

ANALYTICAL STUDY OF NATURE AND SCOPE OF E-COMMERCE WITH RESPECT TO LEGAL FRAMEWORK IN INDIA

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ABSTRACT

E-commerce in India is expanding day by day , so is the related challenge with respect to E-Commerce Regulations. There are many underlying issues that are posing as challenge to the growth of E-Commerce. Out of which one is with regard to the jurisdiction in case of disputes. This is not only a matter of concern in the national level but also at international level. Considering the fact that, there is no boundaries when it comes to Internet. The main issue is whether we can apply the traditional territorial doctrine of jurisdiction , that is applied in the physical world could also be applied or not ? Can the nature of the disputes and the liabilities could be identified and dispute settlement machinery be evolved in the similar manner that we apply in case of Physical jurisdiction. Therefore, this paper tries to undertake a study to describe the present laws and regulations governing e-commerce and examine the challenges and opportunities of e-commerce under the present legal regime in India especially with respect to issue of Jurisdiction. The paper also seeks to find the effectiveness the present laws and regulations in dealing the legal issues of e-commerce in the present legal system and tries to suggest if any improvements required for a better legal and regulatory framework for ensuring a just, fair and consumer-friendly e-commerce environment in India and how the issue of jurisdiction can be settled when it comes to E-commerce related disputes.

Keywords: E-Commerce, Jurisdiction, Liability, E-Contract, Regulation, Information Technology Act 2000.

INTRODUCTION

The origin of commerce by exchanging goods occurred before recorded history, now commerce is a basic activity of goods trading and buying in everyday life. “Entering into the electronic era the way individuals and organizations do business and undertake commercial transactions have been changed.ⁱ This indicates the movement towards electronic commerce. This means there is no paperwork and physical interaction is limited, if at all. Electronic commerce, commonly known as e-commerce, is the buying and selling of product or service over electronic systems such as the Internet and other computer networks. Electronic commerce draws on such technologies as electronic funds transfer, supply chain management, Internet marketing, online transaction processing, Electronic Data Interchange (EDI), inventory management systems, and automated data collection systems.ⁱⁱ E-commerce is considered a game-changer for the Indian economy and the future of Digital India.” Presently, the key stakeholders in e-commerce include the government, travel services like airlines, Indian Rail, bus operators’ retailers/manufacturers, entertainment service providers, and many others; enablers of the e-commerce sector such as logistics providers, financial intermediaries, social networking sites, internet service providers call centres, network service providers, etc. help facilitate transactions online.” Government Initiatives “such as Startup India, Digital India, allocation of funds for the BharatNet Project, promotion of ‘cashless economy’, the launching of the Unified Payment Interface by the RBI and the National Payment Corporation of India have collectively contributed to the growth and success of the e-commerce sector in the country”.ⁱⁱⁱ E-commerce is providing businesses an abundance of opportunities, but there are many risks and challenges in the cross-border e-commerce market out of which jurisdiction issue is one of the most troubling one.””

LEGISLATIVE PROVISIONS WITH RESPECT TO E-COMMERCE

The “Indian government enacted the Information Technology Act 2000 (the IT Act) in June 2000 to address a need for legislation to accord legal recognition to transactions carried out by means of electronic communication”. “Discovery of insufficiencies in the law based on judicial scrutiny resulted in the government amending the IT Act in 2008 by introducing provisions

regarding, inter alia, validity of electronic contracts, security of electronic signatures, punishments for computer-related offences, identity theft, violation of privacy and publishing and transmission of obscene material in electronic form. With the advent of growth in the IT sector, especially the increased role of internet service providers (ISPs) and payment intermediaries in India, the government crystallised the role and responsibilities of ‘intermediaries’ under the Information Technology (Intermediaries Guidelines) Rules 2011 (the IT Intermediary Rules) to grant sanctity to the safe-harbour provisions under the IT Act, with a view to protecting service providers with respect to third-party data.^{iv}”

