CHAPTER 9
CONCLUSIONS AND SUGGESTIONS

The law of contract is the bedrock on which the whole superstructure of the economy is built on. Business, trade and commerce can flourish only when the law of the land is definite and clear in the minds of all concerned parties. Indeed, certainty of law is a vital factor in bringing down the risks and costs of business. This element of certainty should exist across all forms of contract, whether they be negotiated in the conventional form of postal communication or the modern way of electronic communication. Therefore, there is reason for Judges, jurists and practitioners engaging in the study of law to iron out the inconsistencies and make the law of e-contract easy to understand and simple to apply.

While, in its fundamentals e-contract is no different from a conventionally formed contract, i.e., through postal communication, there are some aspects which stretch the capacity and imagination of the contract law. Firstly, there is the question of relevance of the “postal rule” to contracts made through electronic communication. Secondly, there is the question of jurisdiction, given that the infrastructure and working of the internet is highly dynamic, and thus fixing any one place as jurisdiction of the contract is highly contentious and problematic. Thirdly, there are issues relating to evidence of the contract, such as to how identity of the parties to the contract could be ascertained, and their assent to the contract determined. The research done in the above pages has been mainly with these three concerns.
9.1. ESTABLISHED FORMS OF E-CONTRACT

Contracts negotiated through electronic means have now come to be recognised by the courts abroad as well as in India. Jurists are of the opinion that the basic principles of the contract law as applicable to conventional contracts are also applicable to e-contracts too. Thus, we see that click-wrap contracts and browse-wrap contracts are well established legally. Today, a large section of the electronic traffic is composed of electronic contracts, which may either be B2C or B2B, that is, either business to consumer or business to business. Therefore, a broad definition of e-contracts can be that they are contracts made using computers, either via e-mail or the Internet, or that involve computer related products, such as databases and software.

The law of contract in India is governed by the Contract Act of 1872. This Act at the time of its promulgation envisioned that contracts would be negotiated by postal communication, with the accompanying time lag. Therefore, if the system had to be made workable, the offeror should be made bound to his offer on the offeree agreeing to the proposal, even if such acceptance was not yet made known to the offeror. The question is whether this “postal rule” enunciated in the Adams v. Liddell case, is appropriate in the modern conditions of negotiation of contract through electronic communication.

The Supreme Court in the Bhagwandas Kedia had established the acceptance rule in the case of contracts negotiated over instantaneous communication like telephone. Some commentators and some judgments seem to suggest that by analogy, the acceptance rule would prevail in contracts negotiated over electronic means also. However, it is important to note that there have been two major developments which have struck at
this position: firstly, the passage of the Information Technology Act, 2000, which was substantially inspired by international legal trends, and secondly, the judgment of the Allahabad High Court in *PR Transport v. Union of India*.¹

Section 13(1) of the Information Technology Act, 2000 provides that except as agreed to between the parties to the contract, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. This is a major blow against the acceptance rule enunciated by the majority of judges in the *Bhagwandas Kedia* case, and re-establishes the postal rule, as advocated by Hidayatullah J., in his dissenting opinion. Thus, it can be said that the *Kedia* case has taken a back seat with respect its application regarding e-contracts.

The Allahabad High Court in the *PR Transport v. Union of India* recognised email communication as analogous to postal communication, and applied the postal rule as to communication between parties by email. This is a very significant development since it goes against conventional wisdom that email communication was in the same class as telephone communication, i.e. instantaneous communication.

### 9.2. SUGGESTIONS FOR IMPROVING E-CONTRACTS

Although, e-contracts are gaining acceptance in large numbers, due to the lack of clarity in some aspects, there may arise in future some disputes. It is advisable that there should be a policy to promote e-contracts by pre-emptively resolving the ambiguous and vague aspects of e-contracts. Below are some suggestions which will help with promotion and

¹AIR 2006 All 23.
acceptance of e-contracts with the general public as well as the business community:

- The government should conduct training classes for judicial officers as well as other officers of the government to appreciate the forensic aspects of computers and the internet. Many a times, the judicial officers do not know the intricacies of the new technology, and thus the quality of the judgment may suffer, and there may be delays in judgment.

- The Indian Contract Act requires that for an enforceable contract, the parties to the contract must be above 18 years of age. However, the basic problem in the electronic sphere is that there is no fool proof way of knowing the correct age of the customer. Thus, in a recent case filed in the Delhi High Court, the bench asked orally as to how minor persons are registering with online sites such as Facebook and Orkut, when they do not fulfil the requirement of being above the age of 18 years. The government must frame a policy whereby online service providers should try to ascertain the age of the customer before such customers are registered on their sites. Failure to ensure this can lead to information, privacy and money of minor customers being used and abused.

- Presently, electronic communication is still regulated by the Indian Telegraph Act. This Act was framed at a time when there was no idea of the internet or the modern communications systems we have today. Therefore, to suit today’s exigencies, the ancient law is being stretched beyond imagination. There is an urgent requirement to codify the laws relating to electronic communication as well as e-contract and bring them into harmony with each other. We should also take inspiration from the various international treaties and standards regarding contracts and electronic
communication so that there is no hurdle to international commerce
and business with India. Particularly, the model laws framed by
UNCITRAL are very helpful in this regard.

- Since the electronic commerce and communications field is a very
dynamic and fast-changing area, many of the definitions and
concepts provided for in the laws become very soon outdated.
Therefore, to obviate the possibility of injustice, the courts should
give high value to the evidence of experts in the computer field,
who will be having knowledge of the latest trends.

