OFFER AND ACCEPTANCE—A CENTENNIAL SURVEY

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THE INDIAN Contract Act, 1872, (hereinafter referred to as the Act) defines "proposal" and "acceptance".[1] It, however, uses both proposal and offer,[2] obviously in the same sense. In practice, these terms are used interchangeably.[3]

The purpose of this writing is to survey the main trends on the subject in the light of the recommendations of the Law Commiossion of India (1955) and to suggest necessary changes in the Act.

I. Offer and acceptance

Under the Act, a contract is formed by the sequence of offer and acceptance. This view has been emphasised in an Allahabad case.[4] Strictly speaking, it does not hold ground in recent decisions, as stated below, relating to formation of a contract of sale under the Sale of Goods Act, 1930. Under entry 54 of List II of seventh schedule of the Constitution of India, the states may legislate in matters relating to *sale of goods*. The Supreme Court has held that this expression bears the same meaning as under the Sale of Goods Act, 1930.[5] There, under section 4, a contract

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1. S. 2(a) of the Indian Contract Act defines a proposal thus:
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.
S. 2(b) of the Indian Contract Act defines an acceptance thus:
When the person to whom the proposal is made signifies his assent thereto the proposal is said to accepted. A proposal, when accepted, becomes a promise.

2. See ss. 37 and 38 of the Indian Contract Act.

3. See the judgment of Justice Fazal Ali in *MacPherson* v. *Appanna*, A.I.R. 1951, S.C. 184, where throughout the judgment, the term 'offer' has been used in lieu of the statutory term proposal.

4. In *Deep Chandra* v. *Sajjad Ali Khan*, A.I.R. 1951 All. 93 at 97, Justice Seth said:
...the theory of 'offer and acceptance' has received statutory recognition in this country, so that, every contract, must originate in a proposal and every transaction to be recognized as a contract must, in its ultimate analysis resolve itself into a proposal and its acceptance.

5. *State of Madras* v. *G. Dunkerley & Co.*, A.I.R. 1958 S.C. 560 (five-judge bench).

of sale includes sale as well as an agreement to sell[6], and under section 5, It is constituted "by an offer to buy or sell goods for a price and the acceptance of such offer." The definitions of proposal (offer) and acceptance as given in the Contract Act are adopted in the Sale of Goods Act.[7]

The question has arisen in many cases, whether the goods supplied under statutory directions where the prices were fixed by control orders, amount to (contracts of) sale.

In the first landmark case of *New India Sugar Mills* v. *Commissioner, Sales Tax*,[8] the Sugar Controller of India, under the Sugar Products Control Order, 1946, directed the mills to despatch certain quantity of sugar to the Madras State. The state had instructed the mills about the mode of payment also. The majority, consisting of Justices Shah and Kapoor, held that there was no volition on the part of the mills. The State of Madras made no offer, and the mills made no acceptance. Hence no (contract of) sale. So the supply of sugar was not liable to salestax. It was pointed out that the definitions of proposal (as equivalent of the term offer used in the Sale of Goods Act) and acceptance, as given in the Indian Contract Act were in corporated in the Sale of Goods Act by its section 2(15).

Justice Hidayatullah, in his dissenting judgment, emphasised that a valid sale could take place even where the price is fixed by the law. In such a case, there is an implied contract between the parties as to the price. In other words, sale may be voluntary as well as involuntary. The *ratio* of the majority judgment was followed by a division bench of the Calcutta High Court[9] and by a single judge of Punjab and Haryana High Court,[10] with the result that the supply of coal in the first case and of bricks to permit-holders in the second, under statutory directions in each case, were not regarded as sale and hence not liable to salestax.

Later, a five-judge bench of the Supreme Court[11] in *I.S. and W. Products* v. *State of Madras*,[12] unanimously held :

> So long as mutual assent is not completely excluded in any dealing, in law it is a contract.[13]

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6. *Id.* at 566.
7. S. 2(15) of the Sale of Goods Act, 1930, reads:

> expressions used but not defined in this Act and defined in the Indian Contract Act 1872, have the meanings assigned to them in that Act.

See, to similar effet, s. 3 of the Act.

8. A.I.R. 1963 S.C. 1207.
9. *S.K. Roy* v. *Board of Revenue*, A.I.R. 1967 Cal. 338.
10. *Jaswant Singh* v. *E. and T. Officer*, A.I.R. 1967 Punj. and Har. 359.
11. The bench consisted of Wanchoo, C.J., Bachawat, Ramaswami, Mitter and Hegde, JJ.
12. A.I.R. 1968 S.C. 478.
13. *Per* Hegde, J. *id*, at 485. The appeal from the judgment of the High Court was dismissed.

