MANU/SC/0065/1965

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IN THE SUPREME COURT OF INDIA

Civil Appeal No. 948 of 1964

Decided On: 30.08.1965

Bhagwandas Goverdhandas Kedia **Vs.** Girdharilal Parshottamdas and Co. and Ors.

Hon'ble Judges/Coram:
J.C. Shah, K.N. Wanchoo and M. Hidayatullah, JJ.

JUDGMENT

The Judgment of Wanchoo and Shah JJ. Was delivered by Shah J. Hidayatullah, J. delivered a dissenting Opinion.

J.C. Shah, J.

1. Messrs. Girdharilal Parshottamdas and Company - hereinafter called the plaintiffs - commenced an action in the City Civil Court at Ahmedabad against the kedia Ginning Factory and Oil Mills of Khamgaon - hereinafter called the defendants for a decree for Rs. 31,150/- on the plea that the defendants had failed to supply cotton seed cake which they had agreed to supply under an oral contract dated July 22, 1959 negotiated between the parties by conversation on long distance telephone. The plaintiffs submitted that the cause of action for the suit arose at Ahmedabad, because the defendants had offered to seed cotton seed cake which offer was accepted by the plaintiffs at Ahmedabad, and also because the defendants were under the contract bound to supply the goods at Ahmedabad, and the defendants were to received payment for the goods through a Bank of Ahmedabad. The defendants contended that the plaintiffs has by a message communicated by telephone offered to purchase cotton seed cake, and they [the defendants) had accepted the offer at Khamgaon, that under the contract deliver)' of the goods contracted for was to be made at Khamgaon, price was also to be paid at Khamgaon and that no part of the cause of action for the suit had arisen within the territorial jurisdiction of the City Civil Court Ahemedabad.

2. On the issue of jurisdiction, the Trial Court found that the Plaintiffs had made an offer form Ahmedabad by long distance telephone to the defendants to purchase the goods and that the defendants had accepted the offer at khamgaon, that the goods were under the contract to be delivered at Khamgaon and that payment was also to be made at Khamgaon. The contract was in the view of the court to be performed at Khamgaon, and because of the offer made from Ahmedabad to purchase goods the court at Ahmedabad could not be invested with jurisdiction to entertain the suit. But the court held that when a contract is made by conversation on telephone, the place where acceptance of offer is intimated to the offeror, is the place where the contract is made, and therefore the Civil Court at Ahmedabad had jurisdiction to try the suit. A revision applications filed by the defendants against the order, directing the suit to proceed on the merits, was rejected in limine by the High Court of Gujarat. Against the order of the High Court of Gujarat, this appeal has been preferred with special leave.

3. The defendants contend that in the case of a contract by conversation on telephone, the place where the offer is accepted is the place where the contract is made, and that

court alone has jurisdiction within the territorial jurisdiction of which the offer is accepted and the acceptance is spoken into the telephone instrument. It is submitted that the rule which determines the place where a contract is made is determined by Sections 3 and 4 of the Indian Contract Act, and applies uniformly whatever may be the mode employed for putting the acceptance into a course of transmission, and that the decisions of the courts in the United Kingdom, dependent not upon express statutory provisions but upon he some what elastic rules of common law, have no bearing in determining this question. The plaintiffs on the other hand contend that making of an offer is a part of the cause of action in a suit for damages for breach of contract, and the suit lies in the court within the jurisdiction of which the offeror has made the offer which on acceptance has resulted into a contract. Alternatively, they contend that intimation of acceptance of the offer being essential to the formation of a contract, the contract takes place where such intimation is received by the offerer. The first contention raised by the plaintiff is without substance. Making of an offer at a place which has been accepted elsewhere does not form part of the cause of action in a suit for damages for breach of contract. Ordinarily it is the acceptance of offer and intimation of that acceptance which result in a contract. By intimating an offer, when the parties are not in the presence of each other, the offerer is deemed to be making the offer continuously till the offer reaches the offeree. The offerer thereby merely intimates his intention to enter into a contract on the terms of the offer. The offeror cannot impose upon the offeree an obligation to accept, nor proclaim that silence of the offeree shall be deemed consent. A contract being the result of an offer made by one party and acceptance of that very offer by the other, acceptance of the offer and intimation of acceptance by some external manifestation which the law regards as sufficient is necessary.

4. By a long and uniform course of decisions the rule is well settled that mere making of an offer does not form part of the cause of action for damages for breach of contract which has resulted from acceptance of the offer: see Baroda Oil Cakes Traders v. Purshottam Narayandas Bagulia and Anr. MANU/MH/0130/1954 : AIR1954Bom491 . The view to the contrary expressed by a single Judge of the Madras High Court in Sepulchre Brothers v. Sait Khushal Das Jagjivan Das Mehta MANU/TN/0127/1941 : I.L.R. (1942) Mad. 243, cannot be accepted as correct.

