

An Analysis of Conflict of Jurisdiction in E-Commerce in India

Bharti Singh

(LLM, NET) Kurukshetra University, Kurukshetra

1. Introduction

Over the years, the Internet has virtually made our globe smaller. An online transaction may be explained as a way of conducting business by utilizing computer and telecommunication technology to exchange data or conduct business. However, this boom in internet transactions has brought a host of issues for the consumers. One such issue is regarding jurisdiction of such transactions. The primary question that needs to be addressed is “*when a transaction takes place online, where is the contract concluded?*” 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. Therefore, while there are no borders between one region and the other within a country there are no borders even between countries.¹ It is noteworthy that many of the issues related to jurisdiction, choice of law, high cost of cross-jurisdictional litigation, can arise in diverse categories of disputes. Recognizing such a multifaceted concern, this paper highlights the various jurisdictional issues while deciding disputes in e-commerce and the present legal framework in India governing e-commerce in cyber-space.

2. Research Design

In pursuing the present study, the author has followed a doctrinal method of research. It involves the collection of data from primary and secondary sources; primary sources like statutes, reports of the commissions and committees and secondary sources like books written by eminent authors and articles found in the journals and websites. Use of online resources also became very relevant to find out the most updated, relevant and apt information which helped the researcher in exploring the subject from various dimensions. Inductive methodology i.e. getting general results from specific points by the analysis of literature studied has also been used. Research journals and print media are used as inputs to this work for making pragmatic suggestions and recommendations. Important decided cases reported in various legal journals and articles were also helpful for understanding the interpretation of the letter and tenor of the legal provisions. The author would be conducting a critical and analytic

This paper highlights how the technological advancements and internet has enabled the businesses to reach new markets. It also briefly defines E-Commerce and gives Jurisprudential aspect relating to jurisdictional challenges in e-commerce disputes. This paper also highlights various legislations and

¹Justice S. Muralidhar, “Jurisdictional issues in cyberspace” The Indian Journal of Law And Technology (2010)

enquires into the history, growth, challenges and future of jurisdictional aspects of e-commerce in India.

India is witnessing a digital revolution with internet becoming an integral part of its population and availability of internet in the mobile phones. With the decrease in the prices for using internet, change in lifestyle in urban areas and the convenience that internet has brought has supported this revolution.²

In the contemporary era, technology has fundamentally changed the way the businesses were handled by society including consumers. The global presence of internet has enabled businesses to reach new markets and millions of new potential customers. As a result, ‘Online Commerce’ commonly known as ‘Electronic Commerce’ has been developing on a faster pace around the world. “While being able to access global markets, online commerce or e-commerce has enabled businesses to bypass the traditional intermediaries in domestic jurisdictions. Besides, owing to its lower transaction costs, online commerce has caused a steady increase in the number of sellers and suppliers in the market, thus increasing diversity and competition in the market. Therefore, online commerce has been rightly categorized as the new face of entrepreneurship which encompasses existing companies, organizations, small businesses and individual online traders.”³

The term E-Commerce stands for ‘Electronic Commerce’. There is no standard definition for the term e-commerce as such, it is said to be used as a mode of conducting business through electronic means unlike through conventional physical means. Such electronic means include ‘click & buy’ methods using computers as well as ‘m-commerce’ which make use of various mobile devices or smart phones. The concept of E-commerce not only includes selling and purchasing of goods online but also its delivery, payments, supply chain and service managements.

However, there is the other side of the story as well that is, online shoppers sometimes receive mistaken goods, destructive goods in transit, and deferral in conveyance of product or from time to time, shopper does not get the goods. Moreover online shopping fraud is another issue of concern. There are number of instances like a Pune based business man who ordered an iPhone from Snapdeal but received a box containing pieces of wood inside. Since the mode of payment was cash on delivery accordingly he refused to pay.⁴ Again, a

²<http://www.mondaq.com/india/x/299686/IT+internet/Legal+Issues+In+ECommerce+Think+Before+You+Click>

³Ivonnely Colon Figg, “Protecting the new face of entrepreneurship: Online Appropriate Dispute resolution and international consumer to Consumer transaction” 12 FJOCAFL 238 (2007).

