathwait*, Hob. 105 (1615, House of Lords)

<sup>751</sup> *Lampleigh v. Brathwait*, Hob. 105 (1615, House of Lords)  
<sup>752</sup> S. 25, The Indian Contract Act, 1872

love and affection, the same is valid even though there was no consideration for such a promise. The following requirements have got to be satisfied in order that the case is covered under this exception-

2. The parties to the agreement must be standing in a near relationship to each other.
3. The promise should be made by one party out of natural love and affection for the other.
4. The promise should be in writing and registered.

The parties should be nearly related to one another in such an agreement. What is near relationship has neither been defined in the Act, nor in any judicial pronouncement. But, from the various decided cases it appears that it will cover blood relations<sup>1</sup> or those related through marriage, but would not include those relations which are not "near", but only remotely entitled to inherit.

"Natural love and affection" between the parties so nearly related is also needed. If one brother, although not legally bound to do so, transfers half of his property in favour of another brother, so that they have cordial relations, that is deemed to have been done out of natural love and affection, and such an agreement is binding. But, when there is no love and affection between the near relations, Section 25(1) would not apply.<sup>753</sup>

### **Rajlucky Dabee v. Bhootnath Mookerjee<sup>754</sup>**

In *Rajlucky Dabee v. Bhootnath Mookerjee*, after a lot of disagreements and quarrels between a Hindu husband and wife they decided to live apart. At this stage the husband executed a registered document in favour of the wife whereby he agreed to pay for her separate residence and maintenance. In that agreement mention was also made about the quarrels and disagreements between the

two. It was held that from the recitals in the document, it was apparent that the document had been executed not because of natural love and affection between the parties but because of the absence of it, and therefore the wife was not entitled to recover the sums mentioned in the document.

It is further necessary that the agreement should be in writing and the writing be registered under the law relating to registration of documents.

### **B. Position of English Law**

According to English law, contracts are of two kinds:

- (1) Simple Contracts; and
- (2) Contracts under seal, or in the form of a deed.

There, consideration is required only as regards simple contracts. No consideration is required in case of contracts under seal. If the contract is under seal, that is valid even without consideration, irrespective of the relationship between the contracting parties as is required in India.

### **7. Privity of Contract**

The doctrine of privity of contract means that only those persons who are parties to the contract can enforce the same. A stranger to the contract cannot enforce a contract even though the contract may have been entered into for his benefit. If in a contract between A and B some benefit has been conferred upon X, X cannot file a suit to enforce the contract because A and B are the only parties to the contract, whereas X is stranger to the contract.

The rule that a stranger to contract cannot sue has to be distinguished from the rule discussed above that in India a person who is stranger to consideration can sue. It has been noted about that a person may not have himself given any consideration but he can enforce the contract if he is a party to the contract, because according to the Indian law, consideration may be given either by the

<sup>753</sup> *The Legality of Agreements without Consideration*, iPleaders, available at <https://blog.ipleaders.in/the-legality-of-agreements-without-consideration/>, last seen on 18/03/2024.

<sup>754</sup> *Rajlucky Dabee v. Bhootnath Mookerjee*, (1900) 4 CWN 488

promise or a third party. That does not affect the rule of privity of contract.<sup>755</sup>

### A. English Law

In *Tweddle v. Atkinson*<sup>756</sup>, it was held that only parties to the contract can sue each other. In that case the plaintiff,

#### a. *Tweddle vs. Atkinson*

A married girl, B. After this marriage there was contract in writing between A's father and B's father that each would pay a certain sum of money to A and that A will have the power to sue for such sums. After the death of the two fathers, A brought an action against the executors of B's father to recover the promised amount. It was held that A could not sue for the same.

In the above stated case, the plaintiff was both a stranger to the contract as well as stranger to consideration and he could not enforce the claim.