Specific laws, “such as the Payment and Settlement Systems Act 2007, regulate payment system operators and payment intermediaries, including in the e-commerce space. The Reserve Bank of India (RBI) issues regulations from time to time that regulate the use of payment instruments like gift cards, e-wallets, credit cards and debit cards etc for facilitating e-commerce and mobile commerce^v. In March 2016, the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry of the government of India issued guidelines on foreign direct investment (FDI) in e-commerce; see Press Note of March 2016 (PN3), which were subsequently replaced and revised by Press Note of December 2018 (PN2) issued by the DIPP in December, 2018. The introduction of PN2 is a significant development as it provides clarity to the existing FDI framework concerning the e-commerce sector. Certain key highlights of the PN2 are^{vi}:”

1. “a marketplace entity is now expressly restricted from exercising ‘control’ over the inventory of a seller;”
2. “a marketplace entity is ‘deemed’ to have exercised control over the inventory of a seller, if more than 25 per cent of the purchases of such seller are from such marketplace entity or its group companies;”
3. “cashbacks provided by group companies of a marketplace entity to the buyers is required to be fair and non-discriminatory;” and
4. “a marketplace entity cannot mandate any seller to sell any product exclusively on its platform only.”
5. “a seller entity that has equity participation from a marketplace entity (having FDI), or its group company, or whose inventory is controlled by a marketplace entity, or its

group company, is not permitted to sell products on such platform run by such marketplace entity.”

The “RBI also amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Amendment) Regulations 2019 dated 1 February 2019 to make it consistent with the revised legal framework stipulated under PN2. These collectively form the backbone of the legal framework within which business is currently conducted over the internet in India.^{vii}”

ISSUE OF JURISDICTION

Now “coming to the issue of Jurisdiction, the main hurdle for the lawmakers, is to deal with the jurisdiction of the law which they want to enact, especially considering the situation when the trade is happening cross-border. The courts of law primarily have to deal with territorial and pecuniary jurisdictions. Related to e-commerce dispute, deciding territorial jurisdiction gets more complicated, mainly because when it comes to the Internet, there are no borders between the countries.^{viii}” However, in e-commerce transactions, if a business “derives customers from a particular country as a result of their website, it may be required to defend any litigation that may result in that country. As a result, any content placed on a website should be reviewed for compliance with the laws of any jurisdiction where an organisation wishes to market,” promote or sell its products or services as it may run the risk of being sued in any jurisdiction where the goods are bought or where the services are availed of.”

Transactions of e-commerce transcend territorial boundaries. Therefore, e-commerce transactions can give rise to jurisdictional issues. The traditional rules of jurisdiction are not helpful in resolving jurisdictional issues related to e-commerce transactions. For example, a company incorporated in the US could be offering sale of its products through its website hosted in a server located in the UK, and a customer residing in New Delhi might accept the offer. So, if a dispute pertaining to the said transaction, say non-payment of full sale price by the customer arises, where should the company sue? Since e-commerce transactions can span over several jurisdictions, it can give rise to issues like conflict of jurisdictions, multiplicity of proceedings, forum shopping, etc. The law applicable and the modes of enforcement also vary across jurisdictions. Hence, it is important to have clarity regarding the jurisdictional issues

pertaining to e-commerce. It is only the correct determination of jurisdiction that can help a wronged person to file his/her claim in the right court. In order to identify jurisdiction correctly, we need to first understand.

Presently “although e- transactions are at the helm, we must realize that the laws governing these transactions are yet to emerge and develop. Although we have the IT Act in place, it is not sufficient to deal with online transactions in India.^{ix} It is a step in the right direction as it lays down admissibility of electronic records, penalties for cyber-crimes etc. However, in the case of online transactions it can be regarded as an enabling statute which must be read in consonance with the Contract Act, 1872 in order to determine whether the online transaction does indeed constitute a valid contract. There is a dire need for a specific legislation to be enacted to determine issues involving jurisdiction for e-commerce disputes. Justice S. Muralidhar has stated that the traditional approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it.”

