THE THEORY IN CONTRACTS INTER PRAESENTES

In *Bhagwandas* v. *Girdharlal & Co.*,[1] the Supreme Court held by a majority, consisting of Mr. Justice Shah and Mr. Justice Wanchoo (now Chief Justice), that a contract by telephone was formed at the place *where* and at the time *when* acceptance was received by the offeror. The minority, consisting of Mr. Justice Hidayatullah, said that in such a case contract was formed at the place *where* and at the time *when* acceptance was uttered. In reaching its conclusion, the majority considered the relevant provisions of the Indian Contract Act, 1872, and held that the Act did not provide for instantaneous contracts. It also held that in the absence of any specific provision the matter was to be decided by the principles of justice, equity and good conscience which, in effect, meant English common law, if it was applicable to Indian conditions. The minority, on the other hand, was of the view that the matter fell within the four corners of the Indian Contract Act which governed the factual situation and hence the English decisions were inapplicable.

The purpose of this writing is to examine the scope of the above provisions, *i.e.* whether contracts inter praesentes are covered by the Indian Contract Act, and to discuss the role of courts where a given situation falls outside it.

Plaintiffs from Ahmedabad made an offer by telephone to defendants at Khamgaon to purchase certain goods. The defendants, in reply, accepted this offer by telephone from Khamgaon. This resulted in a contract.[2] Later, the plaintiffs, alleging breach of contract, filed a suit for damages at Ahmedabad. The defendants contended that the Ahmedabad court had no jurisdiction because the contract was made at Khamgaon and also because it was to be performed there.

The sole question before the Court related to the jurisdiction of the Ahmedabad court. In order to determine this question, it had to

1. A.I.R. 1966 S.C. 543.

2. The plaintiffs had heard and understood the words of acceptance. In this connection, there can be various situations as ably enumerated by the learned dissenting judge, Mr. Justice Hidayatullah, in his judgment:

> [T]here are four classes of cases which may occur when contracts are made by telephone: (1) where the acceptance is fully heard and understood; (2) where the telephone fails as a machine and the proposer does not hear the acceptor and the acceptor knows that the acceptance has not been transmitted; (3) where owing to some fault at the proposer's end the acceptance is not heard by him and he does not ask the acceptor to repeat his acceptance and the acceptor believes that the acceptance has been communicated; and (4) where the acceptance has not been heard by the proposer and he informs the acceptor about this and asks him to repeat his words.
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> *Id.* at 555.

decide the place *where* the contract was made. This necessarily involved the question as to *when* was a contract by telephone made.[3] The trial court held that the contract was made at the place where the acceptance was intimated to the offeror, and therefore, the Ahmedabad Court had jurisdiction to try the suit. The defendants filed a revision petition in the High Court of Gujarat, and this was rejected by the said Court *in limine*. They, then, appealed to the Supreme Court which by a majority dismissed the appeal.

In order to appreciate the merits of the controversy below, it is worthwhile to quote the following relevant provisions of the Indian Contract Act :

Section 3 :

> The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Section 4 :

> The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
>
> The communication of an acceptance is complete,—
>
> as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;
>
> as against the acceptor, when it comes to the knowledge of the proposer.
>
> The communication of a revocation is complete,—
>
> as against the person who makes it, when it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it;
>
> as against the person to whom it is made, when it comes to his knowledge.
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> *Illustrations.*
>
> (a) *A* proposes, by letter, to sell a house to *B* at a certain price. The communication of the proposal is complete when *B* receives the letter.
>
> (b) *B* accepts *A*'s proposal by a letter sent by post. The communication of the acceptance is complete,—
>
> as against *A*, when the letter is posted;
> as against *B*, when the letter is received by *A*.
>
> (c) *A* revokes his proposal by telegram. The revocation is complete as against *A* when the telegram is despatched. It is complete as against B when *B* receives it.
>
> *B* revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

Section 5 :

> A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
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> An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

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3. Civil Procedure Code, 1908, § 20; See 1 *Mulla on the Code of Civil Procedure* 145 (Aiyar ed. 1965).

Illustrations.

