IN SEARCH OF A MYTHICAL EXCEPTION TO PRIVITY OF CONTRACT IN INDIAN LAW

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Abstract

In a recent judgment, *Utair Aviation v Jagson Airlines*, the Delhi High Court formulated a novel 'conduct, acknowledgement and admission' exception to the privity of contract requirement. Two influential treatises on Indian contract law, Avtar Singh's Contract and Specific Relief and Frederick Pollock and Dinsha Mulla's Indian Contract Act 1872 too, recognise the exception and cite a long list of authorities in its support. This article argues that neither is the exception doctrinally warranted—based as it is on a problematic reading of the authorities cited in its favour—nor its invocation in the case or by the treatises justified. The Court's claim that the 'width' of section 2(d) of the Indian Contract Act which, unlike the English definition of consideration, allows consideration to move from the promisee or another person, provides the doctrinal basis for an expanded list exceptions to the privity rule, will be contested. It will also be argued that the purported exception is rendered conceptually redundant by section 2(d) of the Indian Contract Act 1872. The discussion will have for its backdrop, the contrast between the English law and the Indian Contract Act on two cognate ideas, namely, privity of contract and privity of consideration, the conflation of which, it will be argued, engenders some of the confusion in the case under discussion.

> The rule…is stated in the text-books as based upon the authority of the decision, and afterward, when it offers an easy solution of a difficult case, it is quoted by other judges upon the authority of the text-book, and so, without inquiry into its origin it comes to be regarded as a rule of law; and it is only when it is applied to cases in which it works injustice that the soundness of the rule begins to be questioned.
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> *Edward Quinton Keasby* [1]

I. INTRODUCTION

For nearly half a century, decisions of the highest courts of the land in India have held that the law on privity of contract at Indian law is substantially the same as the doctrine at English law, with the only difference that under section 2(d) of the Indian Contract

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[1] Edward Keasby, "The Right of a Third Person to Sue upon a Contract Made for his Benefit", *Harvard Law Review,* 1894, Vol. 8, p. 93, 94.

Act 1872 (ICA) consideration may move from not just the promisee but also from any other person.[2] Therefore, in India, as was the case in England until the enactment of the Contracts (Rights of Third Parties) Act 1999, no third party to a contract may ordinarily sue upon it.[3] The courts in India have also by and large recognised the same set of exceptions to the privity rule as the English law does, namely, agency, trust and covenants running with property.[4] Recently, the Delhi High Court in *Utair v Jagson* recognised and applied another exception to the privity rule, namely, that of 'conduct acknowledgement and admission'.[5] The court, however, did not take itself to be creating a novel exception. Rather, it claimed to be applying to the case on hand, a well-settled proposition supported by a catena of authorities. Although the court did not rely on it, two respected and influential treatises on Indian contract law, namely, Avtar Singh's *Contract and Specific Relief*, and Fredereick Pollock and Dinsha Mulla's *Indian Contract Act 1872* recognise that 'acknowledgment and estoppel' constitutes an exception to the privity rule and cite a long list of authorities in its support.[6]

The central claim of this article is that the existence of such a 'conduct, acknowledgment and admission' exception is a pure myth. It is doctrinally not well founded and the authorities invoked in support of the proposition by the High Court judgment and the two treatises do not bear such a reading. The article also examines the reasoning of the court in *Utair v Jagson* to identify some misconceptions about the privity doctrine. It will be argued that the court did not, in the first place, need to invoke a novel exception to the privity doctrine as the Indian version of the privity rule, thanks to section 2(d) of the ICA, was wide enough to allow the plaintiff to sue in the case before the court. The 'exception', it will be argued, is designed to rescue the plaintiff from the pincers of a problem that the plaintiff would not have needed rescuing from had the court not imagined the plaintiff to be in it in the first place. Finally, it will be argued that the 'conduct and acknowledgment' exception can conceptually never really amount to a functional serviceable exception at all as such a category is rendered redundant by section 2(d) of the ICA.

Section II sets out and compares the law on privity of contract in India and in England. Significantly, it draws a distinction between *privity of contract* and *privity of consideration* and points out that while with respect to the former the law in India and England are similar, with respect to the latter they are different. Section III discusses the

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2 *M.C.Chacko v State Bank of Travancore* [1970] AIR SC 500 (Supreme Court of India); *National Petroleum v Popat Mulji* [1936] 60 ILR Bom 954 (Bombay High Court); See also *Kepong Prospecting v Schmidt* [1968] AC 810 which was decided by the Privy Council on an appeal arising from Malaysia. The Malaysian Contracts Act 1950 is identical to the Indian Contract Act 1872.

3 There may be and indeed are good grounds for normatively questioning whether the privity of contract *ought* to have any applicability in India, but there it is beyond doubt that this indeed is descriptively the position of law as decided by the courts of the land. For a discussion of the normative question *see* S. Swaminathan, "The Great Indian Privity Trick: Hundred Years of Misunderstanding Nineteenth Century English Contract Law" (unpublished manuscript).

4 See discussion in section IV *infra*.

5 *Utair Aviation v Jagson Airlines Limited* [2012] 129 DRJ 630 (Delhi High Court).