“With the internet, the question of ‘territorial’ jurisdiction gets complicated largely on account of the fact that the internet is borderless.” “The traditional approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it. But, with the internet, the question of ‘territorial’ jurisdiction gets complex mainly because it is borderless. Recognizing such a multifaceted concern, this paper throws light upon numerous theories, doctrines and principles developed by courts both in and outside India.”^x

In common parlance Jurisdictions is of two types:^{xi}

Subject “jurisdiction allows the court to decide cases of a particular category and to check whether the claim is actionable in the court where the case has been filed.”

1. “Personal jurisdiction allows a court to decide on matters related to citizens or people of its territory, the person having some connection to that territory, irrespective of where the person is presently located. Every state exercises the personal jurisdiction over the people within its territory”
2. “The concept of jurisdiction can be understood in a better way with reference to section 15 to 20 of code of civil procedure (1908) which talks about the place of suing or the

subject matter jurisdiction and section 20” of this code specifically speaks about any other category of suit which is not covered in sec 15 to 19 of the code.

Now “coming to disputes, they are inevitable in the course of the life of a business, whether online or offline. The business disputes which the enterprise may encounter include the following:^{xiii}”

A. Contractual disputes

1. “Disputes between the enterprise and the Internet Service Provider (ISP) or web-hosting services provider, including disagreements over interruptions in service, breach in data security etc.”
2. “Business-to-business (B2B) disputes between the enterprise and its suppliers such as non-performance of contractual obligations, misrepresentations, and complaints from customers regarding services provided by suppliers.”
3. “Business-to-consumer (B2C) disputes between the enterprise and its customers such as non-payment for goods or services, non-performance of contractual obligations, poor performance of contract, misrepresentations, breach of the privacy policy, and breach of security of confidential information. It is between the enterprise and its customers that lies the greatest possible scope for disputes.”

B. Non-contractual disputes

These are the common kinds of non-contractual disputes that may arise in an online enterprise.

1. “Copyright - The enterprise might be liable for copyright infringement if it uses copyrighted material in excess of fair use, and without permission.”
2. “Data protection - The enterprise may be liable for sharing or revealing confidential data on customers, as discussed in the segment on Privacy.”
3. “Right of free expression - The enterprise may be subject to defamation suits for defamatory material posted online.”
4. “Competition law, Domain name disputes - The enterprise may be subject to trademark infringement suits if it infringes a registered or otherwise legally recognized trademark. If the enterprise has registered a domain name which corresponds to a registered or common law trademark,” it may be subject to a complaint under ICANN's Uniform Domain “Name Dispute Resolution Policy (UDRP), or the U.S. federal

Anticybersquatting Consumer Protection Act. For a discussion of the UDRP process, see the Berkman Center Online Lecture & Discussion Series by Diane Cabell, Using ICANN's UDRP (Website) (Cabell).”

Although “many of the issues like jurisdiction, choice of law, high cost of cross-jurisdictional litigation) which arise in relation to the different categories of disputes are similar, the difficulties are perhaps more pronounced in respect of B2C transactional disputes which are often of small monetary value.” Traditional methods of resolving cross-jurisdictional commercial disputes, such as international commercial arbitration, are often too costly, inconvenient and burdensome in the context of consumer disputes.^{xiii”}

ISSUE OF JURISDICTION UNDER INDIAN LAW

The “websites registered in India to conduct e-commerce are governed by all Indian laws, such as Information Technology Act, 2000; Consumer Protection Act, 1986; Code of Civil Procedure, 1908; and Indian Contract Act, 1872.” The rules formed under IT Act, 2000 define that the e-commerce websites operating in India are intermediaries, and therefore need to do due diligence pertaining to the cyber law. The UNCITRAL Model Law on Electronic commerce stated that a contract can be made by exchanging data messages and when a data message is used in the formation of a contract, the validity of such contract should not be denied.^{xiv”}The modern law provides equal legal treatment for the use of electronic communication and paper-based communication.”

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.” “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 and digital awards as basis for initiating litigation across courts in the country. Courts presume that with respect to digital signatures, the information provided in the certificate is true and correct, providing legal recognition to E-Contracts.^{xv”}Information “stored in the form of electronic documents are deemed as documents 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. In the case of *SMC Pneumatics v. Jogeshwar Kalra*, the Delhi High Court has assumed extra territorial jurisdiction where a corporation was being defamed through emails.”””