Herein the essential point was that the controller fixed the price. He also fixed up the buyers. The time for supply of the goods and mode of payment of the price thereof were left undetermined. Since the transaction was not completely regulated by law and there was some scope for contractual freedom, although in a small measure, the dealings between the parties constituted a contract of sale.

Same month in *Andhra Sugars Ltd.* v. *State of A.P.*,[14] the same bench reiterated its previous view. Referring to *Dunkerley* case,[14a] Justice Bachawat delivering the unanimons judgment of the court, observed :

> But the court did not say that if one party was free to make an offer of sale and the other party was obliged by law to accept it and to enter into an agreement for purchase of the goods a contract of sale did not result.[15]

Again referring to *New India* case, the learned Justice spoke:

> That decision should not be treated as an authority for the proposition that there can be no contract of sale under compulsion of a statute. It depends upon the facts of each case and the terms of the particular statute regulating the dealings.[16]

In the *Andhra Sugars* case, the statute concerned regulated the bargaining powers of the factory owners to purchase sugarcane at the terms dictated by them. It obliged a factory owner to purchase sugar cane as per the prescribed terms and conditions, if it be offered to him for sale by the canegrower. Such an arrangement was held to be a contract of sale under section 4 of the Sale of Goods Act and enforceable at law.

The court opined that there has been an erosion of the philosophy of *laissez-faire* in the twentieth century. It stated that compulsion of law is not coercion; on the other hand, in such a case, there is mutual assent and the vitiating causes such as coercion, undue influence, fraud and misrepresentation, as stated in the Act, are absent. The court also referred to the element of "willingness" found in the definitions of proposal and acceptance.[17]

A similar question arose in yet another Supreme Court case of *State of Rajasthan* v. *Karam Chand*.[18] In this case, there was an agreement between the State of Rajasthan and the agent of a coal company for the supply of coal to the former. Only the price was regulated by a coal

14. A.I.R. 1968 S.C. 599.

14a. *Supra* note 5.

15. *Supra* note 14 at 605.

16. *Id.* at 606.

17. *Id.* at 604.

18. A.I.R, 1969 S.C. 343. The case was decided by a three-judge bench, consisting of Shah, Ramaswami and Grover, JJ. The appeal from the judgment of the Rajasthan High Court was allowed.

control order. The court held that the mere factum of superimposition of the price on the bargain of the parties did not exclude their transaction from the domain of contract. It was emphasised that the parties were competent to contract and they had also manifested their mutual assent in the agreement. The reliance of the Rajasthan High Court on the *New India* case was not accepted by the Supreme Court, because as against the instant facts, there was no mutual assent in that case.[19] The transaction was held to be one of *sale* and therefore liable to tax under the Rajasthan Sales Tax Act.

In a full-bench decision of the Allahabad High Court,[20] the assessee had supplied wheat to the state government under a levy order which made it obligatory for a licensed dealer to sell 50% of certain wheat stocks to the state government. The latter was bound to purchase wheat, unless it decided to stop its purchase. The price was fixed under a control order. Justice Pathak held that since the order covered only a licensed dealer, whose business it is to sell wheat, the transaction is necessarily a sale. He also stated that the time of delivery and mode of payment were left for negotiation between the parties. The transaction was held to be a sale.[21]

The net conclusion is thus: The emphasis on the conceptualism of proposal (offer)[22] and acceptance so strongly made in the majority judgment of the *New India* case has in later decisions of the Supreme Court, waned virtually to the point of extinction, irrespective of the similarity or dissimilarity of the factual situations. In essence, the statutory doctrine of offer and acceptance has yielded to a judicial doctrine of mutual assent, interpreted too widely. What was hitherto considered as essentials for a valid contract, *i.e.*, volition (at least non-compulsion) on the part of the parties to enter into a bargain and liberty of fixing up the price of goods as they like, do not any longer hold the sway. Henceforth the minimum amount of contractual freedom, despite the absence of these two factors and their regulation by law, is sufficient to label a transaction as contract, provided the parties are competent to contract and there are no vitiating causes like fraud.

II. Offer and invitation to offer

Auction cases

The Contract Act, 1872, contains no special provisions relating to formation of contract at an auction sale. Generally speaking, the ordi-

19. All the previous decisions of the Supreme Court on the subject were explained in this case.

20. *Commr. Sales Tax* v. *Ram Bilas Ram Gopal*, A.I.R. 1970 All. 518 (F.B.).