6 Avtar Singh, *Contract and Specific Relief*, 10th ed., Eastern Book Company, 2010, *passim*; Frederick Pollock and Dinsha Mulla, *Indian Contract Act, 1872*, Nilima Bhadbhade, 14th ed., Lexis Nexis, 2012, *passim*.

salient issues emerging from the Delhi High Court's decision in *Utair v Jagson*. Section IV scrutinizes the claim advanced by the judgment that exceptions to the privity rule are possible in India but not England only because the definition of consideration under section 2(d) of the ICA which allows consideration to move from the 'promisee or any other person' is wider than the English definition according to which consideration must necessarily move from the promisee. It will be argued that this argument *inter alia* conflates privity of contract and privity of consideration. Section V argues that the authorities adduced by the decision in support of novel 'acknowledgment and conduct exception' do not bear the reading proposed by the court. It will be argued that the courts in these decisions never took themselves to be inventing a new exception to the privity doctrine but were merely applying the one of other two well recognised exceptions to privity doctrine recognised in English and Indian law, namely, trust and agency. Section VI argues that the mythical 'acknowledgment and conduct' exception is traceable to Avtar Singh's influential treatise *Law of Contract and Specific Relief* and Pollock and Mulla's, *Indian Contract Act 1872*. However, Avtar Singh bases this doctrine on a problematic reading of three High Court decisions, which results in the elevation of facts, which are ultimately of no bearing to the outcome of the case, to the status of conclusive legal principles; and Pollock and Mulla's attribution of this proposition to a handful of authorities is also questionable. In Section VII it will be argued that there are two ways in which the 'acknowledgment, conduct and admission' exception can operate, both of which make it redundant. If the role of acknowledgment is to preclude the promisor from denying the existence of a promise it cannot entitle the third party to sue as the existence of the promise is hardly in question in such cases. On the other hand, if the only purpose of the acknowledgment is to establish an 'implied' promise with the third party, the latter will no longer be a third party in the real sense—it will be the 'promisee' to the second promise instead, and the Indian definition of consideration under section 2(d) of the ICA is wide enough to allow such a party to sue upon the contract, without having to fit its case within any of the exceptions.

II. PRIVITY IN INDIAN AND ENGLISH LAW

The ICA codified, and to a certain extent reformed, the English common law of contract.[7] Among the challenges faced by courts in interpreting any code which consolidates and amends an existing body of law is to determine the extent of the code's fidelity to the antediluvian law warts and all, and the extent of its intent to reform it.[8] It is feared that legislative reforms tend to be stultified as in dealing with codes courts tend to revert to the pre-codification law on the subject.[9] One of the interpretive challenges the courts

7 See A.C Patra, "Historical background of the Indian Contract Act", *Journal of the Indian Law Institute,* 1962, Vol. 4, p. 373 *passim*; G. Rankin, *Background to Indian Law*, Cambridge University Press, 1946, pp. 88-110.

8 W. Swain, "Contract codification and the English: some observations from the Indian Contract Act 1872" in James Devenney and Mel Kenny eds., *The Transformation of European Private Law: Harmonization, Consolidation, Codification or Chaos?,* Cambridge University Press, 2013, pp. 172-195 *passim*.

9 R.N. Gooderson, "English Contract Problems in Indian Code and Case Law", *Cambridge Law Journal* 1958 Vol. 16 p. 67; Warren Swain, "Contract Codification in Australia: Is it Necessary, Desirable and Possible?", *Sydney Law Review* 2014, Vol. 36, p. 131,141.

in India faced in applying the ICA was to do with that bugbear of the common law of contract: the question of the eligibility of third parties or strangers to a contract to bring an action upon it.

At English common law, two canonical cases from the mid-19th century, namely, *Price v Easton*[10] and *Tweddle v Atkinson*[11] are widely taken to have settled conclusively that a stranger to a contract cannot sue upon it—the rule which has come to be known as the *privity of contract* rule. There is some academic controversy over whether these cases do actually stand for this proposition or support a cognate but distinct *privity of consideration rule* instead:[12] that a person from whom consideration has not moved cannot sue upon the contract.[13] Surveying the 'cloudy history' of the doctrine, Vernon Palmer argues that it is a 'basic misconception' to suppose that the cases in question support the privity of contract rule.[14] Whatever view one takes on this academic debate—and nothing here turns on a determination of this historical issue—there is little doubt that these cases have come to be received as the source and origin of the privity of contract rule and as Patrick Atiyah reminds us, commenting on *Tweddle v Atkinson*, in the law, the case becomes 'more important not for what the judges said but for what the legal profession came to believe the case stood for.'[15] In due course, the privity of contract rule was further cemented by *Dunlop v Selfridge*[16] and it came to be ensconced in the law for decades thereafter, Lord Denning's multiple broadsides at it, notwithstanding,[17]until the Contracts (Rights of Third Parties) Act 1999 mitigated some of the rigours of the doctrine by making it possible for third party beneficiaries to sue under specific circumstances. [18]

It was not altogether clear from the outset how a court in India applying the ICA should receive this body of doctrine so well entrenched in the English law. At the heart of the conundrum was the definition of consideration found in section 2(d) of the ICA:

> 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

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10 *Price v Easton* [1833] 4 B & Ad 433.

11 *Tweddle v Atkinson* [1861] 1 B & S 393.

12 The pair of expressions 'privity of contract' and 'privity of consideration' are borrowed from Lord Wright, "Ought the Doctrine of Consideration to be abolished from the Common Law", *Harvard Law Review* 1936, Vol. 49, p 1225, 1246. Vernon Palmer refers to the same ideas with the expressions, 'parties only rule' and 'the consideration rule': V. Palmer, *The Paths to Privity*, Law Book Exchange, 2006, p. 23.