“Given the nature of e-contracts, one question which often comes to fore is which court would have territorial jurisdiction to try disputes arising out of such e-contracts? The Code of Civil Procedure, 1908 (“CPC”) prescribes the manner of determining the jurisdiction of civil courts in India, based on two fundamental principles:””

(i) “the place of residence of the defendant; and”

(ii) “the place where the cause of action arises.”

Subject to the above, “while the parties remain free to determine the choice of courts to adjudicate their disputes, they can choose only such court(s) which is/are not barred from exercising jurisdiction, i.e. parties cannot confer jurisdiction upon a court which does not have jurisdiction to entertain their case. Ordinarily, contracts contain a specific provision with respect to the place of execution thereof, and the courts of such a place would have territorial jurisdiction to entertain and try the disputes arising under such contracts if in accordance with the CPC as aforesaid. However, since e-contracts are not physically signed/executed and are concluded in a virtual space, simply imposing the traditional principles of jurisdiction, applicable to physical contracts, to such transactions can prove to be challenging.”^{xvi} “The jurisdictional issues of e-contracts have, however, been addressed to an extent under the IT Act. Section 13 of the IT Act governs the provisions relating to time and place of dispatch and receipt of an electronic record, and addresses the issue of deemed jurisdiction in electronic contracts.”^{xvii}”

In the case of *PR Transport Agency vs. Union of India*^{xviii}, “wherein the Allahabad High Court had to decide the question of jurisdiction where the respondent had sent the letter of acceptance by an e-mail to the petitioner's e-mail address. Subsequently, the respondent sent another e-mail cancelling the e-auction in favour of the petitioner *due to some technical and unavoidable reasons*.” “When the petitioner challenged this communication in the Allahabad High Court, the respondent raised an objection as to the *territorial jurisdiction* of the Court on the ground

that no part of the cause of action had arisen within Uttar Pradesh (UP), and therefore, the Allahabad High Court (UP) had no jurisdiction to try the dispute. In the case, the principal place of business of the petitioner was in district Chandauli (UP),” and the other place where the petitioner carried on business was Varanasi, “which is also in the State of UP. The Court, therefore, on the basis of section 13(3) of the IT Act, held that the acceptance of the tender by e-mail would be deemed to have been received by the petitioner at Varanasi/Chandauli, which are the only two places where the petitioner has his places of business. As both these places fell within the territorial jurisdiction of the Allahabad High Court, the Court assumed jurisdiction to try the dispute.”

Further, in the case of *Ranju Aery Vs SpiceJet Ltd*^{xix}, the SC held that “reading the provisions of CPA and the IT Act, 2000, with the help of the ratio of the judgement in *ABC Laminart Pvt Ltd*, we can safely hold that, where contracts for services and/or goods are entered into over the Internet (commonly referred to as online transactions), for the purposes of consumer complaints, part of the cause of action arises inter alia, at the complainant’s place of business, if acceptance of the contract is communicated to her through the Internet, including the medium of email.” Further, “irrespective of whether or not the contract is one made over the Internet; cause of action would also continue to arise at any of the places:”

- (a) “where the contract is performed or is to be performed, or”
- (b) “where money under the contract is either payable or paid, or”
- (c) “where repudiation of the contract is received, if any”

Under the IT Act, Section 1(2) provides that “the Act shall extend to the whole of India and, save as otherwise provided under the Act. it applies also to any offence or contravention thereunder committed outside India by any person. Section 75 deals with the application of the IT Act to offences or contravention committed outside India. As per sub-section (1) of Section 75, the Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.” This is subject to “sub-section (2) which states for the purposes of sub- section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India. Therefore, Indian courts can assume jurisdiction if the offence is committed or the consequence of the offence so

committed can be felt within its jurisdiction. For example, Indian courts can assume jurisdiction if an offence under the IT Act is committed by the display of material on a foreign website that could” be accessed from India.^{xx}”

GLOBAL JURISDICTION IN CASES OF E-COMMERCE

The “traditional approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it. The principle of territoriality has its own limitations. A national law is territory specific and, in most cases, shall not have extra-territorial application. The courts have invoked various principles to ascertain jurisdiction:”

In Personam Jurisdiction:

The words “‘in personam’ mean ‘directed towards a particular person’. It refers to a right, action, judgement or entitlement that is attached to a specific person. An ‘in personam’ suit is one in which relief is sought against, or punishment is sought to be inflicted upon a ‘specific person’. These suits are always against an individual person and only compensatory benefits are awarded. The rules applied by the Indian Courts with regard to this matter fall under the basis of the jurisdiction under the Code of Civil Procedure, 1908 (CPC).”

