

JURISDICTIONAL ISSUES RELATING TO E-COMMERCE

LAW IN INDIA

Written by ***Raunak Kurani***

*3rd Year BA.LLB Hons Student, Symbiosis Law School, Symbiosis International University,
Pune*

INTRODUCTION TO E-COMMERCE

The term E-Commerce plainly means Electronic Commerce and while there is no statute that provides a precise definition to E-Commerceⁱ, it is plainly used in a sense that roughly translates to conducting business through electronic means, not restricted only to sale and purchase of goods but also including delivery, service, management and supply chain.ⁱⁱ However, the definition in the Foreign Direct Investment Policy of India recognizes only the aspect of buying and selling of goods, thereby restricting the scope of interpretation.

India has been a witness to a technological revolution that has opened up several opportunities for businesses and a major beneficiary for this development is the rapidly growing E-Commerce sector in India that has been credited for expansion of major businesses like Amazon and Flipkart. Computer networks have thus, become an important part of the economic infrastructure as transactions are facilitated over the web.

LAWS REGULATING E-COMMERCE IN INDIA

1. The Foreign Exchange Management Act, 1999 & The FDI Policy

Investments, specifically foreign investments in E-Commerce in India are governed by the FEMA. In addition to this, the Department of Industrial Policy and Promotion announces the FDI Policy which is notified by the RBI as amendments to the Foreign Exchange Management (Transfer or Issue of security by Persons Resident Outside

India) Regulations, 2000. The consolidated FDI policy lays down the route of investments, either via automatic route or through government approval through the Foreign Investment Protection Board. So far, 100% FDI is allowed in companies engaged in B2B commerce through automatic routeⁱⁱⁱ and no FDI is allowed to companies engaging in single brand^{iv} and multi-brand retail^v.

2. *The Indian Contract Act, 1872*

The Provisions relating to communication of proposals, acceptance and revocation^{vi} in the The Indian Contract Act, 1872 will govern the agreements that arise out of an E-Commerce Transaction. Furthermore, the agreement must not be unlawful in nature, forbidden by law, fraudulent, immoral and opposed to public policy^{vii} and must not be a result of one party exercising undue influence over the other.^{viii} The Agreements happen in the form of Standard Form of Contracts.

3. *The Information Technology Act, 2000*

Agreements that take place on E-Commerce platforms are mostly in the form of E-Contracts. The provisions of the IT Act provide that an electronic contract is valid and enforceable^{ix} if it complies with all pre-requisites under The Indian Contract Act, 1872. Moreover, the legislation also addresses the dispatch and receipt of Electronic contracts which is an essential factor in determining acceptance of a contract^x without altering or modifying any existing substantive law of contract.

DISPUTES ARISING OUT OF E-COMMERCE

Disputes arising out of E-Commerce related transactions can be classified into two types:

1. Contractual Disputes: These refer to disputes arising out of non fulfilment of a contractual obligation and can take place between the Enterprise and Service provider, Business to Business and Business to Consumer relations.

2. **Non-Contractual Disputes:** These refer to disputes arising out of non-observance of a statutory obligation by either of the parties involved in the transaction. These include disputes related to Copyrights, Data Protection, Domain Name, Competition related matters etc.

While disputes arising out of a contract are settled mostly within the physical territory where either of the two or both the parties are located. However, in the case of an enterprise operating online, the customers are spread across countries and the standard form of contracts, in such cases usually are in favour of the service provider. For example, in case of a dispute arising out of an E-Contract with Facebook, the terms and conditions automatically provide for settlement of disputes in San Francisco, California.

It is pertinent to note that in cases of goods and services whose delivery is restricted to a geographical area, the customer base can raise dispute within the same jurisdiction but with respect to goods and services delivered online, it is almost impossible to even negotiate terms on an individual basis with a large customer base and enterprises are forced to rely on the information entered by their customers, believing it to be true.^{xi}

With respect to civil cases in India, the place of suing is determined by Sections 15-21 of The Code of Civil Procedure, 1908^{xii}, depending on where the plaintiff or defendant is residing or where the cause of action arises. However, this situation does not provide a perfect solution while deciding cyber jurisdiction, a term used to define jurisdiction in cases of conflicts arising out of cyber space.^{xiii} Cyber space is not a physical place and hence, it becomes an extremely difficult challenge to determine jurisdiction in such cases as jurisdiction lies in the virtual world.

ANALYSIS OF JURISDICTION ISSUES WITH RESPECT TO E-COMMERCE DISPUTES IN INDIA

The preamble to The Information Technology Act, 2000 outlines the need to provide legal recognition to E-Commerce transactions and is also applicable to offences committed outside India and involves a computer, system or network located in India.^{xiv} The act recognizes electronic mode of communication as a tool for enforcement of valid contracts across the

country. Furthermore, it also awards recognition to digital signatures^{xv} and digital awards as basis for initiating litigation across courts in the country.^{xvi} Courts presume that with respect to digital signatures, the information provided in the certificate is true and correct^{xvii}, providing legal recognition to E-Contracts. Information stored in the form of electronic documents are deemed as documents^{xviii} and are admissible as evidence before the court of law.