5 . The principal contention raised by the defendants raises a problem of some complexity which must be approached in the light of the relevant principles of the common law and statutory provisions contained in the Contract Act. A contract unlike a tort is not unilateral. If there be no meeting of minds no contract may result. There should therefore be an offer by one party, express or implied, and acceptance of that offer by the other in the same sense in which it was made by the other. But an agreement does not result from a mere state of mind: intent to accept an offer or even a mental resolve to accept an offer does not give rise to a contract. There must be intent to accept and some external manifestation of that intent by speech, writing or other act, and acceptance must be communicated to the offeror, unless he has waived such intimation, or the course of negotiations implies an agreement to the contrary.

6. The Contract Act does not expressly deal with the place where a contract is made. Sections 3 and 4 of the Contract act deal with the communication, acceptance and revocation of proposals. By s. 3 the communication of a proposal, acceptance of a proposal, and revocation of a proposal and acceptance respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicated such proposal acceptance or revocation, or which has the effect of communicating it. Section 4 provides:

"The communications of a proposal is complete when it comes to the knowledge of the person to whom it is made."

7. 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.

8. The communication of a revocation is complete -

as against the person who make it, then 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.

9. In terms s. 4 deals not with the place where a contract takes place, but with the completion of communication of a proposal acceptance and revocation. In determining the place where a contract takes place, the interpretation clauses in s. 2 which largely incorporate the substantive law of contract must be taken into account. A person signifying 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 is said to make a proposal Clause [a] When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise: Clause (b), and every promise and every set of promises, forming the consideration for each other is an agreement: Clause (e). An agreement enforceable at law is a contract: Clause (k). By the second clause of s. 4 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. This implies that where communication of an acceptance is made and it is put in a course of transmission to the proposer, the acceptance is complete as against the proposer : as against the acceptor, it becomes complete when it comes to the knowledge of the proposer. In the matter of communication of revocation it is provided that as against the person who makes the revocation it becomes complete 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, and as against the person to whom it is made when it comes to his knowledge. But s. 4 does not imply that the contract is made qua the proposer at one place and qua the acceptor at another place. The contract becomes complete as soon as the acceptance is made by the acceptor and unless otherwise agreed expressly or by necessary implication by the adoption of a special method of intimation, when the acceptance of offer is intimated to the offeror.

10. Acceptance and intimation of acceptance of offer are therefore both necessary to result in a binding contract. In the case of a contract which consists of mutual promises, the offeror must receive intimation that the offeree has accepted his offer and has signified his willingness to perform his promise. When parties are in the presence of each other, the method of communication will depend upon the nature of the offer and the circumstances in which it is made. When an offer is orally made, acceptance may be expected to be made by an oral reply, but even a nod or other act which indubitably intimates acceptance may suffice. If the offeror receives no such intimation, even if the offeree has resolved to accept the offer a contract may not result. But on this rule is engrafted an exception based on ground of convenience which has the merit not a logic

or principle in support, but of long acceptance by judicial decisions. If the parties are not in the presence of each other, and the offeror has not prescribed a mode ' of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post. In Adams v. Lindsell 1 B & Ald. 681, it was ruled as early as in 1818 by the Court of King's Bench in England that the contract was complete as soon as it was put into transmission. In Adams's case (1 B & Ald. 681), the defendants wrote a letter to the plaintiff offering to sell a quantity of wool and requiring an answer by post. The plaintiff accepted the offer and posted a letter of acceptance, which was delivered to the defendants nearly a week after they had made their offer. The defendants however sold the goods to a third party, after the letter of acceptance was posted but before it was received by the defendants. The defendants were held liable in damages. The Court in that case is reported to have observed that "if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, they the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it, And so it might go on ad infinitum. The rule Adam's case 1 B. & Ald. 681, was approved by the House of Lords in Dunlop and others v. Vincent Higgins and others 1 H.L.C. 381. The rule was based on commercial expediency, or what Cheshire calls "empirical grounds". It makes a large inroad upon the concept of consensus, "a meeting of minds" which is the basis of formation of a contract. It would be futile however to enter upon an academic discussion, whether the exception is justifiable in strict theory, and acceptable in principle. The exception has long been recognised in the United Kingdom and in other countries where the law of contracts is based on the common law of England. Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offerer : see Baroda Oil Cakes Traders' case MANU/MH/0130/1954 : AIR1954Bom491 , and cases cited therein. A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarised as follows. When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram.

11. The defendants contend that the same rule applies in the case of contracts made by conversation on telephone. The plaintiffs contend that the rule which applies to those contracts is the ordinary rule which regards a contract as complete only when acceptance is intimated to the proposer. In the case of a telephonic conversation, in a sense the parties are in the presence of each other : each party is able to hear the voice of the other. There is instantaneous communication of speech intimating offer and acceptance, rejection or counter offer. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversation so as to make it analogous to that of an offer and acceptance through post or by telegraph.

