

E-COMMERCE- A REQUISITE NOT AN APPANAGE

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ABSTRACT

Web as the acquiescent mode of communication is spread all over the world. Whether its retailers, businessman, traders, employees, people from every class and every sector is using this tremendous invention. The consistent growth in e-commerce has made this reality come true which changed the juncture from landline phones to digitalized watches. Its not limited merely for the purpose of transactions or retailing, it also serves as a medium for interaction and forming networks worldwide through sites such as Facebook, Skype, We Chat, which allows companies to connect with clients across the world in order to expand the business. This article discusses bout various strands of e-commerce prevalent at present (in comparison with 90s). The draft National e-commerce policy has also been discussed enlisting its positives and certain recommendations in order to reform. Numerous other aspects like expansion of technology (AI), also tried to ventilate about legality of e-commerce sector through the article.

BYGONE PHASE OF E-COMMERCE

From the augmentation of World Wide Web in the 1990s to the world of digitalization, e-commerce has covered a long orbit of web. At the time of development of www, any person with general and basic computer knowledge along with online connection was able to use the web browser. With the growth of internet, business transaction also became a part of it for buying and selling of goods, providing services and information by forming networks.

“E-commerce originated in a standard for the exchange of business documents, such as orders or invoices, between suppliers and their business customers. Those origins date to the 1948-49, Berlin blockade and airlift with a system of ordering goods primarily via telex. Various industries elaborated upon that system in the ensuing decades before the first general standard was published in 1975. The resulting computer to computers electronic data interchange (EDI) standard is flexible enough to handle most simple electronic business Transactions with the wide adoption of the internet and the introduction of the world wide web in 1991 and of the first browser for accessing it in 1993, most E- commerce sifted to the Internet.”¹

¹ DRr. Vivek Kumar, A study of E-commerce and its legal framework: With special reference to India, 3 International Journal of Law, 89, 89-90 (2017).

After this all the other devices such as broadband, Android phones, laptop, tablets, portable devices, digital watches to wear, etc. This lead to increase in number of internet users on social e-commerce sites used worldwide (such as facebook). This easy access and enormous growth in e-commerce has increased the number of users worldwide, especially in India. Now a days the new trend of buying and selling everything online has lead to rise of e-commerce companies such as Amazon, Flipkart, Newegg, Rakuten, eCarter and specially Alibaba which created a massive amount of market places for business.

De nos jours

With development, a room for misuse also gets created. In a recent news published on 12th June, 2019 the twitter accounts of actor Amitabh Bachchan and singer Adnan Sami were hacked and put on dark web.

“Mr. Bachchan’s account, @SrBachchan, was hacked late on Monday and his display picture was replaced with that of Pakistan Prime Minister Imran Khan. A tweet on the account said, ‘This is an important call to the whole world! We do condemn the irrespective behaviors of Iceland republic towards Turkish footballers. We speak softly but carry a big stick and inform you about the big Cyber attack here. As Ayyıldız Tim Turkish Cyber Army +++.’”²

Meanwhile, on Tuesday afternoon, Mr. Sami’s account was hacked supposedly by the same culprit. Mr. Sami’s display picture was also replaced with Mr. Khan’s, and a tweet was posted which said, “Who ever shows courage to betrayal our brother country Pakistan know that you will see Pakistan’s prime ministers photo and pakistan flag as profile picture [sic].”³

Artificial intelligence- an example of technological development

“Down the road AI is the most avant-garde and self evolution technology. There are few evidentiary examples which symbolize the springing up of AI; like in February, the Kerala police inducted a robot for police work. The same month, Chennai got its second robot-themed restaurant, where robots not only serve as waiters but also interact with customers in English and Tamil. In Ahmedabad, in December 2018, a cardiologist performed the world’s first in-human telerobotic coronary intervention on a patient nearly 32 km away.”⁴

But with the emergence of AI, there comes up several questions like what if while performing duty of a doctor or of police officer, robot runs out of battery or power, will it be considered as an evidence in the court, who will be the one liable for the accident of a driverless AI-based car etc. which has already been bedeviled by courts in U.S. and Germany. So all the countries need to be well prepared (including India) for facing legal and other challenges on this path.

² Gautam S. Mingle, Hackers share details of Amitabh Bachchan’s account on dark web: police, The Hindu, June 12, 2019, at 9.

