# CRITICAL ANALYSIS OF SILENCE IN CONTRACT

Manoj V Amirtharaj, School of Excellence in Law, Chennai

## ABSTRACT

This article researches around the ambiguous and unspoken topic in the law of contracts which is silence, describing the operating, scope, and limits of the act of silence in a contract. Further, we will be seeing how the default rules apply and cover the voidness of silence, as silence is not mere nonattendances of action, we can also describe silence as also a type or mode of action, creating a value for void for making a balance in a contract. The implied terms in a contract are operated by the expressed operations of a contract which allows the silence to express it is operations through the overall output of a promise and acceptance in a contract. Silence is not an automatic reaction but an accommodating action for pre-inactive or post-inactive conditions or situations of parties in a contract, creating assumptions of others' conduct from the contract complying with the default procedures from the agreed terms of the contract. this research article will also deal with how the silence in contracts has evolved from the origin of the existing court system in the world as the silence in contracts can be framed or codified into laws but only can be narrowed down through judicial decisions by correcting in silence in contract from daily legal issues arising from public transactions. The leverage in contracts is sometimes maintained through the silence by the way of giving importance to the local culture to create majoritarian default rules which differ from place to place. These majoritarian rules are set by the usual modes or most common default procedures in the locality or on the particular type of contract, created unwritten and uncodified procedures and rules which apply to silence in a contract. This article will be dealing with the elaborations of the concepts above mentioned.

## INTRODUCTION

In this article, we are visiting to see the presence, role, scope, limitations, and judicial decisions regarding Silence in a very contract. The word silence means "nonattendance of sound or noise"[1] by and large importance. In any case, the word quietness in a legitimate meaning is " Pure and easy silence cannot be considered as a consent to a contract, besides in situations when the hard of hearing quiet is bound in honestness to explain himself, during which case, silence gives assent".

In contracts, most of the terms and expressions are explicitly communicated between parties to make a consensus ad idem. this will be found in Raffles v. Wichelhaus[2] where both the parties have entered into a contract purchasable of cotton through land ship named "peerless" from Bombay one leaving from October and another leaving in December, where the litigant thought it was October and also the plaintiff delivery was on the December ship, hence the plaintiff filed a case for breach of contract. Hence the court held that there was no consensus ad idem and "the contractual terms on the time of conveyance is silence", in this way no authoritative contract.

Silence in an exceedingly contract is usually void until it is drawn to any party's conduct implicitly expressing his/her consent or on the other hand dis assent. with no lead, no goal is long of it, consequently no official contract. In this article further, we'll see silence in several parts for the formation of a contract, exceptions, and its limitations together with supporting case laws.

## CONTRACTUAL SILENCE

Section 9: Promises, express, and implied. Thus far, because the proposal or acceptance of any promise is formed in words, the promise is claimed to be expressed. Thus far in and of itself proposal or acceptance is created otherwise than in words, the promise is professed to be implied.

Contract law mainly focuses on developing default rules for contracts, which are silent, these rules are formed supported general principals and procedures established by the majoritarian on the subsequent sources of contractual obligations:

[1] See, Merriam webster dictionary, 2020.
[2] [1864] EWHC Exch J19.

1. Event of promise.

2. Nature of transaction.

3. Culture.

4. Mode Communication.

5. sort of consideration.

**Illustration**

The Uniform Commercial Code Section 2-314 states the warranty of merchantability as a default rule that applies when a contract for the sale of products is silent on warranties. Section 2-316 elaborates that the warranty of merchantability will be altered by explicit terms in a very sales contract.

Most of the principles aim at majoritarian; the rule-makers will include default rules to unravel if there's a problem between the parties[3]. Perhaps the best obstacle is that rule-makers don't know what most parties implicitly intend once they form an agreement and instead are forced to guess the majoritarian rule[4]. Contracts are inevitably incomplete without default rules, as it's the first role of the jurisprudence to hide the gap between the implied and explicitly stated rules (Silence), to create a legal binding between the parties.