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

Mr. Justice Shah delivering the majority judgment held :

(a) that sections 3, 4 and 5 above, did not deal with the formation of contract by telephone. He said :

> Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf.... ;[4]

(b) that the rule as to formation of contract inter absentees which created a binding contract upon posting (subject in Indian Law to the offeree's right to withdraw his acceptance by an overreaching act) and which was an exception to the general rule that the acceptance must be communicated to, *i.e.* received by, the offeror could not apply to instantaneous contracts, which in their nature were different from correspondence contracts. His Lordship said :

> The question then is whether the ordinary rule which regards a contract as completed only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract and the exception to the rule imposed on grounds of commercial expediency is inapplicable.;[5]

(c) that whenever any matter was not covered under the provisions of the Act, the courts were obliged to apply the principles underlying justice, equity and good conscience, which generally meant the rules of English common law as applicable to Indian conditions. His Lordship said :

> In the administration of the law of contracts, the Courts in India have generally been guided by the rules of the English common law applicable to contracts where no statutory provision to the contrary is in force. The Courts in the former Presidency towns by the terms of their respective letters patents, and the Courts outside the Presidency towns by Bengal Regulation III of 1793, Madras Regulation II of 1802 and Bombay Regulation IV of 1827 and by the diverse Civil Courts Acts were enjoined in cases where no specific rule existed to act according to "law or equity" in the case of chartered High Courts and elsewhere according to justice, equity and good conscience—which expressions have been consistently interpreted to mean the rules of English common law, so far as they are applicable to the Indian society and circumstances...[6]

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4. *Supra* note 1, at 550.
5. *Ibid.*
6. *Id.* at 549.

In short, the majority held that telephonic contracts were not governed by the Indian Contract Act and that since the principles of equity were to be applied, the decision of the Court of Appeal in England in *Entores, Ltd.* v. *Miles Far East Corpn.*[7] (presumably based on equity) was well applicable in India. Thus in the view of the majority, the contract by telephone was formed when the words of acceptance were heard and understood at Ahmedabad.

Mr. Justice Hidayatullah, in his dissenting opinion, said :

(aa) that formation of a contract by telephone (and on analogy through any other instantaneous means of communication) fell under the provisions of section 4 of the Indian Contract Act. His Lordship said :

> In my opinion, the language of S. 4 of the Indian Contract Act covers the case of communication over the telephone. Our Act does not provide separately for post, telegraph, telephone or wireless. Some of these were unknown in 1872 and no attempt has been made to modify the law. It may be presumed that the language has been considered adequate to cover cases of these new inventions.[8]

He further argued :

> If the rule suggested (by the majority) is accepted it would put a very powerful defence in the hands of the proposer if his denial that he heard the speech could take away the implications of our law that acceptance is complete as soon as it is put in course of transmission to the proposer. ;[9]

(bb) that, therefore, the principles underlying justice, equity and good conscience, and the English decisions which were contrary to the Indian enactment could not be imported into India. His Lordship said :

> The rules to apply in our country are statutory but the Contract Act was drafted in England and the English Common law permeates it ; however, it is obvious that every new development of the Common law in England may not necessarily fit into the scheme and the words of our statute. If the language of our enactment creates a non-possumus adamant rule, which cannot be made to yield to any new theories held in foreign Courts our clear duty will be to read the statute naturally and to follow it.[10]

In short, the learned Justice held that the language of section 4 being indubitably clear to deal with the formation of contract by new inventions the principles of equity or the English decision approved by the majority could not apply to the instant case. Thus in accordance with the provisions of this section, a contract by telephone was formed when the words of acceptance were uttered into the transmitter at Khamgaon.

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7. [1955] 2 All E.R. 493.
8. *Supra* note 1, at 557.
9. *Ibid.* Parenthesis supplied.
10. *Id.* at 550.

The majority and the minority, in essence, differed as to the scope of sections 4 and 5 of the Indian Contract Act in their application to the formation of contract by telephone. An analysis of these sections and the whole set-up of the law of offer and acceptance in India, as explained below suggest that the formation of contracts face to face by telephone or teleprinter falls outside the purview of these provisions and that the rule of law, to be adopted in the instant case, should accept the receipt rather than the expedition theory of acceptance.