³ Id at 2.

⁴ G.S.Bajpai & Mohsina Irshad, Artificial Intelligence, the law and the future, The Hindu, June 11th, 2019, at 9.

“China, Japan and Korea are following Germany in developing a law on self- driven cars. In India, NITI Aayog released a policy paper, ‘National Strategy for Artificial Intelligence, in June 2018. The Budget 2019 also proposed to launch a national programme on AI. Till date no comprehensive legislation has been made for regulating this sector. But with this growing technology there is persistent need for building rules and regulations. Since privacy is a fundamental right, certain rules to regulate the usage of data possessed by an AI entity should be framed as part of the Personal Protection Bill, 2018. Traffic accidents lead to about 400 deaths a day in India, 90% of which are caused by a preventable human errors. Autonomous vehicles that rely on AI can reduce this significantly. Patients sometimes die due to non- availability of specialized doctors. AI can reduce the distance between patients and doctors. But as futurist Gray Scott says, “the real question is, when will we draft an artificial intelligence bill of rights? What will that consist of? And who will get to decide that?”⁵

E-COMMERCE- HARDWIRED SEGMENT OF PROSAIC LIFE

“At present, e-commerce has become a necessary constituent of people’s life worldwide, specifically in urban sector. For every facet, tribune is provided by e-commerce, whether it’s related to purchasing items of household or that of buying house. Mail order or catalogue shopping has been in existence in the United States since 1980. This was the predecessor of online commerce, which started in India post 2000.”⁶

“The country’s online retail market witnessed a compound annual growth rate (CAGR) of 53% for the period 2013 to 2017, according to a latest report by consultancy firm Bain & Company.”⁷

E- Commerce Sector in India

Growing Demand: India is the fastest growing market for the E-Commerce sector. Revenue from the sector is expected to increase from US\$ 39 billion in 2017 to US\$ 120 billion in 2020, growing at an annual rate of 51%, the highest in the world.

Attractive Opportunities: A lot of India’s blue chip PE firms are looking for opportunities in the sector.

⁵ Id at 4.

⁶ Venkatesh Ganesh, “Going back to brick and mortar (January 22, 2015) <http://www.thehindubusinessline.com/features/weekend-life/article3836141.ece>.

⁷ India is fastest growing e- commerce market: Report, Times of India, Business (Nov 29, 2018, 12:10 IST), <https://timesofindia.indiatimes.com/business/india-business/india-is-fastest-growing-e-commerce-market-report/articleshow/66857926.cms>.

Policy Support: 100% FDI allowed in B2B E-commerce, 100% FDI under automatic route is permitted in marketplace model of E-commerce.

Increasing Investments: E-commerce industry in India witnessed 21 private equity and venture capital deals worth US\$ 2.1 billion in 2017 and 40 deals worth US \$ 1,129 million in the first half of 2018.⁸

Benchmark

“E-commerce sales as percentage of total retail sales in India in 2017:- 2.2%

Active e-commerce penetration in India as of Q4 2016:- 23%

Active audience reach in India of Q2 2016:- 89%

India retail e-commerce CAGR 2018-2022:-19.9%

Retail e-commerce sales in India in 2017:-20.06bn USD

Retail e-commerce sales growth in India in 2022:- 52.3bnUSD

Annual retail e-commerce sales growth in India in 2017:- 24.8%

Retail m-commerce sales in India in 2016:- 10.46bn USD

Retail m-commerce sales in India in 2020:- 37.96bn USD

Internet users in selected countries in India who have made a purchase via mobile phone in Q4 2016:- 23%

Digital buyer penetration in India in 2016:- 43.6%

Number of digital buyers in India in 2016:- 130.4m

Number of digital buyers in India in 2020:- 329.1”⁹

⁸ E-commerce sector in India, India Brand Equity Foundation (March, 2019), <https://www.ibef.org/industry/ecommerce/showcase>.

⁹ E-commerce in India- Statistics & Facts, Statista, The Statistics Portal, <https://www.statista.com/topics/2454/e-commerce-in-india/>.

LEGAL ISSUES CONVOLUTED IN FORMING COARSE LIFE COMFORTABLE BY MERE CLICKS

Formation of an E-Contract

“Shrink-wrap, click wrap, browse wrap contracts are some of the striking types of e-contracts.