21. Justice Gulati agreed with this judgment. Justice Beg gave a separate but concurring judgment.

22. S. 5 of the Sale of Goods Act, 1930, makes a reference to "an offer to buy or sell goods for a price...." The element of price, which is to be fixed by the consent of the parties, has not received due recognition by the courts.

nary rules relating to offer and acceptance apply in the case of an auction sale also. Section 64(2) of the Sale of Goods Act, 1930, however, provides:

> The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid.

This provision governs only auction sales. The question has arisen in too many cases, whether a bid at an auction, which is subject to confirmation by the authorities, is an offer or an acceptance.[23] The courts have held that a bid is merely an offer which can be withdrawn at any time before its confirmation by the authorities. Until then there is no acceptance and the bidder has power to withdraw his bid (*locus poenitentieae*). This view has in recent years been confirmed by the Supreme Court.[24] Where an auction is not subject to approval, the bid nevertheless constitutes an offer which may be accepted by the auctioneer.

The difficulty, however, arises where the auction sale is announced to be without reserve or to the highest bidder. There are two old conflicting decisions on the subject : One holds that the bid is still an offer[25] and the other that it is an acceptance so that the auctioneer cannot refuse to sell the subject-matter of the bid to the highest bidder.[26] The controversial English case of *Warlow* v. *Harrison*[27] became the target of attack in the first case and of approval in the second.[28] This specific problem as yet awaits a final solution.

Ths case of *Rajah of Bobbili* v. *Suryanarayana*[29] raised a noval situation. Before confirmation of the bid, the highest bidder died. The authorities attempted to accept the second highest bid. It was held that in an auction sale each preceding bid is superseded by the immediately next higher bid for "it would be impossible to rest an auction sale on any principle, if the contrary were the case".[30]

23 *Kenaram* v. *Kailash Chandra*, (1913) 19 I.C. 904 (auction sale of mortgagor's property in execution proceedings); see *Muthu Pillai* v. *Secy. of State*, A.I.R. 1923 Mad. 582 (auction sale of a house); *Venkataswami* v. *Narasayya*, A.I.R. 1965 A.P. 191 (auction sale of right "to collect fees in weekly and daily markets and the cart stands...."; *Abdul Rahim* v. *Union of India*, A.I.R. 1968 Pat. 433 (auction sale of evacuee property); *Linga Gowder* v. *State*, A.I.R. 1971 Mad. 28 (auction sale of certain lease-hold rights).

24. *M/s Bombay Salt and Chemical Industries* v. *L.J. Johnson*, A.I.R. 1958 S C. 289; *Union of India* v. *B.W.* Ram, A.I.R. 1971 S.C. 2295.

25. *Jora Varmull* v. *Jeygopaldas*, A.I.R. 1922 Mad. 486.

26. *Abdul Azizkhan* v. *Municipal Committee*, A.I.R. 1924 Nag. 227.

27. (1859) 1 E. and E. 309.

28. See Schlesinger (General Editor), *Formation of Contracts* (*A Study of the Common Core of Legal Systems*) 422-23 (1st ed. 1968).

29. A.I.R. 1920 Mad. 911.

30. *Id.* at 913.

By and large, the law of auction sale is well settled.

Tender cases

The question relating to formation of contract in tender cases has come before the courts on numerous occasions. The general principles of offer and acceptance apply in these cases. It has thus been held that a tender notice or advertisement calling for tenders is an invitation to offer, tender an offer and posting of its acceptance concludes a contract.[31] Here the tender cases do not present any complicated problem.

In recent years, a new problem of magnitude has arisen on the subject.[32] Sometimes governments or large bodies invite tenders for supply of certain goods at stated intervals or subject to the requirements of the advertiser. The Madras High Court in these cases made detailed references to the English case of *Percival Ltd.* v. *London County Council Asylum and Mental Deficiency Co.*[33] In this English case, Justice Atkin made the following classification of requirement tenders :

1. Sometimes parties make a firm contract "by which the purchasing body undertakes to buy all the specified material from the contractor."[34]
2. Sometimes the purchasing body does not undertake to purchase any goods from the tenderer. If, however, an order for goods is placed within the stipulated period the contractor is obliged to carry it out.
3. "Although the parties are not bound to any specified quantity, yet they bind themselves to buy and pay for all the goods needed by them".[35] There is a contract in this case.

The Madras cases relied on these propositions.[36] Due to expansion of economic needs, more complicated situations may, however, come before the courts.