A majoritarian default rule saves the utmost number of parties from incurring "the time, trouble, and risk of error inherent crafting their contract terms"[5]. When a court isn't certain what the parties agreed on due to a gap-the majoritarian rule is the rule that's possibly the one that the parties implicitly agreed to[6]. As a result, the limited evidence seeking empirically majoritarian default rules usually takes the shape of finding that parties seldom opt for a default rule. Researchers conclude that if most parties fail to cop out of a default rule, then they probably "like" rule[7]. If silence is treated the identical way as some forms of explicit language, then the paper posits that silence is implicitly understood to mean something the same as the express language that receives the identical treatment. this system has the advantage of being relatively

[3] See, Scott & Kraus 2007, 89-93.
[4] See, Schwartz and Scott 2003.
[5] Supra, Scott & Kraus 2007, 90.
[6] Barnett 1992.
[7] For example, see Lewis 1982; Schultz 1952.

unimpaired by the existence of unobservable transaction costs, probabilities of relevance, or importance. The simplest means of implementing the study of silence would be to match many varieties of contracts and determine if contracts that are silent on a given issue are treated similarly to contracts with some explicit terms.

## MEANING OF IMPLIED

**"implied term means proposal or acceptance or both are not meant by words however by acts or lead or behavior in the particular place, time and event of the contract, by the capable parties of the agreement, to create a legal binding between the parties, forming a contract."[8]**

In the case, Sheffield Corp v. Barday[9] the court held "where a demonstration was finished by one in line with another, which act isn't convoluted to right of the outsider, the individual getting it done acts ends up being damaging to the right o outsider, the individual making it happen, qualifies for repayment structure him, who mentioned it ought to be finished" acts turn out to be injurious to the right o third party, the person doing it, entitles to indemnity form him, who requested it should be done"

From this case, we can derive at a point that the instant act of a person by a request of other forms an implied agreement for the act, as here the act of the person signifies his willingness to accept forming an agreement impliedly. The same principle can also be traced from an Indian case of Secretary of State v. Bank of India[10]. The term Act" or "direct" should be with the end goal that it can lead to the deduction that there probably been an implied offer and an acknowledgment of acceptance. This can be traced to the case Umed Singh Hamir Singh v. Marsden Mills Ltd[11].

## IMPLIED TERMS DURING A CONTRACT

In a contract the terms could also be partly implied and partly expressed by applying standing operating procedure for negotiation before the consent of the acceptor is communicated through an act or by word.

[8] See, Pollock and Mulla on Indian Contract Act, 12th Edn.
[9] AC 392 [1905].
[10] AIR 1938 PC 191.
[11] AIR 1959 BOM 143.

**Illustration:**

A, a customer of a restaurant owned by Bordering food from the menu, to the waiter, here it's A impliedly accepted the invitation to offer(menu) by B, ordering it impliedly accepting B proposal price creating an implied promise with standard terms and conditions. If A refuses to pay B, A is held liable and the court will apply only Standard rules because it's a silent promise.

Further from the above illustration, we will derive to a degree where it deals with intention of the contract, where the court may apply rules and the judge supported the intention of the contract and its parties. An implied term in a very contract should be derived from the intention and operation of an agreement, if not compelling with the subsequent conditions a contract's implied term operations are going to be made void or the complete contract is going to be made invalid. The process of implying a term in an express contract or presuming the presence of a term in an express contract. within the case of KA Mathai v. Kora Bibbikutty[12] where the word implied is employed to point that to exist in a legal document which wasn't before the court.

Privy council in an appeal from Australia BP Refinery pty Ltd v. Shire of Hastings[13] has held:

- The First instance, an implied term must be equitable and reasonable.
- Second, it must be necessary to give business efficiency to contract and no term can be implied if the contract is effective without it.
- Third, it must be obvious "it goes without saying".
- Fourth, it must be capable of clear expression.
- Fifth, it must not contradict any express term of the contract."

The UNIDORIT principle says who to ascertain the intention of parties by the following:

1. Reasonability test.

2. Subjective test.

3. Objective test.

**INACTIVITY AS PROPOSAL**

**Section 2. Interpretation-clause:** A (proposal) When one person signifies to a different his

[12] See,(1996)7 SCC 212.
[13] (1977)180 CLR 266, See pg. 9.

willingness to try and do or to abstain from directing anything, to obtain the assent from other for doing such act or abstinence, he's said to form a proposal;