13 See, Palmer *ibid*. at p. 22-25, 164-171; D. Ibbetson, *A Historical Introduction to the Law of Obligations,* Oxford University Press, 1999, p. 242; W. Swain, *The Law of Contract 1670-1870,* Cambridge University Press, 2015, pp. 221, 227.

14 Palmer, *supra* n12, at pp. 22-23,165.

15 P.A. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979, p. 414.

16 *Dunlop v Selfridge* [1915] AC 847.

17 *See* Lord Denning's opinions in *Smith v River Douglas Catchment Board* [1949] 2 ALL E.R. 179; *Midland Silicones v Scruttons* [1962] AC 446; and *Beswick v Beswick* [1966] Ch. 538.

18 We will not, however, discuss the Contracts (Rights of Third Parties) Act 1999 as we are primarily concerned with the comparison between the privity doctrine at English common law and Indian law. Despite the centrality of the privity rule in English law, the Scots law has allowed *jus quaestum tertio*: *See* Hector MacQueen, "Third Party Rights in Contract: Jus Quaesitum Tertio" in Kenneth Reid and Reinhard Zimmermann (eds.) *A History of Private Law in Scotland, II: Obligations*, Oxford University Press, 2000, pp. 220-51.

> to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

The definition of consideration is clearly wider than the English definition as consideration under the provision could move not only from the promisee but also 'any other person'. As Pollock and Mulla put it in their commentary:

> In modern English law, it is well settled that consideration must move from the promisee. Under the Act, however, the consideration may proceed from the promisee or any other person. The result is to restore...and even extend the doctrine of some earlier English decisions [*Dutton v Poole*] which are no longer of authority in England.[19]

This provision clearly made it possible for parties to sue upon a contract even if the consideration had not moved from them provided they remained *parties* to the contract; something that would not be possible under English law which also required for there to be *privity of consideration* to earn the right to sue upon a contract. An early illustration of the effect of section 2(d) and its contrast with the English law is provided by the Madras High Court's decision in *Chinayya v Ramayya*.[20] A, the mother, transferred property to her daughter B on the stipulation that B give an annuity to her uncle C and D, who were A's brothers. B contemporaneously contracted with her uncles C and D to pay the annuity. The court held that C and D were entitled to sue upon the second contract although they provided no consideration, as consideration provided by A was adequate to support an action by them. *Tweddle v Atkinson* would have precluded such an outcome in England. This was considered to be possible in Indian law because of the wide definition of consideration under section 2(d) which allowed consideration to flow from not just the promisee but also from any third person.

The only question that remained to be answered was whether section 2(d) had the effect of allowing third parties to sue upon the contract as ostensibly the ICA was silent on this specific question.[21] This question could very well have come up in *Chinayya v Ramayya* had the daughter not entered into the contemporaneous second agreement with her uncles promising to pay them the annuity.

At one time, there was considerable judicial authority holding that the 'width' of section 2(d) had the effect of negating the idea of privity of contract, thus enabling a third party to sue upon it. Two particularly illuminating decisions illustrative of this line of thinking were *Debnarayan Dutt v Chunnilal Gose*[22] and *Khirodbehari Dutt v Mangobinda*.[23] In *Debanarayan Dutt* Lawrence Jenkins CJ combined the argument about

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19 Frederick Pollock and Dinsha Mulla, *Indian Contract Act,* 2nd ed., Sweet & Maxwell, 1909, p. 16.

20 *Chinayya v Ramayya* [1881] 4 I.L.R. Mad. 187 (Madras High Court).

21 George Rankin notes, that 'there is nothing' in s 2(d) 'to suggest that a person who is not a party to a contract can sue upon it': Rankin *supra* n7, at p. 104.

22 [1914] 41 ILR 137 (Calcutta High Court).

23 [1934] AIR Cal 682 (Calcutta High Court).

the width of section 2(d) with another argument drawn from the history of contract at common law: that the courts in India should not be trammeled by restrictions of *indebitatus assumpsit*, the 'form of action' which was predecessor of the modern action of contract, which meant that a 'stranger' could not sue. [24]

The tide began to turn against this position when the courts in India began to take the view that the wide definition of consideration under section 2(d) notwithstanding, the issue of who can sue on the contract was analytically distinct from it and not covered by the terms of the provision at all. The credit for making this constricted view of section 2(d) mainstream belongs to Fredrick Pollock and Dinshah Mulla who collaborated to bring out, what remains under successive editors, the most influential contract law treatise in India, which, for generations now, has assumed the status of a *vade mecum* for the bar and bench like.[25] In their enormously influential commentary on the ICA they took the view that the question of who can sue upon a contract was analytically distinct from the question of who the consideration could move from; and that section 2(d) had nothing to say on the former question. On the contrary, they argued, the definitions of 'promisor' and 'promisee' conclusively precluded any third party from suing on the contract.[26] This argument, it must be noted, is not as straightforward as Pollock and Mulla and those who endorse their reasoning make it out to be section 2 (c) defines the person making the proposal or offer as 'promisor' and the person accepting it as 'promisee'. Pollock and Mulla's argument, effectively, is that this definition precludes any third party from suing upon the contract. But this seems to be a non-sequitur as section 2 (c) has nothing to say on who can sue upon a contract. On the contrary, section 2(h) defines a contract as 'an agreement enforceable by law'—it does not define it as being enforceable by only the promisor or promisee. Despite the inherent weakness of Pollock and Mulla's argument and its resting on what was obviously a non-sequitur, it gained significant traction.