12. It is true that the Post and Telegraphs Department has general control over communication by telephone and especially long distance telephone, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective intervention of that third agency, Letters or messages cannot be transmitted. In the case of a conversation by telephone, once a connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are

unable to see each other: They are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously, and communication does not depend upon an external agency.

13. 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 act were enjoined in cases where no specific rule existed to act according to law or equity in the case of chartered High Court 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 application to the Indian society and circumstance.

14. In England the Court of Appeal has decided in Entores Ltd. v. Mills Far East Corporation that:

> "..... Where a contract is made by instantaneous communication, e.g. by telephone, the contract is complete only when the acceptance is received by the offeror, since generally an acceptance must be notified to the offeror to make a binding contract."

15. In Entores Ltd.'s case (1955) 2 Q.B.D. 327 the plaintiff made an offer from London By Telex to the agents in Holland of the defendant Corporation, whose headquarters were in New York, for the purchase of certain goods, and the offer was accepted by a communication received on the plaintiffs Telex machine in London. On the allegation that breach of contract was committed by the defendant Corporation, the plaintiff sought leave to serve notice of a writ on the defendant Corporation in New York claiming damages for breach of contract. The defendant Corporation contended that the contract was made in Holland, Denning L. J. who delivered the principal judgment of the Court observed at p. 332:

> "When a contract is made by post it is clear law throughout the common law countries that the acceptance is a complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts is made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing.
>
> and after examining the negotiations made in a contract arrived at by telephonic conversation on different stages, Denning L. J. observed that in the case of a telephone conservation the contract is only complete when the answer accepting the offer was made and that the same rule applies in the case of a contract by communication by Telex. He recorded his conclusion as follows.
>
> > "..... that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received.

16. It appears that in a large majority of European countries the rule based on the theory of consensus add idem, is that a contract takes place where the acceptance of

the offer is communicated to the offeror, and no distinction is made between contracts made by post or telegraph and by telephone or Telex. IN decisions of the State courts in the United States, conflicting views have been expressed, but the generally accepted view is that by the technical law of contracts the contract is made in the district where the acceptances is spoken. This is based on what is called the deeply rooted principal of common law that where the parties impliedly or expressly authorise a particular channel of communication, acceptance is effective when and where it enters that channel of communication. In the text books there is no reference to any decision of the Supreme Court of the United States of America on this question: America Jurisprudence, 2nd Edn. Vo. 17, Art. 54 p. 392 and Williston on Contracts, 3rd Edn Vo. No. 1 p.

17. 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. 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.

18. The trial Court was therefore right in the view which it has taken that a part of the cause of action arose within the jurisdiction of the Civil City Court. Ahmedabad, where acceptance was Communicated by telephone to the plaintiffs.

19. The appeal therefore fails and is dismissed with costs.

M. Hidayatullah J.

20. Where and when is the communication of an acceptance complete under the Indian Contract Act. When parties complete their contract by long distance telephone? On the answer to this question depends the Jurisdiction of the Court trying the suit giving rise to this appeal. A contract was made on the telephone and the proposer complains of its breach by the acceptor. We are hardly concerned with the terms of the contract and they need not be mentioned. At the time of the telephonic conversation the proposers who are plaintiffs in the suit [respondents here] were at Ahmedabad and the acceptor, who is the defendant [appellant here] was at Khamgaon in Vidharbha. The plaintiffs' suit has been instituted at Ahmedabad. If the acceptance was complete and contract was made when the appellant spoke into the telephone at Khamgaon, the Ahmedabad court would lack jurisdiction to try the suit. It would, of course, be otherwise if the acceptance was complete only on the reception of the speech at Ahmedabad and that was the place where the contract was made.

21. 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 England may not necessarily fit into the scheme and the words of our statute. If the language of out enactment creates a non-possumus adamant rule, which cannot be made to yield to any new theories held in foreign courts out clear duty will be to read the statue naturally and to follow it. The Court of appeal in England in Entores Ltd. v. Miles Far East Corporation (1955) 2 Q.B.D. 327, held that a contract made by telephone is complete only where the acceptance is heard by the

proposer [offeror in English common law] because generally an acceptance must be notified to the proposer to make a binding contract and the contract emerges at the place where the acceptance is received and not at the place where it is spoken into the telephone. In so deciding, the court of Appeal did not apply the rule obtaining in respect of contracts by correspondence or telegrams, namely, that acceptance is complete as soon as a letter of acceptance is put into the post box or a telegram is handed in for despatch, and the place of acceptance is also the place where the contract is made. On reading the reasons given in support of the decision and comparing them with the language of the Indian Contract Act I am convinced that the Indian Contract Act does not admit our accepting the view of the Court of Appeal.