The rule of privity of contract was reaffirmed by the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*<sup>757</sup> in the following words:

*"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a Jus quaesitum tertio arising by way of contract. Such a right may be enforced by way of property, as for example, under a trust, but cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."*

#### b. *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*<sup>758</sup>

In *Dunlop's* case the appellants (*Dunlop Co.*), who were manufacturers of motor car tyres, sold some tyres to one *Dew & Co.* with

an agreement that these tyres will not be sold below the list price. *Dew & Co.* in their turn sold some of these tyres to the respondents (*Selfridge & Co.*), with an agreement between *Dew & Co.* and the respondents that the respondents shall observe conditions as to price and the respondents also promised that they would pay to the appellants a sum of £ 5 for every tyre sold below the list price. The respondents sold some tyres below the list price, and the appellants brought an action against the respondents to recover damages for the same.

The House of Lords held that *Dunlop Co.* could not bring an action against *Selfridge and Co.* because there was no contract between the two parties. It was further observed that even if it is taken that *Dew & Co.* were acting as agents for *Dunlop Co.*, the latter still cannot maintain an action as there was no consideration between *Dunlop Co.*, and *Selfridge & Co.*, since the whole of the purchase price was paid by *Selfridge & Co.* to *Dew & Co.*

### B. Indian Law

The rule that "privity of contract" is needed and a stranger to the contract cannot bring an action is equally applicable in India as in England. Even though under the Indian Contract Act the definition of consideration is wider than under the English law, yet the common law principle of privity of contract is generally applicable in India, with the effect that only a party to the contract is entitled to enforce the same.<sup>759</sup>

#### a. *Jamana Das Vs. Ram Avtar*

In *Jamna Das v. Ram Avtar*<sup>760</sup>, A had mortgaged some property to X. A then sold this property to B, B having agreed with A to pay off the mortgage debt to X. X brought an action against B to recover the mortgage money. It was held by the Privy Council that since there was no contract between X and B, X could not

<sup>755</sup> *The Doctrine of Privity of Contract under Indian and English Law*, Legal Service India, available at <https://www.legalserviceindia.com/legal/article-8557-the-doctrine-of-privity-of-contract-under-indian-and-english-law.html>, last seen on 19/03/2024.

<sup>756</sup> *Tweddle vs. Atkinson*, 1 B&S 393, ((1861, House of Lords)

<sup>757</sup> *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*, AC 847, (1915, House of Lords)

<sup>758</sup> *Ibid*

<sup>759</sup> *Narayani Devi vs. Tagore Commercial Co. Ltd.*, AIR 1973 Cal. 401

<sup>760</sup> *Jamana Das Vs. Ram Avtar* (1911) 30 IA 7

enforce the contract to recover the amount from B.

Pointing out that the undertaking to pay back the mortgage money being only by the purchaser of the property in favour of the vendor thereof, Lord McNaughten stated:

*“The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt”<sup>761</sup>.*

#### b. **Advertising Bureau v. C.T. Devaraj**

In *Advertising Bureau v. C.T. Devaraj*<sup>762</sup>, the circus owner, placed order with the plaintiff-appellant for making advertisements for circus. The plaintiff-advertiser did not make any agreement with the financier of circus. The advertiser was not a party to the contract between the financier and the circus owner. There being no privity of contract between the advertiser and the financier, the suit by the advertiser against the financier was, therefore, dismissed.

### 8. **Agreement of Maintenance and Champerty**

Maintenance consists in aiding a party in civil proceedings by providing financial or other assistance without lawful justification. When a person intermeddles in the litigation between others by providing assistance to one of the parties, and he has no interest of his own in the litigation, such intermeddling is unlawful.

Champerty is a kind of maintenance in which the person assisting in the proceedings is to receive a share in the gain made in the proceedings maintained by him. Champerty, therefore, is “a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action.” When the assistance is without justification, it is unlawful. If the person assisting and the person assisted have a common

interest in the proceedings maintained, it is not unlawful.<sup>763</sup>

“A common interest, speaking generally, may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character which is such that the law recognizes it. Such an interest is held to be possessed when in litigation a master assists his servant, or a servant his master, or help is given to an heir, or a near relative, or to a poor out of charity, to maintain a right which he might otherwise lose.”<sup>764</sup>

#### A. **Position in England**

In England, the offences of maintenance and champerty were considered to be obsolete, and the same have been abolished by the Criminal Law Act, 1967<sup>765</sup>. Torts of maintenance and champerty have also been abolished by the Act. But the abolition of torts and offences of maintenance and champerty, shall not affect the law which such a contract is to be treated as contrary to public policy or otherwise illegal. Section 14(2) of the Act makes the following provision in this regard: according to