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31. *Kundan Lal* v. *Secy. of State*, A.I.R. 1939 Oudh 249 (advertisement asking for tenders in printed form); *N.P. Singh* v. *Forest Officer*, A.I.R. 1962 Manipur 47 (tender notice for extraction and supply of timber); *M/s Chiranj Lal* v. *Union of India*, A.I.R. 1963 Punj. 372 (tender for supply of gram to Government); *S.P.C. Engineering Co.* v. *Union of India*, A.I.R. 1966 Cal. 259 (tender notice for construction work); *L. Devi* v. *U.P. State Govt.*, (1966) 64 All. L.J. 1118 (tenders were invited for the supply of certain commodities); *Firm Lakshminarayana* v. *State*, A.I.R. 1967 Mys. 156 (tender notice by government for purchase of cocoons); *Sadhoo Lal* v. *State of M.P.*, A.I.R. 1972 All. 137, (here the court allowed forfeiture of earnest money for withdrawal of the tender by the tenderer before acceptance. But the claim for *damages* was disallowed).

32. *Manickam Chettiar* v. *State*, A.I.R. 1971 Mad. 221; *Murthy and Bros* v. *State*, A.I.R. 1971 Mad. 393. See generally *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*, A.I.R. 1954 S.C. 236.

33. (1918) L.J. K.B. 677.

34. This quotation is given in *Manickam Chettiar* v. *State*, *supra* note 32 at 226.

35. *Ibid.*

36. For details, see I.C. Saxena, Law of Contract, VII *A.S.I.L.* (1971).

Miscellaneous cases

The courts have held that an enquiry about price or a letter asking for estimnte of repairs of a watch does not constitute an offer.[37] Similarly, the Privy Council has held in *S.A. Bonk, Travancore* v. *Dhrit Ram*,[38] that where forms are sent by a bank in response to a request from a customer, there is no offer.

In *MacPherson* v. *Appanna*,[39] decided by the Supreme Court, during negotiations for the sale of a house, the defendant-owner's agent wired to the plaintiff: "Won't accept less than rupees ten thousand." The plaintiff accepted this statement. It was held, approving the decision of the Privy Council in *Harvey* v. *Facey*,[40] that this statement is not an offer, which when accepted, would create a binding contract. The statement, however, of an owner of a house that : "I intend to have Rs. 7,000,"[41] was held to be an offer. It thus depends upon the facts of each case whether or not the words amount to offer.

The Indian courts have not been concerned with formation of contract in cases of self-service stores, automatic vending machines and things placed in windows of shops with price-tickets. The English common law principles would seem to apply to these cases.[42]

Recently the question of an offer has arisen in the context of jurisdiction of a criminal court.[43] In this case, the All India Reporter Ltd., filed a criminal complaint against certain persons in Nagpur. The important question before the trial magistrate was whether the criminal court at Nagpur had jurisdiction to proceed under the Copyright Act, 1957, although the authors and publishers were residing in Allahabad. An advertisement regarding the sale of the books, which allegedly infringed copyright of the complainant, was allegedly contained in Rajasthan Law Weekly and Laws and Flaws which had reached Nagpur from other states.[44]

The Copyright Act, 1957, though has provision as to the place of suing in civil cases, has none in criminal cases. The situation, therefore, is governed by Chapter XV of the Criminal Procedure Code. The main question is where the offence was completed. Under the Copyright Act, 1957, a work is deemed to be infringed (*b*) when any person (*i*) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale of hire or....[45]

37. *Ratan Lal* v. *Har Charanlal*, A.I.R. 1947 All. 337 (letter of enquiry); *Dalpatri* v. *West End Watch Co., Bombay*, A.I.R. 1953 Madh. B. 38.
38. A.I.R. 1942 P.C. 6.
39. *Supra* note 3.
40. (1893) A.C. 552 (P.C.).
41. *Surendra Nath* v. *Kedar Nath*, A.I.R. 1936 Cal. 87, 89.
42. See *infra* note 55.
43. *J.N. Bagga* v. *A.I.R. Ltd.*, 1969 Bom. 302.
44. *Id.* at 304-5.
45. S. 51(b)(i) the Coppyright Act, 1957.