- Ideally, the parties to the contract should have freedom of contract,
that is, the terms of the contract should be mutually agreed and
acceptable to the parties. Such acceptance can come only from open
bargaining and negotiation. Unfortunately, in e-contracts, the seller
is in a highly advantageous situation, and he employs it to impose
unfair terms on the buyer. There is a need to regulate the
imposition of such unfair terms so that the interests of the
consumers are not harmed. Therefore, Consumer Protection Act,
1986 and Competition Act, 2002 need a re-look.

- The question of jurisdiction is very important as regards to e-
contracts. The Supreme Court of India in the Bhagwandas Kedia
case endorsed the ruling in the Entores case, that there will be
instantaneous communication when transactions are conducted
over telephone. However, later developments like the introduction
of the Information Technology Act, 2000 have seriously impacted
the instantaneous communication rule since the Information
Technology Act, 2000 provides that email communication is
deemed to be complete when the email goes out of the computer of
the sender. Therefore, there is a serious need to revise and update
the laws regarding jurisdiction under e-contracts.
9.3. SOCIAL, CULTURAL AND ECONOMICAL IMPACT ON E-CONTRACTS

Although, the simplicity and convenience of e-contracts cannot be denied, we must also look into the effect electronic commerce and online communication have on our social and cultural fabric, and the traditions, culture and ethos of India. Indian culture has over the centuries laid great importance on the relationship between humans—that is why we subscribe to the dictum of *Vasudaiva Kutumbakam*, that the whole world is our family. Transactions were conducted orally based on the goodwill and good faith between parties. Naturally, such transactions also built up very good personal relations, and business relations continued even when there were minor infractions in the contracts.

However, electronic communication has brought about a very impersonal way of transacting business, where people may never see each other face to face although they may be transacting regularly. Due to this, there is no bonding between people, and business relationships are at the risk of breaking very easily. Previously, most business transactions used to be conducted with people one had acquaintance with, and mostly they used to be local people. However, since now business can be done with far-away people too easily, business people have started to neglect doing business with local people, preferring to do business with outsiders. Thus, the local economy has suffered while the foreign economy has prospered. The whole effect of this has been skewed and imbalanced economic growth.
Statement of objects and reasons

In view of growth of e-commerce and disputes related thereto, it is necessary to further amend Information Technology Act, 2000 to remove the conflicts and ambiguity.

PART 1

1. Short title, extent, commencement and application. – (1) This act may be called as Information Technology (Amendment) Act, 2013

(2) This Act shall come into force on such date as Central Government may, by notification, specify.

PART 2

2. Incorporation of following chapter after Chapter XII A of the Principal Act.

CHAPTER XII B

Procedure to be followed by parties to e-contract and courts

79 AA. Seller defined. – Notwithstanding anything contained in any law for time being in force, the seller shall mean and include every intermediary who procures goods from manufacturer or others for sale and commercial gain using e-form.

79AB. Formation of e-contract. – (1) In case of any activity related to sale of any goods using e-form, when the buyer consents to buy that goods by click of particular button provided by seller.

(2) In respect of other e-contracts provisions stated in Indian Contract Act, 1872 shall be applicable.
79 AC. Constitution of Controller of e-sales. – The central government by notification constitute an authority referred to as controller of e-transactions specially to regulate sale through electronic form.

79 AD. Duties of seller. – (1) Every seller before placing its products on display on its webpage, shall get that goods to be examined by controller of e-sales.

(2) Upon such inspection the controller of e-sales shall certify the goods to be eligible for display and sale. Further, the authority shall provide a code to indicate that goods was certified by it.

(3) Every seller shall specify the code issued by authority while displaying the goods for sale on its web page.

79 AE. Domestic Transactions. – “domestic transaction” shall mean and include every commercial transactions carried out using form within territory of India.

Constitution of examiner of electronic evidence to every District Court

79 AF. Constitution of examiner of electronic evidence to every district court. – Central Government shall constitution examiner of every district court within territory of India.

79 AG. Admissibility of reports submitted by examiner of electronic evidence. – Notwithstanding anything contained in any law for time being in force, every report submitted by examiner of electronic evidence shall be admissible as evidence.

79 AH. Marking of documents. – Notwithstanding anything contained in any law for anytime being in force, the examination conducted by examiner of e-evidence and his satisfaction regarding genuinity may be deemed to be marking of e-records.

79 AI. Ascertainment of age. – Every seller on his web page shall make a provision so that every buyer can adduce proof that buyer has attained age of majority.
Provided that any identity proof issued by central government, any local bodies or any recognised societies or co-operative bodies or every scanned original or attested copy of be deemed to be sufficient proof

79AJ. Constitution, powers and functions of controller of e-sales. –

(1) Central Government, by notification, constitute an authority known as controller of e-sales.
(2) Any person having expertise, qualification in trade, commerce, law and information technology may be eligible to be appointed as controller of e-sales.
(3) The central Government may, by notification, establish the controller of e-sales from every state.
(4) The central govt by notification may specify terms of office, disqualification and resignation of controller of e-transactions.

79 AK. Powers and functions of controller of e-sales. –

(1) The controller of e-sales shall examine authenticity and originality of every goods proposed to be sold by the seller.
(2) After his satisfaction he shall issue a code authenticity the originality of goods.
(3) He shall have powers to prohibit any seller from selling its foods whenever such seller contravenes conditions prescribed for sale using e-form.
(4) He shall, from time to time, formulate such policies to benefit consumers
(5) The controller of e-sales shall perform other functions and shall have such other powers which are given to him from time to time by central govt by issuing notification.

Hence this amendment.