Then followed a line of cases, which, in consonance with Pollock and Mulla's position, held that section 2(d) did not have the effect of negating the privity of contract requirement at all as the definition cannot have a bearing on 'the question whether a third party (who is neither the Promisor nor the Promisee) can enforce the contract.'[27] A paradigmatic instance of this kind of reasoning is provided by Rankin CJ's opinion in *Krishna Lal Sadhu v Promila Bala Dasi*.[28]

> Not only, however, is there nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of 'promisor' and 'promisee'. [29]

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[24] [1914] 41 ILR 137, 146.

[25] The treatise is now into its 14th edition: Pollock and Mulla, *Indian Contract Act, 1872*, Nilima Bhadbhade, 14th ed., Lexis Nexis, 2012.

[26] Frederick Pollock and Dinsha Mulla, *Indian Contract Act*, 2nd ed., 1909, p. 19.

[27] *Iswaram Pillai v Sonivaveru Taragan* [1913] 38 ILR Mad 733 (Madras High Court).

[28] *Krishna Lal Sadhu v Promila Bala Dasi* [1928] 32 C.W.N 634 (Calcutta High Court): This view is also reflected in Rankin's extra judicial writings to be found in Rankin (n 7) which we have already had the occasion to consider.

[29] *Utair Aviation v Jagson Airlines Limited* [2012] 129 DRJ 630, 640

Rankin CJ's opinion was quoted with approval in the Supreme Court of India's judgment in *M.C.Chacko v State Bank of Travancore* which settles the privity issue in India decisively by holding that a third party to a contract cannot sue unless the case falls within one of the well-recognised exceptions.[30]

III. *UTAIR v JAGSON*

The Delhi High Court's judgment in *Utair Aviation v Jagson Airlines*[31] purports to liberalise the privity requirement by the formulation of a novel 'conduct acknowledgement and admission' exception to it. The facts of the case are as follows. Defendant 2 (the Contractor) entered into an agreement with Jagson for the supply and maintenance of two helicopters. The Plaintiff Utair, the 'confirming party' to the maintenance agreement between the Contractor and Jagson supplied the equipment required for maintenance of the helicopters directly to Jagson. Despite the agreement between Jagson and the Contractor coming to an end, the plaintiff's equipment continued to remain with Jagson. The Plaintiff, Utair sued for recovery of the equipment. Jagson applied for rejection of the plaint under Order 7 Rule 11 (a) of the Code of Civil Procedure, 1908 —a provision which empowers the court to reject the plaint *inter alia* if no cause of action is disclosed—on the ground that there was no privity of contract between Utair and Jagson and that Utair as a 'third party' could not sue upon a contract which was essentially between Jagson and the Contractor. The plaintiff also pleaded that there was communication between Utair and Jagson and the dealings between them were of the kind that further buttresses the point that there was a contract between the parties. The decision under discussion was handed down by the court on the O.7 R.11 (a) application where it fell for the court to decide, without questioning any of the facts alleged in the plaint, whether a cause of action was disclosed. The court held in Utair's favour by holding that the case fell within what the court regarded to be one of the 'well-recognised exceptions' to the privity doctrine: 'conduct, acknowledgment and admission'.[32]

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30 [1970] AIR SC 500 (Supreme Court of India). Article 141 of the Constitution of India provides that any decision of the Supreme Court of India is binding on all the courts in India including the High Courts. All the other decisions referred to in this article apart from this decision are decisions by High Courts. This has also by and large been the position taken in Malaysia whose Contracts Act 1950 is identical to the Indian Contract Act, 1872—that the privity rule is applicable. The Privy Council too confirmed this position on appeal from Malaysia in *Kepong Prospecting v Schmidt* [1968] AC 810. Lord Wilberforce held:

> It is true that section 2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England, particularly in that it enables consideration to move from another person than the promisee, but the Appellant was unable to show how this affected the law as to enforcement of contracts by third parties.

The courts in Malaysia too have by and large used the same set of exceptions that Indian courts have to get around the privity rule. For a discussion on the privity rule in Malaysia and the exceptions thereto see: Tan Pei Meng, "Circumventing the Privity Rule in Malaysia", *Journal of International Commercial Law and Technology,* 2009, Vol. 4, p. 262 *passim*. For a discussion on the circumventions to the privity rule used by the Indian courts see, see discussion in Section IV below.

31 [2012] 129 DRJ 630.

32 [2012] 129 DRJ 630, pp. 640-41.

> [T]he party may by acknowledgment or by his conduct…proceed to create privity with the said third party by virtue of it being a subordinate to the party to the contract or dealing with the parties to the contract etc…[33]

> [P]rivity can be created by virtue of conduct acknowledgment and admission, it becomes clear that any case where one party is made aware of the relationship of the other party with that of a stranger…and the conduct suggests a kind of relationship, then there can be said to be a nexus or a privity which can be said to be created by virtue of conduct.[34]

The court appears to have been steered in the direction of making the case turn on privity because the question was squarely raised by Jagson. It is not entirely clear, however, if this course was at all necessary. Firstly, a cause of action could be made out *quasi ex contractu* without having to invoke any contract under section 70 of the ICA.