22. Sir William Anson compared the proposal [offer in English common law] to a train of gun powder and the acceptance to a lighted match. The picturesque description shows that acceptance is the critical fact, even if it may not explain the reason underlying it. It is, therefore, necessary to see why the rule about acceptance by post or by telegram was treated as a departure from the general rule of law that acceptance must be communicated. The rule about acceptance by post or telegram is adopted in all countries in which the English Common law influence is felt and in many others and, as will be shown later, the Indian Contract Act gives statutory approval to it. That rule is that a contract is complete when a letter of acceptance, properly addressed and stamped is posted, even if the letter does not reach the destination or having reached it is not read by the proposer. The same principle appeal is to telegrams. See Cowan v. O'Connor (1888) 20 Q.B.D. 640, Tinn v. Hoffman and co. (1873) 29 L.T. 271. The first question is whether the general rule or the special rule applies to contracts made on the telephone and the second what is the position under the Indian Contract Act. The answer to the first question is that there is difference of opinion in the countries of the world on that point and to the second that the Indian Contract Act does not warrant the acceptance of the decision in the Entores case (1955) 2 Q.B.D. 327. To explain the true position, as I understand it, I may start from the beginning.

23. A contract is an agreement enforceable by law and is the result of a proposal and acceptance of the proposal. The proposal when accepted becomes a promise, Now it may be conceded, that, as Bowen L. J. said in Carlill v. Carbolic Smoke Ball Co.(1893) 1 Q.B.D. 256 :

> "..... as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes an offer, in order that the two minds may come to there."

24. or, as Anson puts it, acceptance means in general a communicated Acceptance. This is the English Common law rule and is also accepted in the United States, Germany and France. The communication must be to the proposer himself unless he expressly or impliedly provides that someone else may receive it. According to our law also [S. 7] in order to convert a proposal into a promise the acceptance must be absolute and unqualified and in the manner prescribed or in some usually and reasonable manner. The intention to accepts must be expressed by some act or omission of the party accepting. It must not be mental acceptance a propositum in menti retentum though sometimes silence may be treated as acceptance. Section 3 of our act says that the communications of acceptance is deemed to be made by an act or omission of the party by which he intends to communicated such acceptance or which has the effect of communicating it.

25. The difficulty arises because proposals and acceptances may be in presents or inter

absents and it is obvious that the rules must vary. In acceptance by words of mouth, when parties are face to face, the rule gives gives hardly any trouble. The acceptance may be by speech, or sign sufficiently expressive and clear to form a communication of the intention to accept. The acceptance takes effect instantly and the contract is made at the sometime and place. In the case of acceptance inter absents the communication must be obviously by some agency. Where the proposer prescribes a mode of acceptance that mode must be followed. In other cases a a usual and reasonable manner must be adopted unless the proposer waives notification. Cases in the last category are offers of reward for some service [such as finding a lost purse or a stray dog [William v. Carwardine] 4 B & A 621, or fulfilling some condition, such as trying a medicine [Carlill v. Carbolic Smoke Ball Co.-supra]. The offer being to the whole world, the acceptance need not be notified and the contract is made when the condition is fulfilled.

26. Then come cases of acceptance by post, telegraph, telephone, wireless and so on. In cases of contracts by correspondent or telegram, a different rule prevails and acceptance is complete as soon as a letter of acceptance is posted or a telegram is handed in for dispatch. One way to describe it is that acceptance is complete as soon as the acceptor puts his acceptance in the course of transmission to the proposer so as to be beyond his power to recall. Acceptance by post or telegram is considered a usual mode of communications and it certainly is the most often followed. But letters get lost or miscarried and telegram get garbled. What should happen if the letter got lost in the post or the telegraphic message got mutilated or miscarried? It was held as early as 1813 in Adams v. Lindsell (1813) 106 E.R. 250, that even in such a contingency acceptance must be taken to be complete as soon as the letter is posted and not when it is delivered. It was observed:

> "For if the defendant were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notifications that the defendants and received their answer and assented to it and so it might go on ad infinitum. ".

27. Of course, if it is contemplated that the acceptance will be by post, what more can be acceptor do than post the letter? The above question was asked by Lord Cottenham in Dunlop v. Higgins(1948) 9 E.R. 805, and the Lord Chancellor also asked the question: How can he be responsible for that over which he had no control?"