A proposal initiated the method of contract formation, and hence cannot be made through silence or inactivity. Certain cases have given rise to the likelihood of silence being an efficient proposal. Substantial delay, i.e., silence and inactivity by the claimant in pursuing the relevancy arbitration after it's been organized may add up to a proposal to leave it. Accordingly, a consent to present a question to assertion can be said to have been deserted by said to possess been abandoned by a long delay where neither party has taken steps in an arbitration proceeding for an extended time. In the case, Andre's Compagnie SA v. Marine Transocean Ltd[14] (the sumptuous Sun )" as explained in Paal Wilson & co A/s v. Partenreederei Hanna Blumenthal[15] (The Hannah Blumenthal), through it was held that no agreement to abandon the reference was formed. An agreement can't be created to create a contract without an expression of willingness for signifying to a different with the subsequent condition:

1. Consistent.

2. Exact.

3. Unambiguous.

4. Communication without misleading others.

5. Free consent.

These are the essentials of the proposal for a contract, which may not be satisfied by an implied proposal or offer which can express the willingness of the offeror to offeree in an actual or certain manner in silence or inactivity as a mode of communication for a suggestion.

## SILENCE AS ACCEPTANCE IN THE FORMATION OF CONTRACTS

**SILENCE AS ACCEPTANCE** within the **FORMATION OF CONTRACTS**. - "He who remains silent certainly doesn't speak; nevertheless, indeed, he doesn't deny."'[16] things expressed by this truism have been the source of considerable confusion in our law of contracts. the choices are almost as varied because of the jurisdictions, and nowhere will we find an

[14] See,[1985]2 All ER 993.
[15] See,[1983]1 All ER 34.
[16] Digest, L, 17, 142 (Paulus). See POUND, READINGS IN ROMAN LAW, 2d. ed.,~25-26.

adequate analysis of the questions involved or the principles upon which they need to be decided. Though acceptance of a proposal is typically made by spoken or written words, very often the offer may involve an act or authorize another mode of acceptance. because the offeror is that the "czar of his offer" such acts, when induced by the offer,[17] constitute an acceptance. In such cases, there's something external by which to gauge the intent of the parties. But where the mere passive conduct of the offeree is claimed to be an acceptance, the question is tougher.

In considering this problem, some difficulty has arisen thanks to the failure of the courts to contemplate the difference between a proposal for a unilateral and one for a contract and therefore the difference within the situations produced thereby. within the case of the previous, the courts often have allowed recovery, purportedly on the premise of contract, which might be justified only on another grounds.

**Illustration:**

" If A sends goods to B under a contract which is later rescinded by agreement and A tells B that he must pay a particular sum in cash or return the products, the mere retention of the products by B doesn't constitute a contract. B has performed neither of the alternatives contained within the offer. True, he's also held liable thanks to his duty to return the products, but such liability must be founded upon the conversion of the products or in the contract for his or her value. Even from an objective standard, the contract doesn't accommodate the terms of the offer. However, where the "acceptance" if effective would create a contract executory on either side, we have presented the unavoidable question, May silence be construed as acceptance ?"[18]

The problem may arise with the offeree because of the plaintiff. Where the offer authorizes an ambiguous act as acceptance, the performance of such an act with the intent to suits the offer creates the contract. it is not sufficient to answer that the proof of intent is more or less within the arbitrary power of the offeree; the offeror must have understood the case he was creating. Likewise, where the offer expressly or impliedly authorizes silence as acceptance, such passive

[17] If the act is performed in ignorance of the offer, as where a reward is offered for the capture of a felon, there is no contract. Ball v. Newton, 6i Mass. 599 (i851); Fitch v. Snedaker, 38 N. Y. 248 (i868); Williams v. West Chicago St. Ry. Co., i9i Ill. 6io, 6i N. E. 456 (i9oi). The English courts have entertained a contrary view. Williams v. Carwardine, 4 B & Ad. 621 (i833); Gibbons v. Proctor, 64 L. T. (N. S.) 594 (i89i). Also, if the offered expressly states that his acts are not performed in acceptance.

[18] Silence as Acceptance in the Formation of Contracts. See, Harvard Law Review, Feb. 1920, Vol. 33, No. 4 (Feb. 1920), pp. 595-598.

conduct on a component of the offeree in compliance therewith should form a binding contract. But the courts seem willing to travel only to this extent: That if the offered chooses to make acceptance within the style thus authorized, the offeror has but himself accountable if true is unsatisfactory, but that the offeror cannot by his actions put the offeree within the position within the case A. B. Dick Co. v. Fuller[19].