The provision is based on the English Copyright Act of 1956. There are no cases, English or Indian, which explain the meaning of the phrase "offers for sale." The additional sessions judge who referred the point to the High Court stated that an offer for sale does not include an advertisement. The complainant argued that the phrase, "offers for sale", must be understood "in generic or dictionary sense"[46] and that this expression should not be confused with the definition of proposal as given in section 2(*a*) of the Contract Act.[47] The counsel for the applicants argued that the word, "offer", has always been understood in English law as a proposal, the acceptance of which leads to a contract and that newspaper advertisements are never considered as proposals (offers) by Indian courts. Support for this view was drawn by referring to the decision of the Supreme Court in the *MacPherson* case. The High Court distinguished the above judgment of the Supreme Court, which it thought had to be decided in the context of the Act. Similarly, it pointed out that the decision of the Queen's Bench in *Fisher* v. *Bell*[48] was of limited assistance. Justice Deshmukh, who delivered the judgment, said that "that judgment deals with a different statute (Restriction of Offensive Weapons Act, 1959), having a different purpose and a different language."[49] He held that the expression "by way of trade" controls the meaning of both the expression "displays" and "offers for sale." So offers for sale include advertisements. Since the said periodicals were "for the time being"[50] *assumed* by the court to have circulation in Nagpur, the Nagpur criminal courts would have jurisdiction. The court therefore, dismissed the revisions and remanded the case to the lower court. Perhaps the case has not gone in appeal to the Supreme Court.

In another Bombay case, however, the question of offer of bribe was determined in accordance with the settled notion of offer as given in the Act.[51]

III. Contract by telephone

The law relating to communication of proposal and acceptance and their revocation is contained in sections 3, 4, 5 and 6 of the Act. The parties may form the contract by correspondence as by letters and telegrams, or by instantaneous means of communication as by telex, telephone or face to face.

Neither the revocation of proposal and acceptance nor formation of

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46. *Supra* note 43 at 305.
47. See *supra* note 2.
48. (1961) 1 Q.B. 304.
49. *Supra* note 43 at 307 (parenthesis supplied).
50. *Id.* at 305.
51. See *Damodar* v. *State*, A.I.R. 1955 Bom. 61, where the question was whether the re was an offer of a bribe under s. 165-A of the Indian Penal Code.

a contract by letters and telegrams has raised any complicated problems.[52]

Recently the question of formation of contract by telephone has arisen twice. And this has created a controversy whether the Act deals with such a situation. In the first reported case on the subject,[53] the Madhya Pradesh High Court answered the question in the negative. It relied on the decision of the Court of Appeal in England in *Entores, Ltd.* v *Miles Far East Corp.*,[54] and held that a contract by telephone is made when the offeree's acceptance is heard and understood by the offeror.

When the same question was presented before the Supreme Court in *Bhagwandas* v. *Girdharlal & Co.*,[55] it led to its divided opinion. In this case, plaintiffs from Ahmedabad made an offer by telephone to the defendants at Khamgaon to purchase certain goods. The defendants, in reply, accepted this offer by telephone from Khamgaon. This resulted in a contract. 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. This necessarily involved the question as to the time when such a contract by telephone is concluded.

The majority consisting of Justices Wanchoo and Shah held that this problem is not governed by the Act since its draftsmen "did not envisage use of the telephone as a means of personal conversation between parties...."[56] It pointed out that the general principle of formation of a contract is that the acceptance should be received by the offeror. The correspondence and telegram cases provide an exception to this rule because of commercial expediency. Having regard to the nature of telephonic conversation, the majority held that "communication of acceptance is a necessary part of the formation of contract. .."[57] It, therefore, did not think fit to engraft another exception to the general rule. The majority also suggested that in cases not governed by the Act, the principles of equity, justice and good conscience would apply. This means that the principles of English law will apply unless Indian conditions are different.[58] It noted the English decision in the *Entores* case and adopted its principle here. Thus a contract by telephone is made at the place where and at the moment when the offeror receives the acceptance.

Justice Hidayatullah, in his dissenting opinion, opined that the formation of contract by telephone was covered by the language of section

52. See *Baroda Oil Cakes Traders* v. *Parshottam*, A.I.R. 1954 Bom. 491.
53. *Firm Kanhaiyalal* v. *Dinesh Chandra*, A.I.R. 1959 M.P. 234.
54. (1955) 2 All E.R. 493.
55. A.I.R. 1966 S.C. 543.
56. *Id.* at 550.
57. See *ibid.*
58. *Id.* at 549.

4 of the Act.[59] He considered that the reference to the English decision was unnecessary because the court there was not required to interpret the words of section 4. He cautioned that "every new development of the common law in England may not necessarily fit into the scheme and the words of our statute".[60]

The principle laid down by the majority would apply to all cases of formation of contracts made by instantaneous means of communication.

IV. Meaning and mode of acceptance

Excepting the case of statute-born contracts, a person is not bound to accept an offer.[61] Unless there is an unqualified acceptance, there is no contract.