First, according to section 4 of the Act, an acceptance is effective, as against the proposer, when it is put in a course of transmission to him. It is submitted that the use of the phrase "put in a course of transmission," in case of formation of oral contracts with or without telephone is inapt, although it may well apply to contracts inter absentees. This expression is not in usage in case of formation of contracts inter praesentes. "Put" means "placed" and "course" refers to "duration." When parties conclude a contract by conversation, it is obvious that the acceptance is spoken rather than "put in a course of transmission." Thus the case of formation of contracts by the use of new inventions, as also the antique method of formation of contract by conversation face to face, fall outside the domain of sections 3 and 4.

Second, the language of section 5 is plainly inapplicable to contracts inter praesentes.[11] This section empowers the offeree to revoke his acceptance at any time before or at the same time it comes to the knowledge of the offeror. Now, if in instantaneous contracts an acceptance were to become complete on despatch as in postal contracts under the law, as suggested by the learned dissenting justice, there would hardly be any scope for revocation of an acceptance.

When parties are separated by distance and use the post as a means of communication, it is obvious that the reaching of acceptance must take some time before it comes to the knowledge of the offeror. The offeree, meanwhile, therefore, has an opportunity to reclaim his acceptance by an overtaking communication. Thus, as a matter of fact, an ordinary letter may be overreached by an express letter, telegram, telephone, etc. This, however, cannot be said of an uttered acceptance. If such an acceptance were to become effective when spoken into the transmitter, and to create a contract *eo instanti*, the acceptor, as a matter of fact, will have no opportunity to retract his acceptance, contrary to the power he can exercise in formation of a contract inter absentees. Again, the theory of two units of time for an effective acceptance,[12] one "as against the proposer" and the other "as against the acceptor" point out that the legislature thought of a reasonable amount of gap between the despatch of acceptance and its receipt. Thus the provisions of sections 4 and 5 were intended to apply, as they

11. See *supra* at 454-55 for the text of the section.
12. See Indian Contract Act, 1872, § 4, quoted at 454, *supra*.

do apply, to cases of formation of contracts inter absentees, and not to cases of formation of contracts inter praesentes.

Third, the illustrations appended to sections 4 and 5 deal only with postal contracts. Although, as a rule, illustrations appended to sections are not treated as exhaustive of the scope of a section, here they indicate fairly well, in the context of the language of the above sections, the mind of the drafters that they had not thought of providing for cases other than postal contracts.[13]

Lastly, the Indian Contract Act is not exhaustive. According to to its preamble, the Act was intended "to define and amend certain parts of the law relating to contracts." The Privy Council has held in a number of cases that the Indian Contract Act is not exhaustive.[14] In England, until the year 1872, in which year the contract law in India was brought on the statute book, no significant development had taken place regarding the formation of contracts face to face or through instantaneous means of communication.[15] So the English drafters of the Act, being preoccupied with postal contracts which engaged the attention of English courts as early as 1818 when the celebrated case of *Adams* v. *Lindsell*[16] was decided, may not have thought of formation of contracts by any other mode.

The Indian provisions, thus, do not cover cases of formation of contracts by telephone or by any other method of instantaneous communication. In view of this gap, the Court was left to apply any theory of acceptance in consonance with the principles underlying justice, equity and good conscience. The view of the majority that, in the instant case, the receipt theory of acceptance should be applied is sound and can further be supported on the following equitable grounds:

First, the reason of the rule making acceptance complete on despatch in postal contracts does not apply in instantaneous contracts. As a rule, an offer without consideration, being *nudum pactum*, is revocable,[17] even though the offeror promised to keep it open for a specified time and even though the offeree incurred expenses in detrimental reliance on it.[18] The rule of consideration, thus, gives the offeror an unbridled power of revoking his offer at any time before acceptance.

13. This writer does not agree with the recommendation of the Law Commission of India expressed in the *Thirteenth Report* (*Contract Act, 1872*) 14 (1958) that illustrations be abolished from the Indian Contract Act.

14. *Irrawaddy Flotilla Co.* v. *Bugwandass*, (1891) 18 I.A. 121, at 129 (P.C.); *Jwaladut* v. *Bansilal*, A.I.R. 1929 P.C. 132, 133-34.