Sections “19 and 20 of the CPC set the basis for Indian courts to exercise ‘In-Personam’ jurisdiction which is relevant to e-commerce disputes.^{xxi}” “Section 19, is limited to cases in which torts arising and compensation from and for the wrong done to person or to movable property. It excludes any suit filed under causes of action arising other than tort. Section 20 of the CPC allows a defendant to defend his suit in the place where he was residing, thereby not causing inconvenience to the defendant. The Plaintiff in this case has the option to try the case either in the court which is located where the defendant works or resides or where the cause of action has risen.^{xxii}” The “case of Motion Pictures USA v. ICrave TV^{xxiii}, involving sale of copyrighted material online in the US, courts invoked this principle.” The petitioner “sought the intervention of the courts to restrain the activities of the defendant, a Canadian website alleging Copyright infringement Trademark Infringement and unfair competition amongst other things.” The defendant was “involved in the sale of copyrighted television and

entertainment programs through their site. In addition to its infringing activities the defendant issued advertising space to companies in US and Canada. It was held that by infringing trademarks and copyrights within the US and advertising to American viewers, the US courts had personal jurisdiction over the case.”^{xxiv}

THEORY OF MINIMUM CONTACT

Due “to various legal conflicts originating from the internet, courts around the world, face the difficult question of deciding whether to develop a new body of jurisprudence to deal with a novel legal problem, or to identify analogous legal precedents that best fit the facts of the case. In the late 18th century, the United States Supreme Court in *Pennoyer v. Neff*^{xxv} formulated two broad principles of Jurisdiction:”

- (1) “Every state possesses exclusive Jurisdiction within its territory; and”
- (2) “no state can exercise jurisdiction over persons without its territory. Thus, the state had jurisdiction is personam; over persons located in the forum state) or jurisdiction in rem (over property located in the forum state.””

A “new concept was laid down by the court in the case of *International Shoe v. Washington*^{xxvi}, in the middle of 19th Century known as the ‘minimum contacts’ standard. The court ruled that” a “non-resident of a state may be sued in that state if the party has ‘certain minimum contacts with (the state) such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.’ This court observed that the lower courts must quantify the defendant’s contacts with the state and the relationship between the contacts before exercising personal jurisdiction.”^{xxvii} “Minimum “contacts can be deduced from the fact of selling goods and providing services, maintaining office or store, entering into a contract with someone or committing a tortuous act in the state. A non-resident’s minimum contact with a forum state is treated as the equivalent of territorial presence in the state and hence justifies the state’s” exercise of sovereignty over the non-resident. ^{xxviii}At the same time, “a non-resident’s ‘purposeful availment’ of opportunities within the state is viewed as a liability to be brought to account under that state’s jurisdiction in exchange for the protection of its laws. Hence according to this legal theory, a defendant must have ‘minimum contacts’ with the jurisdiction for a tribunal or court to try a case involving a foreign party. According to this rules, in the

United States, a defendant must not be made subject to jurisdiction unless he has availed himself of the jurisdiction, by having minimum contacts with the forum. Therefore, the question that arises is whether a company selling its products through a website to consumers in other states or countries has, by virtue of its website, availed itself of the jurisdiction of such other states or countries and thus ‘minimum contacts’ with these other jurisdictions.”