28. Dunlop v. Higgins is the leading case in English Common law and it was decided prior to 1872 when the Indian Contract Act was enacted. Till 1872 there was only one case in which a contrary view was expressed [British and American Telegraph Co. v. Colson [1871) 6 Ex. 108 , but it was disapproved in the following year in Harris' case (1872) L.J.C. 625, and the later cases have always taken a different view to that in Colson's case. In Henthorn v. Fraser (1892) 2 Ch. 27, Lord Hescehell considered that Colson's case must be considered to be overruled. Earlier in 1879 4 Ex.216 [Household Fire Insurance Co. v. Grant]. Bramwell L. J. was assailed by doubts which were answered by Thesiger L. J. in the same case:

> "A contract complete on the acceptance of an offer being posted but liable to being put an end to by any accident in the post, would be more mischievous than a contract only binding on the parties upon the acceptance actually reaching the offeror. There is no doubt that the implication of a complete, final and absolutely binding contract being formed as soon as the acceptance of an offer is posted may in some cases lead to hardship but it is difficult to adjust

conflicting rights between innocent parties. An offeror, if he chooses, may always make the formation of the contract which he proposes, dependent on the actual communication to himself of the acceptance. If he trusts to the post, and it no answer is received, he can make inquires of the person to whom the offer was addressed..... On the other hand if the contract is not finally concluded except in the event of the acceptance actually reaching the offeror, the door would be opened to the perpetration of fraud; besides there would be considerable delay in commercial transactions; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance has reached its destination."

29. It is hardly necessary to multiply examples. It is sufficient to point out that Lord Denning [then Lord Justice] in the Entores case also observes:

"When a contract is made by post it is clear law throughout the Common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is where the contract is made."

30. Although Lord Romilly M. R. in Hebbs' case(1867) L.R. 4 Eq. 9, 12, said that the post office was the common agent of both parties, in the application of this special rule the post office is treated as the agent of the proposer conveying his proposal and also as his agent for receiving the acceptance. The principles which underline the exceptional rule in English Common law are:

[i] the post office is the agent of the offeror to deliver the offer and also to receive the acceptance;

[ii] no contract by post will be possible, as notification will have to follow notifications to make certain that each letter was duly delivered;

[iii] satisfactory evidence of posting the letter is generally available;

[iv] if the offeror denies the receipt of the letter it would be very difficult to disprove his negative; and

[v] the carrier of the letter is a third person over whom the acceptor has no control.

31. It may be mentioned that the law in the United States is also the same. In the American Restatement [Contract: $ 74] it is stated that a contract is made at the time when and the place when the last act necessary for its formation is performed. In the Volume on Conflict of laws, $326 reads:

"When an offer for a bilateral contract is made in one state and an acceptance is sent from another state to the first state in an authorized manner the place of contracting is as follows:

[a] If the acceptance is sent by an agent of the acceptor, the place of contracting is the state where the agent delivers it;

[b] if the acceptance is sent by any other means, the place of contracting is the state from which the acceptance is sent.

32. Comment on these clauses is:

[a] "When acceptance is authorized to be sent by mail, the place of contracting is where the acceptance is mailed.

[b] When an acceptance is to be sent by telegraph, the place of contracting is where the message of acceptance is received by the telegraph company for transmission."

33. Professor Winfield [writing in 1939] said that this rule prevailed in Canada, South Africa, New Africa New South Wales. Dealing with the European countries he said that three systems are followed : [1] the system of Information under which the offeror must be notified and the contract is formed only when the offeror is so informed. This prevailed in Belgium, Italy, Spain, Rumania, Bulgaria and Portugal; [2] The system of declaration under which the contract is formed from the moment when the recipient of the offer declares his acceptance, even without the knowledge of the offeror. This system is divided into three theories:

"[1] theory of declaration stricto sensu, that is to say, declaration alone is sufficient.

[ii] theory of expedition, that is to say, the sending of the acceptance by post is enough though not a bare declaration;

[iii] theory of reception that is to say, the reaching of the letter is the decisive factor whether the letter is read or not.

3 4 . The theory of reception as stated here is accepted in Germany Austira, Czechoslovakia, Sweden, Norway, Denmark, Poland and the U. S. S. R. Prof. Winfield however, concludes:

"But the greater majority of states accept either the theory of declaration stricto sensu or the theory of expedition. Among many others Dr. De Visscher [in his article in Revue de Droit International [1938] " Du moment et de lieu de formation des contracts par correspondence en droit international prove? Mentions Brazil, Egypt, Spain [Commercial Code], Japan, Morocco, Mexico..... France..... in 1932 ..... decided in favour of expending theory"

[3] The mixed or Electric system: In this the contract is formed when the acceptance is received but it relates back to the time when the acceptance was sent.

35. We now come to the question of telephone. Prof. Winfield expressed the opinion that the rule which has been accepted for letters and telegrams should not be extended to communications by telephone. He favoured the application of the general rule that an acceptance must be communicated. He asked a question if the line is in such bad working order that the offeror hears nothing and if the parties get in touch again and the offer is cancelled before it is accepted, will there be a contract ? he answered:

"It is submitted that there is no communication until the reply actually comes to the knowledge of the offeror. In the first place, the telephone is much more like conversation face to face than an exchange of letters ..... the risk of mistake over the telephone is so great compared to written communications that businessmen would demand or expect a written confirmation of what is said over the telephone."