A browse wrap agreement is intended to be binding on the contracting party by the mere use (or browse) of the website.

Shrink wrap agreements though not directly relevant to e-commerce platforms are relevant in the context of e-commerce mostly because of the kind of goods associated with shrink-wrap agreements. In case of a shrink-wrap agreement the contracting party can read the terms and conditions only after opening the box within which the product (commonly a license) is packed.”¹⁰

Validity

For any transaction to be legal, validity serves as first and foremost ingredient. Like all the others, e-contracts also gets governed by the basic contract act of India i.e. Indian Contract Act, 1872. As specified in Contract Act, for a valid contract there are certain pre-requisites like lawful consideration, free consent, an agreement which needs to be agreed by both the parties which afterwards take the form of contract. Likewise is the state of e-contracts for gratifying its requisites IT Act, bastions and provides the required conditions for a valid e-contract.

In cut and dried situation usually e-contracts such as click- wrap agreements becomes enforceable if the conditions as per Indian Contract Act gets fulfilled.

BLEMISHES IN INTERSECTION OF E-CONTRACTS WITH VALIDITY

Contracts with Minors

The main deface of e-commerce sector is that the one who is performing the transaction is unknown and virtually it is not possible to verify the age of person entering in the e-contract. Whereas according to the provisions of Indian Contract Act any individual below the age of majority is not pertinent to enter into any agreement, hence not enforceable by law.

Stamping Requirements

¹⁰ Nishith Desai, E-Commerce in India Legal, Tax and Regulatory Analysis (July 2015), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/E-Commerce_in_India.

Various states in India have enacted certain legislations related to stamp duty which makes it obligatory for every instrument under which rights gets transferred or created. Also for presenting evidence confronting a competent authority, the instrument needs to be properly stamped; if the due procedure is not followed, a prescribed amount of penalty and required stamp duty is to be paid. In case if there is intentional eschewal of stamp duty, it imposes criminal liability on concerned individual.

Signature Requisites

Under Indian Copyright Act it is mandatory to get the assignment of copyright signed by assignor, whereas in the Indian Contract Act, a contract to be physically signed is not a requirement. In e-commerce, electronic signatures equates the physical signatures as per IT Act which has not been notified by the Central government.

Vital issue of confidentiality worldwide

In the case of **Bragg v. Linden Research**,¹¹ the courts found that an internet site's arbitration provision could not be enforced on the basis that it was both procedurally and substantively unconscionable. In this case the plaintiff, an owner of virtual property on an Internet site, sued defendants, operators of the Internet virtual world, for the removal of certain virtual property he purchased from the virtual world and for freezing of the plaintiff's account. The defendants contended that the terms of the use agreement for the site compelled arbitration. In this matter the arbitration provision was buried in a take-it-or-leave-it set of terms presented to customers before they could participate on the site. The provision's lack of mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision demonstrated that the arbitration clause favored the site operators over the participants. Consequently, the court denied the motion to compel arbitration.

Privacy

In the absence of a specific legislation, the Supreme Court of India in the cases of *Kharak Singh v State of UP*¹² and *People's Union of Civil Liberties v. the Union of India*¹³ recognised the “right to privacy” as a subset of the larger “right to life and personal liberty” under Article 21 of the Constitution of India.

The IT Act deals with the concept of violation of privacy in a limited sense; it provides that the privacy of a person is deemed to be violated where images of her private body areas are captured, published or transmitted without her consent in circumstances where she would have had a reasonable expectation of privacy¹⁴ and prescribes a punishment of imprisonment of up to 3 years and/or fine of up to INR 2 lakhs.

¹¹ 487 F. Supp. 2d 593 (2007); Cited from “Unconscionable Terms Prevent Enforceability Of E-Commerce Contract Clauses” By Jonathan D. Bick available at <http://www.bicklaw.com/Publications/UnconscionableTermsandE-contracts.htm>.

¹² AIR 1963 SC 1295.

¹³ 1997 (1) SCC 318.

¹⁴ Section 66-E of the IT Act.