Unqualified acceptance

Under section 7 of the Act, an acceptance to be effective must be absolute and unqualified. It is a question to be determined in each case, on the basis of facts, whether or not the acceptance is conditional. The Sind court has held that a minor variation in the terms of acceptance, with those of offer will not nullify the acceptance.[62] A conditional acceptance creates no contract; it is a rejection of the original offer and acts as a counter-proposal.[63]

In *Badri Prasad* v. *State of M.P.*,[64] decided by the Supreme Court, the plaintiff entered into an agreement with another to fell trees on the latter's land for some consideration. This land became vested in the government under a statute. Under the above contract-terms, the government prohibited the plaintiff from felling the trees. On February 1, 1955, it wrote to the latter :

> Kindly inform whether you are ready to pay further Rs. 17,000.... This contract can be given to you on this compromise only.[65]
> The plaintiff replied :
> I am ready to pay Rs. 17,000 provided my claim to have the refund of Rs. 17,000 already paid...or any other relief consequential to the judgment of that case remains unaffected. I reserve my right to claim the said or like amount. Subject to these conditions I shall pay Rs. 17,000 as required in your above referred letter.[66]

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59. *Id.* at 557.
60. *Id.* at 550.
61. *Thawardas* v. *Union of India*, A.I.R. 1955 S.C. 468; *P.S. Mills Ltd.* v. *P.S. Mills Mazdoor Union*, A.I.R. 1957 S.C. 95, 102.
62. (1908) 2 Sind L.R. 7.
63. See for example, *Moolji Jaitha & Co.* v. *Seth Kirodimal*, A.I.R. 1961 Ker. 21.
64. A.I.R. 1970 S.C. 706. See *Jawahar Lal* v. *Union of India*, A.I.R. 1962 S.C. 378.
65. A.I.R. 1970 S.C. 706 at 708.
66. *Ibid.*

The court held that the government's letter was merely an invitation to offer. It further observed as *obiter* that even if this letter be construed as an offer, the plaintiff had expressly made his acceptance conditional.

In another case,[67] decided by the Madras High Court, the offeree accepted the offer of employment in an unambiguous manner but added: "awaiting detailed letter." The court held that although this expression would mean that there was no final acceptance, here it did not make the acceptance as conditional. It was stressed that the words used must be construed in the context of the surrounding circumstances.

The question has arisen, in cases of offer to sell immovable property, whether the acceptance by the offeree expressing that it is "subject to the title being approved by the purchaser's solicitor"[68] is tantamount to a conditional acceptance. The Andhra Pradesh High Court has replied this question in the affirmative because there is no *consensus ad idem* between the parties. This has been held notwithstanding the provisions in section 55(2) of the Transfer of Property Act that, unless there is a contrary contract :

> The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer to the buyer the same.

If an offer is plainly accepted, the submission of some new matter for consideration of the offeror for inclusion in the deed of contract does not detract from an absolute and unqualified acceptance.[69]

Circuitous acceptance

Visweswaradas v. *Naryan Singh*[70] raised the novel question whether the filing of the plaint regarding suit for specific performance of the contract (and the service of the summons with a copy of the plaint to the defendant) amounts to acceptance of the defendant's offer. The court answered the question in negative because the plaintiffs did not thereby intend to accept the offer and to communicate the acceptance through the process of the court.

The court stressed that a business offer is not usually accepted by a plaint. This view finds support from section 7(2) of the Act whereunder the acceptance must be "expressed in some usual and reasonable manner." Whether or not the offeree has adopted this method depends upon the facts and circumstances of each case.

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67. *Minakshi Mills Ltd.* v. *Anantarama Ayyar*, A.I.R. 1930 Mad. 654.

68. *P. Venkanarayana* v. *R. Chinna Reddy*, A.I.R. 1959 A.P. 256, 259.

69. *Sir Mahomed Yusuf* v. *Secy. of State*, A.I.R. 1921 Bom. 200. See for details (and also for a comparative study) of Indian law 2 Schlesinger, *supra* note 28.

70. A.I.R. 1969 S.C. 1157.

Acceptance by silence

Silence means inaction. It would, therefore, exclude cases of acceptances by conduct. Although under section 7(2) the offeror may prescribe a method of acceptance, he cannot prescribe silence as a manner of acceptance. This has been held in numerous Indian cases, following the English case of *Felthouse* v. *Bindley*.[71] This principle is in consonance with the reasons of common sense because otherwise numerous contracts will result by mere omission to reply to letters by unwilling contractors.

Acceptance by conduct

Law requires manifestation of acceptance, be it by express words, by conduct or otherwise.[72] The offeree's conduct if it corresponds to affirmation of the offer or tantamounts to its assent will be treated as acceptance. Thus where a tenant sends a cheque for the rent after deducting repairing expenses therefrom to the landlord who, without demur, encashes it, there is acceptance by conduct.[73] No communication of acceptance is necessary in such a case.[74]

Recently a few cases on the subject have arisen under sections 7 and 8 of the Act.