These were substantially the facts in Wheeler v. Klaho[20] "A jury would be warranted find that neglect of the duty to return imported an acceptance of the choice offered to sell. This ignores the stipulation on cash. It seems clear that the offered couldn't, by mere retention of the products, have effected a contract when the offer was for cash only."

In the case Day v. Caton[21] A distinction must be made between promises "implied in fact" and people "implied by law." Thus, if A does work for B, with the latter's knowledge, but with none express request, and B accepts the work or its results, by pure inference of fact B's conduct is acceptance. But if B doesn't know of the work, the sole basis of liability is in the contract upon the promise "implied by law" to forestall unjust enrichment. Where the act is performed without intent to just accept the known offer, there's no contract, as is illustrated by the "reward cases." Hewitt v. Anderson[22], Vitty v. Eley[23]. Where similar acts are through with the intent to just accept, there's a contract. Wentworth v. Day[24], Cummings v. Gann[25]. In Bhagwandas govidhandas Kedia v. Girdharilal Parbottamdas &co[26] case, Acceptance of a proposal and intimation of acceptance by some external manifestation that the law regards as sufficient is critical.

As observed within the case of Fairline Shipping corporation v. Adamson[27], mere absence of communication of acceptance isn't capable of binding offeror & offeree within Legal Bondage, such a result would only result in estoppel directing against the offeror, but the reason behind the conduct of the plaintiff couldn't be found on estoppel. If the offeree does nothing, he is going to be certain to a contract or a variation. In Karansigh v. collector, Chhatarpur[28], Law

[19] A. B. Dick Co. v. Fuller, 213 Fed. 98 (1914); Mooney v. Daily News Co., ii6 Minn. 212, 133 N. W. 573 (i9ii); De Wolf Co. v. Harvey, i6i Wis. 535, 154 N. W. 688 (1915).
[20] See, 178 Mass. I4I (1901), (p. 145).
[21] See, II9 Mass. 513, V6 (I87).
[22] See, 56 Cal. 476 (I88o).
[23] See, 5i App. Div. (N. Y.) 44 (1900).
[24] See, 44 Mass. 352 (I841).
[25] See, , 52 Pa. St. 484 (I866).
[26] AIR 1966 SC 543.
[27] [1974]2 All ER 967.
[28] AIR 1980 MP 89.

doesn't run up the person to whom a proposal is created to reply thereto proposal and hence acceptance can't be inferred from the silence on a part of the offeree. In the case of Robophone Facilities Ltd v. Blank[29], Silence isn't a good expression of intention or is in action, Silence is nature of equivocal, as there's over one reason for silence, as assert the very fact of their fact of acceptance to suit his convenience.

## ACCEPTANCE CAN BE IN EXCEPTIONAL CIRCUMSTANCES

1. Offeree makes up his mind to accept a proposal continuing such a stipulation and complies without the proposal by remaining silent, where an option holder has agreed that his silence shall be accepted, or the proposal been made on the form provided by the offeree and he that his silence shall constitute acceptance.[30]
2. Silence taken together with certain facts, may constitute acceptance. The conduct of the offeree may raise estoppel, as observed from the case Spiro v. Lintern[31]
3. In the event that silence is supported by leading might comprise acceptance. " Where an inhabitant was offered a restoration of occupancy at a higher lease, his proceeding to remain established acknowledgment[32].

## Conclusion

Therefore, from this research article, we can understand the functions of silence in contracts by the above-stated judicial decisions, law journals, and interpretation.

From the research, I conclude that :

" Silence in the contract is void action or an inactive communication of proposal or acceptance of contracts, which isn't sufficient for creating a legal binding between the parties, until accompanied by any external manifestation of intention of a party, signifying its intention without any ambiguous implied terms or terms varying from that of the standards accepted by the majority, binding the parties with intention of contract applying the majoritarian standards".

[29] [1966]3 All ER 128.
[30] See, Halsbury's Laws of England, fourth Edn, vol 9,p.246.
[31] [1973]3 All ER 319(CA).
[32] See, Chitty on contracts, Twenty-Eight Edn, p.120( conduct raising estoppel).