While there doesn't seem to be a lot of Jurisprudence with respect to Jurisdiction in cases of disputes arising out of E-Commerce, The Indian Penal Code, 1860 states that any person liable by Indian law commits an offence outside the territory of India, he shall be held liable in the manner as if such act had been committed within the territory of India.^{xix} In the case of *SMC Pneumatics v. Jogeshwar Kalra*^{xx}, the Delhi High Court has assumed extra territorial jurisdiction where a corporation was being defamed through emails.

With respect to E-Commerce transactions, the question pertaining to territorial disputes gets complicated, mainly due to the fact that the Internet is borderless. The Delhi High Court has, on several occasions addressed the Jurisdiction issue with respect to cyber space. In the *Banyan Tree Case*^{xxi}, the Delhi High Court has held that in order to satisfy a court that it had the Jurisdiction to entertain a suit when the Plaintiffs were a hospitality company registered in Singapore, it needs to be proved that the Defendant purposefully availed itself of the Jurisdiction of the court.

The Code of Civil Procedure provides for institution of proceedings in a court within whose jurisdiction the defendant resides or the cause of action arises.^{xxii} The Supreme Court has thus observed that it is indeed a common ground that courts in India should have the jurisdiction to issue an injunction to a party over which it has a personal jurisdiction.^{xxiii} However, this power shall be used in extremely rare cases because an injunction, even though directed against a person in his personal capacity causes interference with the jurisdiction of another court. Acknowledging the growing concept of E-Commerce, the Delhi High Court has held that the presence of the concerned person at the place is not necessary to file a suit and only the three-fold requirements pertaining to agency for the purpose of carrying on business shall be fulfilled.^{xxiv} Furthermore, the Supreme Court has clarified that if the plaintiff is engaged in trading across the country, he is entitled to his choice of forum to initiate proceedings.^{xxv}

The Supreme Court has also derived a **Purposeful Availment Test** to adjudicate matters to which Internet companies are made parties. The Courts primarily look at three factors while adjudicating on jurisdiction in certain cases. These include:

- i. Availment of a company to another jurisdiction.
- ii. Whether the commission of the act/offence happened in another jurisdiction.
- iii. Whether the jurisdiction is reasonable enough for the defendant to defend himself.^{xxvi}

Another test derived by the Supreme Court is the **Forum Convenience Test** to advance the proposition that even if a small part of the cause of action arises within the territorial jurisdiction of the High Court, it does not give the complete authority to the High Court to adjudicate the matter upon its merits and in cases where it may be deemed appropriate, the High Court can actually refuse to exercise its discretionary jurisdiction.^{xxvii} The Delhi High Court has further clarified the proposition citing that once a website is even accessed from Delhi, it is sufficient to invoke the territorial jurisdiction of the court.^{xxviii} Once a domain name is accessed from anywhere, the territorial jurisdiction is no longer restricted to the place of residence of the defendant.^{xxix}

The Judiciary has not had many opportunities to address the issue of Jurisdiction Issues pertaining to E-Commerce in India. Hence, it is worth noting that the precedents established so far are subject to further review and the grey area pertaining to conferring jurisdiction upon an adjudicating authority is still a work in progress.

CONCLUSION

The Information Technology Act, 2000 is the primary legislation that governs E-Commerce in India and it lacks a lot of specificity required to govern online transactions, including Jurisdictional issues. E-Commerce is still an emerging field, the law is still evolving and will take some time to develop successfully. There is a dire need for specific provisions that are beneficial and friendly to the consumer. While most E-Commerce transactions happen in a B2C form i.e. Business to Consumer form, the Jurisdiction that is conferred upon the consumer courts is only pecuniary in nature. The existing framework with respect to the Information

Technology Act must be read in accordance with the provisions of the Indian Contract Act, 1872. While the issues pertaining to the place of suing are, in most cases governed by the CPC, there is no provision that provides for enforcement of a foreign judgement except for Section 10 of the CPC. In cases where the jurisdiction is not conferred upon any court through a contract in cross border transactions, enforcement of such judgements becomes a grey area of concern, especially in Private International Law. Moreover, for MNCs carrying out business across the country, the liberty to file a case in the place where they are carrying out business gives them sufficient scope for Forum Shopping, which is not beneficial to the consumer and thus, some clarity with respect to choice of forum here is necessary. In the future, there is a need for a separate legislation to govern E-Commerce transactions that would take into account the existing provisions of the Indian Contract Act and Information Technology Act and provide proprietary information structures that provide for protection and safeguards for all parties involved in a transaction.

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