15. Remarks of Hill, J., in *Newcomb* v. *De Roos*, [1859] 121 E.R. 103, 104, regarding the formation of contract inter praesentes, were disapproved by Denning, L. J., as he then was, in *Entores, Ltd.* v. *Miles Far East Corpn.*, *supra* note 7, at 495.

16. [1818] 1 B. & Ald. 681.

17. See Indian Contract Act § 5 and § 25.

18. *Schonlank* v. *Muthunayana Chetti*, (1892) 2 M.L.J. 57; *Adaitya Dass* v. *Prem Chand*, A.I.R. 1929 Cal. 369.

The despatch rule in contracts inter absentees by treating the acceptance as binding upon the offeror (although not upon the offeree under the Indian law) from the time of posting cuts short the period of revocation available to an offeror under the rule of consideration. It also enables the offeree to know the time of creation of the contract which (subject to withdrawal of acceptance by him) springs from posting of acceptance, and to avoid the risk of delay or loss of acceptance in transit. In instantaneous contracts, on the other hand, the offeree is required to make acceptance without loss of time. And since, generally, there can be no question of detrimental reliance on the offer in such cases, the question of protection of the offeree from revocation of an offer under the despatch rule does not arise here. It is, therefore, necessary to apply the ordinary rule, based on human nature and human expectations, that an acceptance is complete only when it is communicated to, *i.e.* received by, the offeror.

Second, it is in the interest of uniformity in international trade and commerce that the receipt theory in contracts inter praesentes which prevails in many countries of the West and in the English common law should be accepted.[19] At least in the common law orbit, there should be as large a measure of agreement on the subject as is possible. The receipt theory of acceptance in contracts inter praesentes fits well the fabric of the law of offer and acceptance in India and is, doubtless, suited to the needs of business and commerce. Under this theory, a businessman may be tempted to initiate a bargain by making an offer by instantaneous communication to the other party so as to invest jurisdiction in a court at a place of his own choice, where of course, he must receive acceptance. Through this technique, he can also avoid the hazards of postal communications attendant in correspondence contracts which will make him liable in law.

In sum, the application of the receipt theory of acceptance to instantaneous communications, which are not covered by the Indian Contract Act, is welcome and must be adhered to.

More far-reaching are the observations of their Lordships (in the majority judgment) that the expression "justice, equity and good conscience" which is to guide the courts when the Indian Contract Act is silent on a situation, has been "consistently interpreted to mean the rules of English common law, so far as they are applicable to the Indian society and circumstances."[20] It is submitted that their Lordships were not only summarizing an historical evolution as to the interpretation

19. In *Entores, Ltd.* v. *Miles Far East Corpn.*, *supra* note 7, Lord Justice Denning, as he then was, while adopting, in instantaneous contracts, the receipt theory of acceptance which prevails in most of the European countries, remarked: "In a matter of this kind, however, it is very important that the countries of the world should have the same rule." *Id.* at 496.

20. *Supra* note 1, at 549.

of the expression justice, equity and good conscience, but were also laying down a rule of judicial guidance for the lower courts in India on problems which may arise outside the Indian Contract Act.

During the British regime, the courts had uniformly laid down, as a rule of law, that whenever a given situation could not be dealt with by the Indian Contract Act, the principles of English law, if applicable to Indian circumstances, would be attracted on the basis of justice, equity and good conscience.[21] As early as 1887, Lord Hobhouse, delivering the judgment of their Lordships of the Privy Council (in a case relating to personal covenant by a guardian to bind the infant ward by it for which there was no express provision in Indian law) said :

> In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India.[22]

This dictum was reiterated by the Judicial Committee in a subsequent case[23] dealing with the application of the English maxim : "once a mortgage, always a mortgage," in relation to section 60 of the Transfer of Property Act, 1882, which deals with the mortgagor's right to redeem.[24] The courts in India have followed the dictum,[25] and the Supreme Court has, in the instant case, cemented it.[26]

Doubtless, under the existing law, the principles underlying justice, equity and good conscience must apply in situations outside the Act.[27] But this does not necessarily mean that we should look to English common law alone for guidance. The change from serfdom to freedom

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21. *Waghela Rajsanji* v. *Shekh Masludin*, (1887) I.L.R. 11 Bom. 551, 561 (P.C.) ; cases cited in *supra* note 15 ; *Khan Bahadur* v. *Makhna*, A.I.R. 1930 P.C. 142, 143 ; *Maung Sein Done* v. *Ma Pan Nyun*, A.I.R. 1932 P.C. 161, 164 ; *Tarachand* v. *Syed Abdul Razak*, A.I.R. 1939 Sind 125, 126 and *Devendra Kumar* v. *Gulabsingh*, A.I.R. 1946 Nag. 114, 116, which cited Waghela case (*supra*) as an authority ; *Gajanan Moreshwar* v. *Moreshwar Madan*, A.I.R. 1942 Bom. 302, 304.