#### ➤ **Section 14: Civil rights in respect of maintenance and champerty**<sup>766</sup>

(2) *The abolition of criminal and civil liability under the law The England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal*

#### B. **Position in India**

Because of peculiar Indian conditions, English law of maintenance and champerty have no application in India. A fair agreement to supply funds to carry on a suit in

<sup>761</sup> Ibid

<sup>762</sup> *Advertising Bureau v. C.T. Devaraj*, AIR 1995 SC 2251

<sup>763</sup> Dr. R. K. Bangia, *Contract – I*, 228 (8th ed, 2021)

<sup>764</sup> *Neville vs. London Express Newspapers*, AC 368, (1919, House of Lords)

<sup>765</sup> S. 13, Criminal Law Act, 1967 (United Kingdom)

<sup>766</sup> S. 14, Criminal Law Act, 1967 (United Kingdom)

consideration of a share of the property, if having a recovered, ought not to be regarded as being, per se, opposed to public policy. Even if parties to the contract do not share a common interest in the civil proceedings contract of such champerty will be applicable in India. Indeed, cases may be easily supported in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

In an agreement of champerty, the courts have to see whether the financier is trying to take undue advantage of helplessness of the other party, or the agreement is a fair one taking into account the amount of financial assistance, and proposed gain to the financier out of the litigation.

If an agreement is found to be extortionate and unconscionable so as to be inequitable against the party, or to be made, not with the bona fide object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper object, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them.<sup>767</sup>

### **Navaneetha Krishnaswami Devasthanam v. Rakmani & Co**

In Navaneetha Krishnaswami Devasthanam v. Rakmani & Co.<sup>768</sup>, the financier undertook not only to finance the litigation but also looked after the same including engaging lawyers and securing records, etc. In return, the financiers beyond sharing the fruits of the decree were to get a bonus of five lakhs of rupees. The financiers actually spent about 8 lakhs of rupees. It was held that under these circumstances, payment of bonus of 5 lakhs of

rupees could not be considered to be unconscionable or extortionate.

## **9. Performance of Contract by Joint Promisors**

The Indian legal framework distinguishes itself from English law concerning the succession of actions against joint promisors and the effects of releasing one promisor. Let's take look at them;

### **A. Successive actions against different joint promisors**

If the promisee brings an action against one or some of the joint promisors only, and leaves others, does a judgment against those some promisors bar an action against the others? For instance, A, B and C jointly promise to pay 3,000 rupees to D, and D brings 20 actions against A only. If D's claim is not fully satisfied, can he bring subsequent actions against B and C?<sup>769</sup>

#### **a. Position in England**

In England, the question has been answered the negative in *King vs. Hoare*<sup>770</sup> and it has been held that when the judgment has been obtained against some of the joint contractors, or joint debtors it debars a subsequent right of action against the others.

#### **b. Position In India**

There has been a difference of opinion between the various High Courts as to whether the rule laid down in *King vs. Hoare* should or should not be followed in India.

The Allahabad and Madras High Courts have held that notwithstanding the rule laid down in English cases, if the judgment against some of the promisors remains unsatisfied, there is no bar in India to subsequent actions against the other promisors. In *Muhammad Askari v. Radhe Ram Singh*<sup>771</sup>, Strachey, C.J. has held that since Section 43 of the Indian Contract Act permits an

<sup>767</sup> Dr. R. K. Bangia, *Contract – I*, 228 (8th ed, 2021)

<sup>768</sup> Navaneetha Krishnaswami Devasthanam v. Rakmani & Co, AIR 1962 AP 457

<sup>769</sup> Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 364 (9th ed, 1972)

<sup>770</sup> King vs. Hoare, 13 M. & W. 494 (1844, House of Lords)

<sup>771</sup> Muhammad Askari v. Radhe Ram Singh, ILR (1900) 22 ALL 307

action against anyone of the joint promisors, and debars him from pleading that the other joint promisors should be joined in the suit, it follows that there is no bar to second suit against the joint promisors, if the first one does not satisfy the claim. It was held that the rule laid down in *King v. Hoare* was not applicable in India. Similar view has been expressed by the Madras High Court also. In **T. Radhakrishna v. K.V. Muthukrishnan**<sup>772</sup>, it has been held that a decree obtained against some of the joint promisors only, is no bar to a second suit on the same contract against the other joint promisors.