The “Federal District Court of Pennsylvania in the case of *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*^{xxix},” held that “the defendant satisfied the minimum contacts rule criteria as they had entered into agreements with various internet access providers within the state of Pennsylvania, through which they had established minimum contact and also had satisfied the test under the Long-Arm statute of the State of Pennsylvania.” This statute includes both general and specific jurisdiction over out-of-state defendants. It also “states that to “establish general jurisdiction, a non-resident’s contacts with the forum must be continuous and substantial. In contrast to the In Personam Jurisdiction, In Rem Jurisdiction pertains to immovable property. Hence a discussion on the same would be of no relevance to the subject under analysis.”

If we “consider Indian scenario, it was held by the Delhi High Court in *Casio India Co. Ltd. v. Ashita Tele Systems (P) Ltd.*^{xxx}” that “due to ubiquity, universality and utility of the features of the internet and the world wide web, any matter associated with it possesses global jurisdiction. It was also held that once access to the impugned domain name website could be had from anywhere else, the jurisdiction in such matters cannot be confined to the territorial limits of the residence of the defendant.” The plaintiff, “Casio India, had filed the suit alleging passing off action by the defendant, who had maintained a deceptively similar domain name. The defendant challenged the locus of the plaintiff, contending that the court had no territorial jurisdiction”. However, “the objections of the defendant regarding territorial jurisdiction were overruled, holding that the fact that the website of Defendant 1 can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this court. It was, accordingly, held that the objections with regard to the territorial jurisdiction were without merit. Courts in buyers' city have jurisdiction”^{xxxi}

Further, “the principle laid down by the Supreme Court in *Bhagwand Goverdhandas Kedia v. Girdharilal Purshottamdas & Co.*^{xxxii}” This was a case “wherein offer and acceptance was communicated through telephonic conversation. It was held therein that where contract is concluded by parties through instantaneous methods of communication, contract is formed

when acceptance is duly communicated to the offeror. So, the place from where acceptance is communicated would assume jurisdiction as well.” “The same principle was applied in cases of e-commerce as well, by the Delhi High Court in *World Wrestling Entertainment Inc. v. Reshma Collection*^{xxxiii}. The plaintiff “was a company broadcasting wrestling competitions, and selling merchandise products online. Alleging unauthorised sales of merchandise by the defendant, the plaintiff brought the suit in Delhi, on grounds of trademark infringement.” The defendant was located in Mumbai, outside Delhi jurisdiction. The plaintiff sought to maintain the suit in Delhi on the ground that it was carrying on business in Delhi, as its products could be accessed” from Delhi through website. The Division Bench accepted the contention of the plaintiff and held that “the suit could be maintained in Delhi. The court used the classic example of formation of a contract by telephone. It stated that the acceptance of the contract takes place where the acceptance of the offer is intimated to the offeror. The court applied this rule to commercial transactions over the internet”. It stated:

1. “The website of the plaintiff refers to various goods and services. It is not an offer but an invitation to an offer, just as a menu in a restaurant.”
2. “The invitation, if accepted by a customer in Delhi, becomes an offer made by the customer in Delhi for purchasing the goods.”
3. “When, through the mode of the software and the browser, the transaction is confirmed and payment is made to the plaintiff through its website, the plaintiff accepts the offer of the customer at Delhi.”
4. “Since the transaction between the two (customer and vendor) takes place instantaneously, the acceptance by the vendor is instantaneously communicated to its customer through the internet at Delhi. Therefore, in such a case, part of the cause of action would arise in Delhi. So, the courts in the place from where the prospective buyer could access the goods of the seller can have jurisdiction. This, virtually, could mean that the suit could be brought anywhere in the world.”

Further, “dictum laid down by the Delhi High Court in *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy*^{xxxiv} Banyan Tree Holding was an enterprise giving hospitality services”, who had “been carrying out their business under the name and style Banyan Tree. The defendants were a township developer, who were using the name Banyan Tree for one of their

projects, and were offering online services through their domain www.makprojects.com/banyantree. Alleging dilution of goodwill by the action of passing off, the plaintiff sought for injunction to prohibit the use of name Banyan Tree by the defendants.”