36. In this opinion Professor Winfield found support in the American Restatement [Contract : $ 65].

> "Acceptance given by telephone is governed by the principles applicable to oral acceptance where the parties are in the presence of each other:
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> > but he conceded that the decided cases in the United States are to the Contrary. Williston [Contracts] at p. 238 gives all of them. In the decided cases the analogy of post and telegraph I accepted for telephone and it is observed.
> >
> > > "The point decided by these cases related to the place of a contract rather than its existence, but the decision that the place where the acceptor speaks is the place of the contract necessarily involves the conclusion that it is the speaking of the acceptor, not the hearing of the offeror, which completes the contract. [See Traders G. Co. v. Arnold P. Gin Co-Tex Civ. App. 225 S. W. 1011].
> > >
> > > No doubt the decided cases are of the State courts but it is hardly to be expected that a decision on such a point from the Supreme Court of the United States would be easily available. The Swiss Federal Code of obligations, it may be mentioned, provides [Art. 4] Contracts concluded by telephone are regarded as made between parties present if they or their agents have been personally in communications."

37. Williston whose revised edition [1939] was available to Dr. Winfield, Observed that a contract by telegram suggested analogies to a contract by correspondence but a contract over the telephone was more analogous to parties addressing each other in presents and observed:

> "A contract by telephone presents quite as great an analogy to a contract made when the parties are orally addressing one another in each other's presence. It has not been suggested that in the latter case the offeror takes the risk of hearing an acceptance addressed to him. The contrary has been held..... If then it is essential that the offeror shall hear what is said to him, or at least be guilty or some fault in not hearing, the time and place of the formation of the contract is not when and where the offeror speaks, but when and where the offeror hears or ought to hear and it is to be hoped that the principles applicable to contracts between parties in the presence of each other will be applied to negotiations by telephone."

38. The Entores case fulfilled the hope expressed by Williston and Professor Winfield. Before I deal with that case I may point out that in Canada in Carrow Towing Co. v. The Ed Mc William, (46 D.L.R. 506), it was held, as the headnote correctly summarizes:

> "Where a contract is proposed and accepted over the telephone, the place where the acceptance takes place constitutes the place where the contract is made. Acceptance over the telephone is of the same effect as if the person accepting it had done so by posting a letter, or by sending off a telegram from that place".

39. Similarly, in the Restatement [Conflict of laws] the comment in $ 326, partly

quoted before is:

> [c] when an acceptance is to be given by telephone, the place of contracting is where the acceptor speaks his acceptance;
>
> [d] when it is by word of mouth between two persons standing on opposite sides of a state boundary line, the place of contracting is where the acceptor speaks at the time he makes his acceptance.
>
> [e] This rule does not apply to an offer which requires for acceptance actual communication of consent to the offeror. In that case, the place of contracting is where the acceptance is received is accordance with the offer.

40. $ 64 in the Volume on contract Says:

> "An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offeror, unless the offer otherwise provides".

41. It may be mentioned that in an old English case [Newcomb v. De Roos] (1859) 2 E & E 271, Hill J. observed:

> "Suppose the two parties stood on different sides of the boundary line of the district : and that the order was then verbally given and accepted. The contract would be made in the district in which the order was accepted."

42. This case was expressly dissented from in the Entores case to which I now proceed. I have quoted at length from Professor Winfield, Williston and the American Restatement because they lie beneath the reasons given by the court of Appeal.

43. The question in the Entores case (1955) 2 Q.B.D 327, was whether under the Rules of the Supreme Court the action was brought to enforce a contract or to recover damages or other relief for or in respect of the breach of a contract made within the jurisdiction of the Court [or 11 r. 1]. As the contract consisted of an offer and its acceptance both by a telex machine, the proposer being in London and the acceptor in Amsterdam, the question was whether the Contract was made at the place where the acceptor tapped out the message on his machine or at the place where the receiving machine reproduced the message in London. If it was in London a writ of Summons could issue, if in Amsterdam no writ was possible. Donovan J. held that the contract was made in London. The court of Appeal approval the decision and discussed the question of contracts by telephone in detail and saw no difference in principle between the telex printer and the telephone and applied to both the rule applicable to contracts made by word of mount. Unfortunately no leave to appeal to the House of Lords could be given as the matter arose in an interlocutory proceeding.