In a Patna case,[75] a government notification stated the minimum charges of electrical energy in terms of quantity consumed for industrial undertakings. The respondents continued to consume the energy, without demur, at least, until they filed the suit. It was rightly held that this amounted to acceptance by conduct. Here this inference was not difficult.

In an Allahabad case,[76] the plaintiff sent to the defendent several standard forms. These were required to be duly signed and then returned. The defendent returned some of them duly signed, but the rest were not returned. The plaintiff had read over to the defendant the prescribed terms, including the one referring to compulsory arbitration. There "was prior agreement...that the contract forms if not returned unsigned with a letter shall amount to acceptance of the transactions noted therein."[77]

The question before the court was whether omission of the defendant to send some contract forms amounted to acceptance under section 7 of the Act. The court quoted and examined sections 7 to 9 of the Act. It held that an acceptance may be express or implied; an implied acceptance may be made under section 8, which is merely illustrative and not exhaustive of the situations of the implied acceptance as shown in an earlier

71. (1863) 11 W.R. 429. *Haji Mahomed Haji Jiva* v. *E. Spinner*, I.L.R. (1900) 24 Bom. 510. There are other cases also on this point, see for example. *S.M. Bholat* v. *Yokohama Specie Bank*, A.I.R. 1941 Rang. 270, 272.

72. *Bhagwandas* v. *Girdharlal & Co.*, *supra* note 55.

73. *Behari Lal* v. *Radhye Shyam*, A.I.R. 1953 All. 745.

74. *Nalini* v. *Somasundaram*, A.I.R. 1964 Mad. 52.

75. *State* v. *Inderchand Jain*, A.I.R. 1968 Pat. 171.

76. *Gaddarmal* v. *C. Agarwal & Co.*, A.I.R. 1968 All. 292.

77. *Id.* at 295.

decision of this court in *Gaddarmal* v. *Tata Industrial Bank, Ltd.*[78] The court opined that acceptance can be made in forms other than mentioned in sections 7 and 8 and exemplified that if the parties agree they could validly stipulate that all books sent by a bookseller to a person if not returned by him within three days shall be deemed to have been purchased. A contract so formed was, in its opinion, neither against public policy nor vague or unreasonable.

In a Bombay case,[79] the court examined the scope of section 8 of the Act. Here through the negligence of the railway authorities certain goods were lost. The plaintiff served notice on the railways. He also stated that the railways were in the habit of sending cheques for smaller amounts in satisfaction of the full claim and forewarned that he would accept the cheque only as part-payment. The railways sent the cheque with the usual printed conditions, as expected. It was held that the plaintiff by his acceptance under these circumstances was not barred by section 63 of the Act, which deals with remission of performance of promise. The court stated that here sections 7 and 8 were to be read together. A conditional acceptance under section 7 did not operate as an unconditional acceptance under section 8. The court examined numerous cases before stating this conclusion.

These cases mark the development of the law of acceptance by conduct and define the scope of sections 7 and 8.

V. General offers and reward cases

An important area, which hitherto has not been a source of much litigation, relates to acceptance of an offer of reward. Broadly speaking, the question of an offer of reward may arise in the following three cases :

(*a*) Announcement of reward by a public body.

(*b*) Announcement of reward by a private individual.

(*c*) Award under the terms of a statute.

There have been two landmark reported decisions,[80] both by the Allahabad High Court on category (*b*), but apparently none on the remaining categories. In one of these two cases,[81] the court dismissed the plaintiff's claim to the reward on the ground that he was, *inter alia*, ignorant of the terms of the offer, when he had found the missing boy. In other words, knowledge of an offer is necessary to make a valid acceptance. This decision is, no doubt, in consonance with the principles of the English common law and the definition of the term proposal in section 2(*a*) of the Act. But, it is submitted, that it is too legalistic, and would, in some cases, at least, enable a promisor to wriggle out of his *bona fide* promise (proposal) to offer reward to the person who fulfils its terms. This High

78. A.I.R. 1927 All. 407.

79. *Union of India* v. *M/s Babulal*, A.I.R. 1968 Bom. 294.

80 *Lalman Shukla* v. *Gouri Dutt*, (1913) 11 All. L.J. 489; *Harbhajan Lal* v. *Har Charan Lal*, AI.R. 1925 All. 539.

81. *Lalman Shukla* v. *Gauri Dutt, supra* note 80.