> S. 70. Obligation of person enjoying benefit of non-gratuitous act.—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 to restore, the thing so done or delivered

In this case, all of the relief claimed by the Plaintiff would also have been available under section 70 of the ICA, which is a quasi-contractual provision that allows the owner of goods who has non-gratuitously handed them over to recover them from another party along with compensation even in the absence of a contract. And secondly, even if one were to hold, however improbably, the view that any cause of action in this case must be *ex contractu*, the question of privity still remained orthogonal to the relief sought as Utair claimed in the plaint to be a 'confirming party' to the agreement: a pleading, by virtue of which it could not be termed as a 'stranger' to the contract. A confirming party may literally be the third party *in* the contract but that does not mean that it is the third party *to* the contract. The court's decision to bring the case within one of the exceptions of the privity rule seems to be premised on such a conflation. Thus the judgment, for the most part can be seen as an attempt to rescue the plaintiff from the pincers of a problem that the plaintiff would not have needed rescuing from had the judgment not imagined the plaintiff to be in it in the first place. The plaintiff's case didn't need to be brought within one of the exceptions to the privity rule because privity did not seem to pose any hurdle to the plaintiff's case in the first place.

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[33] *Ibid.* at p. 641.
[34] *Ibid.* at p. 642.

IV. THE IRRELEVANCE OF THE WIDE DEFINITION OF CONSIDERATION

The decision prefaces its discussion on exceptions to the privity rule by claiming that while in England no stranger to a contract can sue upon it, they can under exceptional circumstances do so under Indian law only because the definition of consideration under section 2(d) of the ICA which allows consideration to move from the 'promisee or any other person' is wider than the English definition which provides that consideration may move from the promisee only.[35] But this claim seems problematic for three reasons. *Firstly*, English law does recognise exceptions to the privity rule: [36] a) trust;[37] b) agency;[38] c) covenants running with property.[39] It follows therefore that the width of the definition of consideration has no bearing on the question of who can sue upon it. Exceptions (a) and (b) have also been received by Indian cases with there being no doubt that their source is the English common law.[40] And exception (c) has comparable statutory recognition in sections 39 and 40 of the Transfer of Property Act (India) 1882 albeit only with respect to immovable property.[41] Additionally, section 15(c) of the Specific Relief Act 1963 (India) allows any beneficiary of a contract made for a family or marriage settlement to bypass privity and sue thereupon.

Secondly, if the reasoning underlying the argument—that exceptions to privity were made possible in Indian law only because consideration may move from 'any other person'—were to be taken to its logical conclusion, the privity doctrine in India would be obliterated in a single swoop and consideration moving from anyone should allow anyone to sue upon a contract as there would then be no good reason to read 'any other person' restrictively to mean just the category of persons forming one of the recognised exceptions to the privity doctrine. Consider for instance, the agency exception. If the only reason why consideration provided by A (agent) to B (promisor) is good enough for C (principal) to sue on is because the agent A is 'any other person' under section 2(d), there is nothing to preclude this principle from extending to all cases where consideration moves from just about any person: because it should not matter on the plain terms of section 2(d) who the 'any other person' is. It should be an inexplicable mystery for someone

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35 *Ibid.* at p. 638.

36 See M. Furmston and G. Tolhurst, *Privity of Contract*, Sweet & Maxwell, 2014, pp. 44-102; In addition to the 'exceptions' set out here there is also the scope for other 'circumventions' of the privity rule or ways round it such as collateral contracts and assignments which will not be discussed in this article: *See* the UK Law Commission's Consultation Paper No. 121, "Privity of Contract: Contracts for the Benefit of Third Parties", 1991, *passim*; and G.Trietel, *Some Landmarks of Twentieth Century Contract Law,* OUP 2002, pp. 84-89 (where he discusses some ways around the privity requirement in the context of *Beswick v Beswick*).

37 This exception has been recognised since as early as *Tomlinson v Gill* [1756]. See also *Gregory and Parker v Williams* [1817] 3 Mer 582; and *Les Affréteurs Réunis SA v Leopold Walford* [1919] AC 801.

38 Palmer *supra* n 12, at pp. 64-67.

39 Furmston and Tolhurst *supra* n at 36, pp. 50-53. *Smith v River Douglas Catchment Board* [1949] 2 ALL E.R. 179. The exception is also recognised by Ss. 56, 78 & 79 of the *Law of Property Act 1925*.

40 *Khirodbehari Dutt v Mangobinda* [1934] AIR Cal 682 (Calcutta High Court); *National Petroleum v Popat Mulji* [1936] 60 ILR Bom 954 (Bombay High Court).

41 Furthermore, while S.56 of the Law of Property Act (UK) 1956 is wide enough to cover any condition or covenant, the Ss. 39 & 40 of the Transfer of Property Act (India) 1882 deal only with a limited nature of covenants relating to immovable property.

endorsing this claim why the term 'any other person' should be read restrictively to mean only category of persons falling within one of the recognised exceptions such as trust, agency, etc. The fact of the matter is that, contrary to what the judgment claims, the width of section 2(d) has nothing to do with the exceptions, which have been received from the English common law.

Finally, the argument in question seems to conflate *privity of contract*, the idea that a stranger to the contract cannot sue and *privity of consideration*, the idea that a consideration must move from the promisee. No one can cavil about the wider definition of consideration under section 2(d) having a direct bearing on the idea of privity of consideration. But as we have seen in Section II, for better or worse, it is conclusively settled by the Supreme Court of India now that section 2(d) cannot be taken to have the effect of negating the privity of contract requirement.

V. THE MYTH OF THE NOVEL EXCEPTION

Utair v Jagson traces the origin of the 'conduct, acknowledgment and admission' exception to a decision of a single judge of the Calcutta High Court in *Narayani Devi v Tagore Commercial Corporation*.[42] That decision, in turn, purports to follow an earlier decision of the Calcutta High Court in *Jnan Chandra v Manoranjan Mitra*.[43] It must be noted that the court in *Narayani Devi* never took itself to be inventing a new exception to the privity doctrine but was merely applying the 'agency exception' to the case which was described by the court in *Jnan Chandra* to be one of the 'two well-recognised exceptions' to the privity doctrine. This is borne out from the excerpt from *Narayani Devi* set out in the judgment and reproduced below.