DRAFT NATIONAL E-COMMERCE POLICY

The Draft National e-Commerce policy, issued by the Department for Promotion of Industry and Internal Trade (“DPIIT”) on 23 February 2019 (“Draft Policy”), is a welcome move in the background of an exciting and rapidly growing e-Commerce industry in India and globally. Already, the e-Commerce market in India is worth \$38.5 billion, a 17% growth over the previous year.¹⁵

The 42-page draft transmits six comprehensive points at issue, of the e-commerce ecosystem -- data, infrastructure development, e-commerce marketplaces, regulatory issues, stimulating domestic digital economy and export promotion through e-commerce.

This draft policy has several facets of e-commerce which makes it as the first coup policy for e-commerce in India. India has become one of those countries like China and U.S. which as growing and developing towards a pre-eminent e-commerce legislation.

“Within India, the draft policy boosts the government’s schemes/ programmes, such as Digital India, Skill India, Make in India and Startup India, which rely on e-Commerce and its components. For instance, it has introduced norms for consumer protection, recognized the importance of data, its protection and storage, granted infrastructure status to data centers and server farms, integrated different systems to track imports and introduced anti-counterfeiting and anti-piracy measures. It is also in sync with the recently updated industrial policy which reflects the underlying brick-and-mortar economy.”¹⁶

The draft of e-commerce policy expands the definition of e-commerce to marketing, buying, distribution and selling of goods and services using electronic means.

Updated definitions of e-Commerce exist in India. For instance, in the 2018 landmark judgement in the case of *Christian Louboutin Sas v. Nakul Bajaj & Ors.*, the Delhi High Court interprets e-Commerce as simply commerce, the purchase-sale of goods/ services which takes place online, and not from physical brick and mortar shops, malls or kirana stores.¹⁷

The stew lies between digital economy and e-commerce as the draft policy doesn’t clarifies the difference between the above mentioned two aspects.

¹⁵ Ministry of Consumer Affairs, Food & Public Distribution, *E-Commerce Business*.
<http://www.pib.nic.in/Pressreleaseshare.aspx?PRID=1562698>.

¹⁶ Ambika Khanna, A critique of India’s Draft National e-Commerce Policy, Gateway House, Indian Council on Global Relations (April 4th, 2019), <https://www.gatewayhouse.in/india-e-commerce-policy/>.

¹⁷ CS (Comm) 344/2018.

Complicating the issue is the lack of distinction between an ‘intermediary’ and an e-Commerce ‘platform’. But help is at hand. In the landmark judgement of *Christian Louboutin Sas v. Nakul Bajaj & Ors.*, the Delhi High Court deliberated over when an e-Commerce company can be labelled an intermediary. It observed that for an e-Commerce company to claim exemption under the safe harbour provisions (which it can do only if it is considered to be an intermediary) under the Information Technology Act, 2000, it would have to ensure that it did not have active participation in the selling process. Therefore, not every e-Commerce company shall be treated as an intermediary.¹⁸

Identity Theft and Impersonation

- The IT Act provides that the identity of a person shall be deemed to have been stolen when any unique identification of a person (such as her electronic signature or password) is fraudulently or dishonestly used. The Act prescribes a penalty of imprisonment of up to 3 years and fine up to INR 1 lakh.¹⁹
- The IT Act provides that whoever, by means of any communication device or computer resource cheats by impersonation, shall be punished with imprisonment of up to 3 years and with fine of up to INR 1 lakh²⁰
- The IPC further provides that any person who cheats by impersonation shall be punishable with imprisonment of up to three years and/ or fine.²¹

CONCLUSION WITH SUGGESTIONS

The blistering growth of e-commerce sector is not only telltale of increasing receptiveness of people but has also come up with the legal issues faced by the country.

For a better secure transaction, it becomes stint of the companies to keep the details of the buyers shielded, also it needs to be tested and verified by the e-commerce whether the product is genuine or not.

The widespread sector of e-commerce has come a long way from the incipient when internet became a portent to the present time where it works as a necessity for every individual specially in metropolitan cities.

¹⁸ CS (Comm) 344/2018.

¹⁹ Section 66-C of the IT Act.

²⁰ Section 66-D of the IT Act.

²¹ Section 419 - Punishment for cheating by impersonation Whoever cheats by impersonation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

With the change in time, legal system has also tried to ensnarl by making enactment and developments in the IT sector. But for this tangled web much more is required in order to deal with emerging issues and for filling the loopholes.

Therefore it becomes the need of hour for e-commerce industries to reach out for resolving issues and a compact understanding of legal regime followed up by management strategies.