Court, in another case on the subject,[82] gave a liberal construction to the terms of reward. Here the father of a missing boy advertised : "Anybody who finds trace of the boy and brings him home, will get Rs. 500". The plaintiff traced the boy with prior knowledge of the offer. He wired to the boy's father about recovery of the boy but did not literally take the boy home. Upholding the plaintiff's claim for reward, the court held that he had substantially fulfilled the terms of the reward to which he was, therefore, entitled.

The Allahabad theory of knowledge of offer, it is apprehended, would also apply to cases of rewards preferred by statutes. Section 168 of the Act, which deals with the rights of a finder of goods, recites :

> ...where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

The provisions do not seem to have been judicially interpreted. Pollock and Mulla support the knowledge theory.[83] Perhaps the courts would not approve the theory of statutory right because the Act adopts the principles of common law. In the context of social justness of the cause, it will be astute to adopt the latter theory.

The Law Commission of India, dealing with the recommendations on the Act, does not suggest changes in the formation of a contract of reward. While, it would be welcome to notice a liberal construction of the provisions of reward to enable a plaintiff to recover the proffered reward, this alone would not meet the inequitous results in other cases. It is submitted that the Act be so amended that it should not be obligatory on the plaintiff to prove his knowledge of the offer in the cases of (*a*) public rewards and (*b*) statutory rewards. The crux is the compliance with the terms of the offer of reward and not the technicality of its knowledge. The cases of private rewards may, however, for the time being continue to be governed by the existing law to avoid wholesale radical changes in the life of the nation.

VI. Loss of acceptance

A problem which hitherto has remained largely academic is the loss of the letter of acceptance during transit. This raises the controversy whether or not the acceptance is complete in law.

Section 4 of the Act states that an acceptance is complete "as against the person to whom it is made, when it comes to his knowledge." This has led to a belief that the offeror is not bound where the letter of acceptance goes astray because he has not received the knowledge of acceptance.

82. *Harbhajan Lal* v. *Har Charan Lal, supra* note 80.

83. Pollock and Mulla, *Indian Contract and Specific Relief Acts* 590 (8th ed, Setalvad and Gooderson 1957).

In a Bombay case,[84] Justice Gajendragadkar, however, held that :

> Even if the acceptance does not reach the proposer for the reason that it is lost or misplaced in transit, the contract would be complete....[85]

This view is in consonance with the English cases decided in the nineteenth century.[86] It sets at rest the controversy which might have arisen on an interpretation of the above provisions of the Act.

VII. Incomplete performance and acceptance

Section 8 of the Act reads : "Performance of the conditions of a proposal...is an acceptance of the proposal." In cases, where the offeror requires performance (*i.e.* an act) instead of a promise, the former constitutes an acceptance of offer. This would lead to the conclusion of a unilateral contract.

The Law Commission of India has doubted whether the expression 'performance of the conditions of a proposal' means a complete performance, or even partial performance is sufficient.[87] It is submitted that this view is not sound : the offeror is interested in complete performance which constitutes consideration for the offeror's liability to perform his part of the contract. The commission, in support of its views, has suggested the addition of the following provision to section 8 :

> In the case of a promise made in consideration of the promisee's performing an act, the promisee's entering upon the performance of the act is an acceptance of the proposal, unless the promise contains an express or implied term that it can be revoked before the act has been completed.

Thus the beginning of performance by the offeree in many cases will create a binding contract between the parties. To the extent that this provision does away with inequitous results which follow untimely revocation of a unilateral offer, it is welcome.

VIII. Conclusion

The Indian Contract Act contains simple rules relating to offer and acceptance which are largely, but not wholly, based on the English common law. These provisions have come in for elaboration during the course of a century. The development of the distinction between an offer and an

84. *Baroda Oil Cakes Traders* v. *Parshottom*, *supra* note 52.

85. *Id.* at 494.

86. See *Dunlop* v. *Higgins*, (1848) 1 H.L. Cas. 381; *Household Fire and Carriage Insurance Co.* v. *Grant*, (1879) 4 Ex. D 216.

87. Law Commission of India *Thirteenth Report* 17 (1958).

invitation to offer, the rules as to formation of contract in cases of auction sales (especially where such sale is announced to be subject to confirmation by the authorities), and tenders and telephonic conversations, has been on the lines of English law. The view of the majority of the judges of the Supreme Court in the *Bhagwandas* case that where the above Act is silent the English law should guide us on the basis of justice, equity and good conscience unless Indian conditions are different, would tend to eliminate experimentation with solutions unknown to English law. However, many new situations have not come before the courts.

The law relating to reward and unilateral contracts needs to be reformed as outlined in this survey.