A contrary view has been expressed by the Calcutta and the Bombay High Courts. In **Hemendro Coomar v. Rajendrolal**<sup>773</sup>, the Calcutta High Court has held that the rule of English law laid down in *King v. Hoare* is applicable in India and the judgment against one joint promisor would be a bar to a subsequent action against the others. Similar view has been expressed by the Bombay High Court in **Shivlal v. Bridichand**<sup>774</sup>.

The view expressed by the Allahabad and the Madras High Courts appears to be more in consonance with the provisions of the Indian Contract Act. The liability of joint promisor mentioned in Section 43 is not merely joint, but joint and several and, therefore, an action against one of the joint promisors should not put an end to the cause of action. Subsequent actions against different promisors is not against the schemes of the act.

## B. Effect of release of a joint promisor

Contrary to English contract law, according to Indian Contract Act Section 44, a release of one joint promisor doesn't absolve others;

### a. Position in India

On the release of one joint promisor, the other joint promisors are not

discharged and their liability continues as before. This is incorporated in Section 44 of the Indian Contract Act, 1872, which is as follows:

### ➤ Section 44. Effect of release of one joint promisor:<sup>775</sup>

*Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.*

The release of one of the joint promisors does not release others, nor does it release the promisor who has been released by the promisee from his responsibility, to contribute to the other joint promisor or promisors.

### **Devi Lal v. Himat Ram**

In *Devi Lal v. Himat Ram*<sup>776</sup>, there was an action brought against the various partners of a partnership firm for the recovery of money. During the pendency of an appeal, one of the respondent-partner died. Since his legal representatives were not brought on record, the appeal abated against him. It was held that the abatement of the appeal against one partner did not result in the abatement of the appeal against the other respondents (partners).

### b. Position in England

The position in this regard in England is different from that in India. Under English law, a release of one of the joint promisors results in the discharge of all others, unless the right against the others is preserved by an agreement.

## Conclusion

In conclusion, the comparative analysis between the Indian Contract Act and

<sup>772</sup> T. Radhakrishna v. K.V. Muthukrishnan, AIR 1970 Mad. 337

<sup>773</sup> Hemendro Coomar v. Rajendrolal, ILR (1878) 3 Cal. 353

<sup>774</sup> Shivlal v. Bridichand, (1917) 19 Bom LR 370

<sup>775</sup> S. 44, The Indian Contract Act, 1872

<sup>776</sup> Devi Lal v. Himat Ram, AIR 1973 Raj. 39

English Contract Law highlights nuanced distinctions in several crucial aspects of contract formation and enforcement. These disparities reflect the unique legal frameworks and societal contexts of each jurisdiction.

Capacity to contract, past consideration, agreement without consideration, and privity of contract emerge as key areas of differentiation. While both legal systems prioritize ensuring parties' legal competence to contract, they diverge in their emphasis on specific criteria such as age, mental capacity, and soundness of mind. The treatment of past consideration illustrates varying degrees of flexibility and rigidity in contractual relationships, with the Indian Contract Act accommodating past consideration more readily than English Contract Law.

Agreement without consideration represents another notable departure, with India allowing certain agreements to be valid without consideration, unlike England's stricter requirement. Similarly, privity of contract is approached differently, with English law maintaining a strict privity requirement while Indian law allows for certain third-party enforcement under specific circumstances. Moreover, the abolishment of offenses like maintenance and champerty in England contrasts with India's unique socio-legal conditions, where such laws find non-applicability due to differing societal norms. Differences also arise in the performance of contracts by joint promisors, with England and India adopting contrasting approaches regarding judgments against joint promisors and the release of one joint promisor.

Overall, while both legal systems aim to uphold fairness and justice in contractual matters, the specific legal principles and interpretations vary significantly between England and India, reflecting their distinct legal traditions and societal contexts. Understanding these disparities is crucial for businesses and individuals engaged in cross-border

transactions, enabling more informed and effective contractual engagements in a globalized legal environment.

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