In my opinion, even if it is held, that there was no privity between the plaintiff and these two defendants, when the said contract was entered into, yet in the facts and circumstances of this case, it must be held that the two defendants have created such privity with the plaintiff by their conduct and by acknowledgment and by admission, as stated above and they have constituted themselves the agent of the plaintiff. Such admission will also be found in Exhibit 'C' and such conduct will be found from the evidence both oral and documentary. This is a case which comes directly within the exceptions to the general doctrine that the stranger to the agreement cannot sue to enforce his right because of want of privity between the promisor and the stranger (Vide: observation of the Division Bench of this Court in *Jnan Chandra Mukherjee v Monoranjan Mitra*, AIR 1942 Cal 251 at p. 252).[44]

The facts in *Narayani Devi* bore some resemblance to those in *Beswick v Beswick*.[45] A sold his business to B in return of B's promise to pay him a lifetime annuity and upon his death to his wife C. And much like *Beswick* there was there also an acknowledgment of his contractual liability by B in the form of the payment of some instalments of the

[42] [1973] AIR Cal 401 (Calcutta High Court).
[43] [1942] AIR Cal 251 (Calcutta High Court).
[44] Excerpted at [2012] 129 DRJ 630, 641.
[45] [1968] AC 58.

annuity to C. Here C could have sued B as the legal heir of A, but brought the suit in her personal capacity instead. Upholding C's right to sue in her personal capacity, somewhat improbably, the court found that B was C's agent: a fact that it took to be established by B's conduct and acknowledgment thus bringing the case within the well-recognised 'agency' exception as set out in *Jnan Chandra Mukherjee*.[46] The anomalous result seems to have been produced by language used in *Narayani Devi* to formulate the agency exception which is identical to that used in *Jnan Chandra* for this purpose—'where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party'. This formulation is not altogether apposite. The source of this phraseology is probably Rangnekar J's judgment in *National Petroleum v Popat Mulji*[47] a celebrated decision which predates *Jnan Chandra*

> [T] here are two exceptions made to this general rule. The first exception is where the contract is made by a trustee for the benefit of a beneficiary, in other words, where there is a case of trust, and the other exception is where by acknowledgment or part payment or by estoppel privity may be established as a ground of agency. These two exceptions are also recognised by the decisions in this country.[48]

Rangnekar J in *National Petroleum* makes it tolerably clear that trust and agency are the two exceptions to privity; and estoppel and acknowledgment are among the means of establishing agency. There is little doubt that it is precisely this sense in which acknowledgment and estoppel appear in *Jnan Chandra* and *Narayani Devi* as well.

Under the well-recognised agency exception, the agency is between the promisee and the third party with the former being the agent; not between the promisor and the third party.[49] However precarious the court's hanging the case on the agency exception—and precarious it was indeed it was—it is the agency exception that was dispositive of the case in *Narayani Devi*, but the judgment in *Utair* extracts from the excerpted passage, the doubtful proposition that the court evolved a novel free standing exception based on 'conduct, acknowledgment and admission of the defendant'.

The judgment in *Utair v Jagson* further claims that this principle can also be found to be relied on by the Punjab High Court in *Babu Ram v Dhan Singh*.[50] However, even this does not seem to be right. In *Babu Ram* the court had allowed relief on another well recognised exception to the privity rule, namely, 'trust':

> By now it is well settled that ordinarily a stranger to a consideration cannot take advantage of a contract even though it may be for his benefit. This rule is, however,

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46 Whichever way one choses to view the facts, no relationship of principal and agent was in fact made out between C and B.

47 [1936] 60 ILR Bom 954 (Bombay High Court).

48 *Ibid*. at p. 995.

49 *See* the UK Law Commission's Consultation Paper No. 121, "Privity of Contract: Contracts for the Benefit of Third Parties", 1991, p. 14.

50 [1957] AIR P&H 160 (Punjab High Court).

> subject to certain exceptions. One of the exceptions covers cases where a stranger holds the position of cestui que trust in relation to the obligee.[51]

Finally, the court also argues that the 'conduct, acknowledgment and admission' exception is instantiated in the decision of the Mysore High Court in *Devaraje Urs v Ramkrishnaniah*.[52] This doesn't appear to be correct, either. As we will see in the following section, the plaintiff in *Devaraje Urs* had argued that his case falls within the well-recognsied 'trust sexception' and that is the submission accepted by the court.

VI. QUESTIONING THE SCHOLARLY ENDORSEMENT OF THE NOVEL EXCEPTION

The judgment in *Utair v Jagson* does not rely on Avtar Singh's textbook *Contract and Specific Relief*, but in it the court could have found support for its proposition about there being the kind of exception to the privity doctrine that it was trying to invoke. Avtar Singh, in fact, reads one of the decisions relied on by the Delhi High Court, *Devaraje Urs v Ramakrishnaiah* as creating an 'acknowledgment or estoppel exception'. This reading is open to question. Avtar Singh extracts the following proposition from *Devaraje Urs*:

> The suit was held to be maintainable. 'Though originally there was no privity of contract between B and C, B having subsequently acknowledged his liability, C was entitled to sue him for recovery of the amount.'[53]

The quotation from *Devaraje Urs* used by Avtar Singh, it turns out, comes *not* from the body of the judgment but from the headnote. And that headnote, it appears, wrongly summarises what was held in the judgment. The text of the judgment itself leaves no doubt that the plaintiff had sought to fit the case within the 'trust' exception and that is just what the court had permitted.