44. The leading judgment in the case was delivered by Lord Denning [Then Lord Justice] with whom Lord Birkett [then Lord Justice] and Lord Parker [then Lord Justice] agreed. Lord Birkett gives no reason beyond saying that the ordinary rule of law that an acceptance must be communicated applies to telephonic acceptance and not the special rule applicable to acceptance by post or telegraph. Lord Parker also emphasizes the ordinary rule observing that as that rule is designed for the benefit of the offeror, he may waive it, and points out that the rule about acceptance by post or telegraph is adopted on the ground of expediency. He observes that if the rule is recognized that

telephone or telex telecommunications [which are received instantaneously] become operative though not heard or received, there will remain no room for then general proposition that acceptance must be communicated. He illustrates the similarity by comparing an acceptance spoken so softly as not to be heard by the offeror when parties are face to face, with a telephone conversation in which the telephone goes dead before the conversation is over.

45. Lord Denning begins by distinguishing contracts made by telephone or telex from contracts made by post or telegraph on the ground that in the former the communication is instantaneous like the communication of an acceptance by word of mouth when parties are face to face. He observes that in verbal contracts, there is no contact if the speech is not heard and gives the example of speech drowned in noise from an aircraft. The acceptance, he points out, in such cases must be repeated again so as to be heard and then only there is a contract. Lord Denning sees nothing to distinguish contracts made on the telephone or the telex from those made by word of mouth and observes that if the line goes dead or the speech is indistinct or the telex machine fails at the receiving end, there can be no contract till the acceptance is properly repeated and received at the offeror's ends. But he adds something which is so important that I prefer to quote his own words :

> "In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But, suppose that he does not know that his message did not get home he thinks it has. This may happen it the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the massage to be repeated: so that the man who sends an acceptances reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance - yet the sender of it reasonably believes it has got home when it has not--then I think there is no contract."

46. Lord Denning thus holds that a contract made on the telephone may be complete even when the acceptance is not received by the proposer. With respect I would point out that Lord Denning does not say where the contract would be complete in such a case. If nothing is heard at the receiving end how can it be said that the general rule about a communicated acceptance applies? There is no communication at all. How can it be said that the contract was complete at the acceptors end when he heard nothing. If A says to B. Telephone your acceptance to me and the acceptance is not effective unless A has heard it, the contract is not formed till A hearers it. It A is estopped by reason of his not asking for the reply to be repeated, the making of the contract involves a fiction that A has heard the acceptance. This fiction rests on the rule of estoppel that A's conduct induced a wrong belief in B. But the question is why should the contract be held to be concluded where A was and not on the analogy of letter and telegram where B accepted the offer? Why, in such a case, not apply the expedition theory?

47. Even in the case of the post the rule is one of assumption of a face and little logic is involved. We say that the proposal was received and accepted at the proposers end. Of course, we could have said with as much apparent logic that the proposal was made and accepted at the proposer end. It is simpler to put the acceptor to the proof that he

put his acceptance in effective course of transmission, than to investigation the denial of the proposer. Again, what would happen if the proposer says that he heard differently and the acceptor proves what he said having recorded it on a tape at his end? Would what the proposer heard be the contract if it differs from what the acceptor said? Telegrams get garbled in transmission but if the proposer asks for a telegram in reply he bears the consequences. As Ashurst J. said in Lickbarrow v. Mason (1787) 102 E.R. 1192.

> "Whenever one of two innocent parties must suffer by the act of third, he who has enabled such person to occasion the loss must sustain it."

48. Other difficulties may arise. A contract may be legal in one state and illegal in another. Williston reports one such case [Mullinix v. Hubbard] 109 C.C.A. 8, in which the legality of a bargain dealing in cotton futures was held to be governed by New York law when orders were telephoned from Arakansas as where such dealings were illegal, to New York city where they were legal. What happens when the acceptor mistakes the identity of the proposer. One such case [Tideman and Co. v. McDonalo] 275 S.W. 70 , has led to much institutional discussion [See 39 Har L. R. 388] and [1926] 4 Tax LR 252] quoted by Williston.

49. It will be seen from the above discussion that there are four classes of cases which may occur when contracts are made by telephone: [1] where the acceptance is fully hard and understood: [2] where the telephone fails as a machine and the proposer does not hear the acceptor and the acceptor knows that his acceptance has not been transmitted; [3] where owing to some fault at the proposers 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. I shall take them one by one.