The suit was filed in Delhi. “The reason for maintaining the suit in Delhi as averred in the plaint was that firstly, the defendants were advertising their projects and offering services to Delhi residents and secondly, the defendants' website could be accessed from Delhi. It is pertinent to note that the jurisdiction was sought to be derived from Section 20 CPC, and not from the Trade Marks Act”. The Delhi High Court held that “the mere possibility of access of website from Delhi would not mean that the defendants were carrying out business in Delhi. The court held that it lacked jurisdiction on the basis of the following reasons”:

1. “Mere hosting of a website which is accessible by anyone from within the jurisdiction of the court is not sufficient.”
2. “Mere posting of an advertisement by the defendant depicting its mark on a passive website which does not enable the defendant to enter into any commercial transaction with the viewer in the forum State cannot satisfy the requirement of giving rise to a cause of action in the forum State.”
3. “An interactive website which is not shown to be specifically targeted at viewers in the forum State for commercial transactions, will not result in the court of the forum State having jurisdiction.”

The court relied on “the tests employed by the US courts, i.e. the ‘long arm test’ and the sliding scale test, which have been discussed in the previous section, for reaching its conclusions. The court observed that the personal jurisdiction which could be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet”^{xxxv}. The court took note of the following circumstances:

1. “Where a defendant that clearly does business over the internet enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper.”
2. “Where a defendant only posts information on the internet accessible to users in foreign jurisdictions, the court cannot exercise personal jurisdiction where the website is merely passive.”

3. “Where the defendant uses an interactive website to host information and exchange the same with the user, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.”

So, for the courts of a place to assume jurisdiction, mere passive availability of a website from that place is not sufficient. It has to be established that the “defendant had personally availed of the jurisdiction of the place by indulging in conscious and intentional acts within the jurisdiction, in furtherance of commercial interests with the intention of donning a frill and final executable contract.”

RECOMMENDATIONS

1. 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. It can be proposed that the legal framework supporting commercial transactions on the internet should be governed by consistent principles across the state, national, and international borders that lead to predictable results regardless of the jurisdiction in which a particular buyer or seller resides.” This is possible only when there will be a 174 uniform law regulating this new environment and which will promote the certainty and public trust that is needed for progress in this area.
2. E-commerce websites should lay down purchasing and payment process in sequence with absolute clarity, regular updating and monitoring of information provided.
3. The “terms and conditions should not be general in nature but specific depending upon the nature of the goods & services offered and they should be brought to the sufficient attention of the consumers and provide ample opportunity to read and then accept. E-commerce players should ensure reasonable efforts to prevent unauthorized transaction.”
4. Further, “when e-commerce takes place as B2C that is, business to consumer, then Consumer Protection Act, 1986 obviously has its role to play but, alas! It too does not talk about online transactions and on account of jurisdiction of various consumer

forums, it gives only the brief account of pecuniary jurisdiction of the forums. There is a dire need for specific provisions for online transactions where directly consumer is involved. All businesses engaged in e-commerce should ensure that they take account of consumer protection issues.”

5. The various treaties between the nation and resolutions of the World Trade Organization may ease the process to help meet ends of justice.
6. There is a need for enactment of statute in India based on the theories like “minimum contact” and “long arm statute” of the United States of America.

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. The present state of the law in India may be summarized. A plaintiff, not having the benefit of the limited long arm provision of either section 134 of the Trade Marks Act, 1999 or section 62 of the Copyright Act, 1957 will not be able to persuade a court to exercise jurisdiction over a defendant hosting a website containing the material purportedly violating the plaintiff’s IP rights unless it is shown that the defendant targeted its interactive website at viewers in the forum state for the purpose of commercial transactions and in fact entered into such transactions using the website. Further a lone trap transaction may not demonstrate the ‘purposeful’ targeting by the defendant of the forum state or of ‘aiming’ at particular customers therein.” A more systematic behaviour “over a series of transactions will have to be shown as having been entered into by the defendant. It may be argued that the test evolved in *Banyan Tree* may not answer the problems in a different factual setting and in a different context, for e.g., the tort of defamation or the crime of cyber pornography. But then *Banyan Tree* does not deal with those contexts for which other tests will have to be devised. Nevertheless, the courts in India will have to guard against over-protection of local interests and adopt a balanced approach to ensure that a middle path is found in individual cases.””

ENDNOTES

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