22. *Waghela Rajsanji* v. *Shekh Masludin*, *supra* note 22.

23. *Khan Bahadur* v. *Makhna*, A.I.R. 1930 P.C. 142, 143.

24. In *Khan Bahadur* v. *Makhna*, *supra* note 22, Lord Tomlin said :

> In *Waghela Rajsanji* v. *Masludin* . ., Lord Hobhouse pointed out that a direction to decide by equity and good conscience was generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances. The terms of S. 60, T.P. Act are an indication that the rules of English law relating to a mortgagor's right to redeem are applicable to Indian society and circumstances. There is no indication to the contrary. The matter must therefore be determined by the rules of English law.

Id. at 143.

25. See *supra* note 22.

26. According to article 141 of the Indian Constitution, the law laid down by the Supreme Court has the force of a precedent and binds all the (lower) courts within the territory of Indian. See I.C. Saxena, "The Doctrine of Precedent in India : A study of Some of Its Aspects," 3 *Jaipur L.J.* 188 (1963).

27. See *supra* note 1, at 549.

in India should enable us to think independently and accept suitable solutions whether English, American, Continental or those worked out purely from local circumstances. The theory advocating English Law, even with a proviso, is unsuitable to the Indian society and circumstances, and is an unhealthy induction into our legal system. It will be conducive to the growth of a healthy system of administration of justice in free India, if the higher judicial authorities, on the one hand, refrain from *directing* the lower courts to apply English law even with a proviso in vacant[28] factual situations, and, on the other hand, they themselves analyze English and other solutions, as may be available, in the light of "Indian society and circumstances" and apply them purely on merits and not on mere considerations of uniformity within the common law orbit.[29] The responsibility for providing new solutions lies with distinguished scholars who must grapple with imaginary factual situations and provide choices of solutions to courts.[30]

In the end, while the minority's view as to the formation of contracts inter praesentes cannot be accepted, its warning as to English law, whenever a factual situation falls within the framework of the Indian Contract Act, is quite sound. The majority's view, on the other hand, as to the formation of contracts inter praesentes is quite sound, but its view as to the relevance of English jurisprudence on new problems in India cannot be accepted.

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28. "Vacant" here means a situation which does not fall within the four walls of the Indian Contract Act, 1872.

29. In the Privy Council case of *Imambandi* v. *Mutsaddi*, (1918) 45 I.A. 73 Mr. Justice Ameer Ali delivering the judgment of their Lordships, said:

> Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence reference to judgments of foreign courts, to which Indian practitioners cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, is only likely to confuse the administration of justice.

Id. at 93.

Obviously, 'foreign Courts' mean courts other than Indian and English. These observations are made in the last paragraph of the judgment, after their Lordships in the preceding paragraph have tendered their advice to His Majesty. This seems to be contrary to practice. Anyhow, it is not intended to enter into the legal value of the observations.

This view, however, cannot be accepted today. Our accessibility to foreign legal material in our libraries has, since Independence, very much improved. The Indian Law Institute, as a forum for developing comparative law, has emerged. The Bar Council of India has rightly listed compartive law as a compulsory study in the new curriculum of a three-year LL.B. degree course. The Indian Judiciary, therefore, cannot shut out foreign solutions which suit our society.

30. This would, however, entail a heavy duty on the Indian Law Institute to collect, from time to time, a group of Indian and foreign scholars who would do fruitful legal research keeping in view the Indian society and circumstances and needs of the nation. Some law seminars in future should be at least partly problem oriented and must invite distinguished men from different fields of law, including some representation of those on whom the law may have to be applied. Varying solutions to problems should be discussed, bearing in mind their over-all effect on our masses.

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