> The Respondent [Plaintiff] has…referred to a case…which was a suit by the creditor of the vendor against the purchaser under a sale deed with *terms in it similar to the present*, it was held by Subanna J that a person who is not a party to the contract and with whom there is no privity cannot gain any advantage by it, yet a contract can be so framed as to secure a benefit to a third party as a *cestui que trust* in which case the latter may sue in his own name to enforce the contract… these cases clearly help the Respondent.[54]

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51 *Ibid.*

52 [1952] AIR Mys 109 (Mysore High Court).

53 Avtar Singh, *Contract and Specific Relief,* 10th ed., Eastern Book Company, 2010, pp. 122.

54 *Devaraje Urs v Ramakrishnaiah* [1952] AIR Mys 109,110 (Mysore High Court). Emphasis added by the author.

Another case Avtar Singh adduces as 'illustration of acknowledgment by conduct' and of estoppel is *Khirodbehari Dutt v Mangobinda*.[55]

> The tenant and the sub-tenant of a piece of land agreed between themselves that the sub-tenant would pay the tenant's rent direct to the landlord. The agreement was acted upon by all the parties interested. Under these circumstances the landlord was allowed to obtain a decree for his rent direct against the sub-tenant. In other words, the sub-tenant was estopped from denying his liability to pay the tenant's rent on the ground that there was no such contract between him and the landlord.[56]

None of the factors enumerated by Avtar Singh in the above paragraph had any more role to play in the reasoning of the court than the colour of the plaintiff's shirt and his inference that the ratio of the decision was to create an exception to the privity rule on that basis that the sub-tenant was estopped from denying his liability is based on a purely gratuitous reading of the case. *Khirodhbehari Dutt*, it will be recollected from the discussion in Section II, was in the same line of cases such as *Debnarayan Dutt v Chunnilal Gose* and Lort-Williams J was reiterating the kind of reasoning offered by Lawrence Jenkins CJ in *Debnarayan Dutt* painting with broad strokes Lort-Williams J wanted to strike at the roots of privity of contract by claiming that it had no application under the ICA. He was not trying to create any 'exception' to the privity of contract doctrine. Rather, his point was that the doctrine was not applicable in India at all, *tout court*.

> We now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v Atkinson*… I prefer to base my decision, on a frank recognition that these [the trust and agency exceptions] are fictions and that in India no necessity arises for resorting to them.[57]

It would not have mattered to the outcome of the case whether or not the defendant acknowledged anything after having made the promise. Nothing turned on it because the effect of Lort-Williams J's judgment was to uproot the privity of contract doctrine in its entirety.

Finally, we must turn to another case mentioned by Avtar Singh in passing in support of this principle, namely, *Debnarayan Dutt v Chunnilal Ghose* which seems to exhibit a similarly problematic extraction of the ratio underlying the case. We have already had the occasion to consider briefly in *Debranayan Dutt* in Section II. In this case, the defendants 1 to 4 had borrowed money from the plaintiff subsequent to which they transferred all their properties to defendant 5 with a direction to repay the plaintiff. Contemporaneously the plaintiff and defendant 5 entered into an oral 'arrangement' by which the 'liability of defendant No. 5 under the transfer was acknowledged and accepted.' The plaintiff

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55 [1934] AIR Cal 682 (Calcutta High Court).
56 Avtar Singh, *Contract and Specific Relief,* 10th ed., Eastern Book Company, 2010, p. 122.
57 [1934] AIR Cal 682, 690-691.

argued that this amounted to an oral contract. Whilst accepting that there was certainly an acknowledgment of liability the court refused to hold that it amounted to a contract. But none of this was of any bearing in the matter because Lawrence Jenkins CJ, just like Lort-Williams J did in *Debnarayan Dutt* meant to dismantle the very doctrine of privity root and branch by claiming that it was not to be applicable in India at all.

> [T]he administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v Atkinson* … In the old writ in indebitatus assumpsit… the breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience.[58]

The fact that the defendant had acknowledged his liability had no bearing whatsoever in the ultimate outcome of the case. Jenkins CJ made it tolerably clear that if A and B enter into a contract which is to benefit C, the latter should be entitled to sue upon it as courts in India need not follow the constricting privity rule of *Tweddle v Atkinson*. If *Tweddle v Atkinson* is not applicable to India, it should be inapplicable to the whole gamut of cases where a third party is suing upon a contract made for its benefit—the subtleties in state of relations between the parties is of no further consequence than the plaintiff having 'red hair and freckles' or that 'his name was Smith' or that in incident giving rise to the suit 'arose on a Friday'.[59] What we find here is yet another instance of one of the facts in the case, of no ultimate bearing to the outcome, being elevated to the status of a legal principle.