50. Where the speech is fully heard and understood there is a binding contract and in such a case the only question is as to the place where the contract can be said to be completed. Ours is that kind of a case. When the communication fails and the acceptance is not heard, and the acceptor knows about it, there is no contract between the parties at all because communications means an effective communication or a communication reasonable in the circumstances, Parties are not ad idem all. If a man shouts his acceptance from such a long distance that it cannot possibly be heard by the proposer he cannot claim that he accepted the offer and communicated it to the proposer as required by s. 3 of our contract Act, In the third case, the acceptor transmits his acceptance but the same does not reach the proposer and the proposer does not ask the acceptor to repeat his message. According to Lord Denning the proposer is bound because of his default. As there is no reception at the proposers end, logically the contract must be held to be complete at the proposer's end. Bringing in considerations of estoppel do not solve the problem for us. Under the terms of s. 3 of our Act such communication is good because the acceptor intends to communicate his acceptance and follows a usual and reasonable manner and puts his acceptance in the course of transmission to the proposer. He does not know that it has not reached. The contract then results in much the same way as in the case of acceptance by letter when the letter is lost and in the place where the acceptance was put in course of transmission. In the fourth case if the acceptor is told by the offerer that his speech cannot be heard there will be no contract because communication must be effective communication and the act of acceptor has not the effect of communicating it and he cannot claim that he acted reasonably.

51. We are really not concerned with the case of a defective machine because the facts here are that the contract was made with the machine working perfectly between the two parties. As it is the proposer who is claiming that the contract was complete at his end, s. 4 of our act must be read because it crates a special rules. It is a rather peculiar modification of the rule applicable to acceptance by post under the English Common Law. Fortunately, the languages of s. 4 covers acceptance by telephone wireless etc. The section may be quoted at this stage:

"4. Communication when complete.

52. The Communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

53. 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.

54. as against the acceptor, when it comes to the knowledge of the proposer.

55. It will be seen that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made but a different rule is made about acceptance. Communications of an acceptance is complete in two ways [1] against the proposer when it is put in the course of transmission to him so as to be out of the power of the acceptor; and [2] as against the acceptor when it comes to the knowledge of the proposer. They theory of expedition which was explained above has been accepted. Section 5 of the Contract act next lays down that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards and an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. In the third case in may above analysis this section is bound to furnish difficulties, if we were to accept that the contract is only complete at the proposer's end.

56. The present is a case in which the proposer is claiming the benefit of the completion of the contract at Ahmedabad. To him the acceptor may say that the communication of the acceptance in so far as he was concerned was complete when he [the acceptor] put his acceptance in the course of transmission to him [the proposer] so as to be out of his [the acceptor's] power to recall. It is obvious that the word of acceptance was spoken at Khamgaon and the moment, the acceptor spoke his acceptance he put it in course of transmission to the proposer beyond his recall. He could not revoke his acceptance thereafter. It may be that the gap of time was so short that one can say that the speech was heard instantaneously, but if we are to put new inventions into the frame of our statutory law we are bound to say that the acceptor by speaking into the telephone put his acceptance in the course of transmission to the proposer, however quick the transmission. What may be said in the English common Law, which is capable of being moulded by judicial dicta, we cannot always say under our statutory law because we have to guide ourselves; by the language of the statute. It is contended that the communication of an acceptance is complete as against the acceptor when it comes to the knowledge of the proposer but that clause governs cases of acceptance lost through the fault of the acceptor. For example, the acceptor cannot be allowed to say that he shouted his acceptance and communication was complete where noise from an aircraft overhead drowned his words. As against him the communication can only be complete when it comes to the knowledge of the proposer.

He must communicate his acceptance reasonably. Such is not the case here. Both sides admit that the acceptance was clearly heard at Ahmedabad. The acceptance was put in the course of transmission at Khamgaon and under the words of our statute I find it difficult to say that the contract was made at Ahmedabad where the acceptance was heard and not at Khamgaon where it was spoken. It is plain that the law was framed at a time when telephones, wireless, Telstar and Early Bird were not contemplated. If time has marched and inventions have made it easy to communicate instantaneously over long distance and the language of our law does not fit the new conditions it can be modified to reject the old principles. But we cannot go against the language by accepting an interpretation given without considering the language of our Act.

57. 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. Even the court of Appeal decision is of 1955. It is possible today not only to speak on the telephone but to record the spoken words on a tape and it is easy to prove that a particular conversation took place. Telephones now have television added to them. The rule about lost letters of acceptance was made out of expediency because it was easier in commercial circles to prove the dispatch of the letters but very difficult to disprove a statement that the letter was not received. If the rule suggested 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.

58. No doubt the authority of the Entores case is there and Lord Denning recommended an uniform rule, perhaps, as laid down by the Court of Appeal. But the court of Appeal was not called upon to construe a written law which brings in the inflexibility of its own language. It was not required to construe the words: 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.

59. Regard being had to the words of our statute I am compelled to hold that the contract was complete at Khamgaon. It may be pointed out that the same result obtains in the Conflict of law's as understood in America and quite a number of other countries such as Canada. France, Etc. also apply the rule which I have enunciated above even though there is no compulsion of any statute. I have, therefore, less hesitation in propounding the view which I have attempted to set down here.

60. In the result I would allow the appeal with costs.

ORDER

61. In view of the opinion of the majority the appeal is dismissed with costs.