The 'acknowledgment and estoppel' exception is also endorsed by another standard textbook on contract law in India, namely, Pollock and Mulla's *Indian Contract Act 1872*.[60] Pollock and Mulla argue[61] that 'a stranger to a contract can sue where one of the parties to the contract agrees with the stranger to pay him directly or is estopped form denying liability to so pay.'[62] The principal authority cited in favour of this proposition is *Subbu Chetty v Arunachalam Chettiar*.[63] Sastri J in *Subbu Chetty* does indeed allude to the 'acknowledgment and estoppel' exception, but does so only as a summary of the list of exceptions enumerated in another judgment of the Madras High Court which he approves, namely, *Iswaran Pillai v S. Taregan*.[64] It turns out that *Iswaran Pillai* no mention of the acknowledgement and estoppel exception whatsoever and Sastri J appears to have produced an erroneous summary of the *Iswaran Pillai* in so far as he reported that

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58 [1914] 41 ILR 137, 144-145.
59 Glanville Williams, *Learning the Law,* 11th Universal Indian Reprint, p. 68.
60 Pollock and Mulla, *Indian Contract Act, 1872*, Nilima Bhadbhade, 14th ed., Lexis Nexis, 2012, p. 106.
61 The reference here is to the 14th edition, *ibid*.
62 Pollock and Mulla *supra* n 60, at p.106.
63 [1930] 31 *Law Weekly* 371 (Madras High Court).
64 *Ibid*. at p.376; *Iswaran Pillai v S. Taregan* [1914] AIR Madras 701.

it included the 'acknowledgment and estoppel exception'. Another two decisions, *Seth Bhabhootmal v Munnalal Sagotia*[65] and *Daw Po v U Po Hmyin*[66] relied on by Pollock and Mulla in support of the estoppel exception, merely cite *Subbu Chetty* as authority for the proposition; and in any event, no question of applying such an exception arose in the cases and the exception in question was not dispositive of the dispute on hand in any of them. None of the other cases cited by Pollock and Mulla in favour of the acknowledgment and estoppel exception make any mention of it let alone applying it.[67]

VII. THE REDUNDANCY OF THE EXCEPTION

There are two ways in which the 'acknowledgment, conduct and admission' exception can operate, both of which, it will be claimed, make it redundant. If the role of 'acknowledgment' is to preclude the promisor from denying that a state of affairs existed—which at the most would mean precluding him from denying the existence of a promise—it is not clear how the third party profits from it. If a state of affairs, which is to say an express promise, cannot give a third party a right to sue, a fortiori, the principle which precludes the promisor from denying that state of affairs—which is precisely what estoppel or acknowledgment do—cannot either. To allow that would lead to the absurd result that while it would not be possible to sue on an express promise it would be possible to sue on an implied promise or on something even weaker. The absurdity can be demonstrated by applying the acknowledgement exception to the case of *Beswick v Beswick*.[68] A, a coal merchant entered into an agreement with his nephew B, transferring his entire business to him, in return for B agreeing to employ him as a consultant for life on a fixed salary and in the event of A's death to pay A's wife C, an annuity of £5 per week. On A's death B paid C one instalment of £5 but made no further payment. Overruling the Court of Appeal the House of Lords held that C could not sue in her personal capacity, although she could sue for specific performance as A's administratix. If the exception endorsed by *Utair v Jagson* be applied to *Beswick v Beswick*, B's payment to C of £5 would amount to an 'acknowledgment' of liability to pay her and hence would entitle C to bring an action against B. But the acknowledgment by B is, in any event, only an acknowledgment of what he had promised in the agreement with A—which was signed and stamped—and that is not in any doubt. The absurdity in the operation of the acknowledgment exception can be gauged from the fact that where a written, signed and stamped agreement between

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65 [1943] AIR Nag 266 (Nagpur High Court).

66 [1940] AIR Rang 91 (Rangoon High Court).

67 *Ramaswamy Ayyar v Krishnasa*; [1935] AIR Mad 904 (Madras High Court): not only does this case not refer to estoppel but it pins the case on an implied promise between the promisor and the 'third party'; *Surjan Singh v Lala Nanak Chand*; [1940] AIR Lah 471 (Lahore High Court): the court brought the case within the agency exception and there was not as much as a mention of the acknowledgment and estoppel exception; *Deb Narain Dut v Ram Sadhan Mandal* [1911] 9 Ind Cases 988 (Calcutta High Court); *Jiban Krishna Mullick v Nirupama Gupta* [1926] Cal 1009 (Calcutta High Court); *Hashmatlal v Pribhadas* [1929] AIR Sindh 117 (Sindh High Court); *Noratmal v Mohanlal;* [1966] AIR Raj 89 (Rajasthan High Court); *Moitrali Mukherjee v Manik Chand Jojuri* [1996] AIR Cal 226 (Calcutta High Court): the concept of estoppel does find mention in this case but in an entirely different context namely estoppel of the tenant to deny the title of the landlord which is statutorily recognised under s. 116 of the Indian Evidence Act 1872.

68 [1968] AC 58.

A and B expressly making C the beneficiary would not entitle C to sue upon it, a mere acknowledgment by B to C about his obligation under the agreement would do so.

On the other hand, if the only purpose of the acknowledgment exception is to make the perfectly anodyne point that the acknowledgment and estoppel could establish an 'implied' promise with the third party, then the 'exception' becomes redundant. This is because the so-called third party will no longer be a third party in the real sense—it will be the 'promisee' to the second promise instead. The situation would then resemble *Chinnayya v Ramayya* (except that *Chinayya* was the case of an express promise and this would be a case of implied promise) and the promisee to the second promise will in any case be able to sue.[69] In the case under discussion, all the pleadings regarding 'conduct and acknowledgment' in the plaint could, at best have gone to strengthen the point that there was indeed an 'implied' promise between the Utair and Jagson making Utair the 'promisee', which further buttresses the point that there was no need to invoke an exception to the privity doctrine at all, whether real or mythical.

[69] The situation resembles that in *Ramaswamy Ayyar v Krishnasa* [1935] AIR Mad 904 (Madras High Court) discussed in *supra* n 67.