⁴Kunal Anand, “This Man Ordered Two iPhones. Snap deal sent Him Pieces Of Wood”, *Times of India*, December 12, 2014, available

B.Tech student saw a listing of iPhone 5S which was priced at Rs. 68 and accordingly he ordered the same. However, later the order was cancelled by Snapdeal so he chose to proceed against Snapdeal. Thereby, Consumer Court slapped Rupees ten thousand fine on Snapdeal for not delivering iPhone for rupees sixty eight.⁵ Another instance of a consumer ordered a Samsung Galaxy Note via Flipkart but discovered a Nirma soap delivered to his address instead of cell phone. The consumer registered a complaint with the police and after various complaints, Flipkart returned him money.⁶ In 2007, the shopper filed Online payment fraud reached to \$329 million compared to 2006, when it was \$198 million reported by Internet Crime complaint in the year 2008.

Numerous challenging queries mandate responses in any transaction like where can the litigants prosecute? Which country's law will apply? By what are the means to enforce verdict?

3. Indian Statutes and E-commerce Jurisdiction

The highly profitable e-commerce segment of India must be explored only after complying with the laws governing the respective e-commerce segment. There is no single set of laws and regulations that govern all e-commerce segments and every e-commerce segment is governed by different laws.

As a global body, the United Nations Commission on International Trade Law (UNCITRAL) was used as a forum by the government to develop uniform law standards for electronic commerce. This forum recognized that modern legislation on electronic transactions should take into account core elements such as: the electronic transactions should not be discriminated against solely because of their nature; the legal value of electronic transactions shall be equivalent to other forms of communication such as on paper in writing; and further, the law shall be technology- neutral to accommodate emerging technologies or generics. Such core elements may be complemented by the contractual choices of the parties to a specific transaction⁷ The General Assembly of the United Nations adopted a resolution on January 30, 1997 commending the Model Law on Electronic Commerce (worked out by the UNCITRAL) for a favourable consideration by the Member States as a Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper- based methods of communication and storage of information. Government of India enacted the Information Technology Act (henceforth referred to as IT Act) in

[at:http://www.indiatimes.com/news/weird/this-man-ordered-two-iphones-snapdeal-sent-him-pieces-of-wood-228895.html](http://www.indiatimes.com/news/weird/this-man-ordered-two-iphones-snapdeal-sent-him-pieces-of-wood-228895.html)

⁵Mohal Ghosh, "Snap deal Faces Major Embarrassment – Consumer Court Slaps Rs 10,000 Fine for Not Delivering iPhone For Rs 68", *Trak.in*, February 16, 2016, available at: <http://trak.in/tags/business/2016/02/16/snapdeal-consumer-court-fine-iphone-delivery/>,

⁶Sagar Rajput, "Case of cheating against Flipkart for delivering soap instead of Samsung phone", *The Hindustan Times*, June 8, 2016, available at: <http://www.hindustantimes.com/mumbai/case-against-flipkart-as-customer-gets-soap-instead-of-smartphone/story-R0xjgbcK6G5JAYbTKIqEM.html>

⁷UNCITRAL Model Law on Electronic Commerce (1996), United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html

June 2000. This enactment amended the related provisions of the Indian Penal Code, the Indian Evidence Act, the Bankers' Books Evidence Act, and the Reserve Bank of India Act. With the enactment of the IT Act, the information in the electronic format was granted legal status, digital signatures were defined and got legal recognition, and, electronic contract became legally binding.

Information Technology Act, 2000 provides validity to e-contracts⁸. This legislation was enacted to change outdated laws and deal with cyber crimes. A section which becomes relevant from the IT Act in terms of online transactions is Section 13 (3) which provides that:

"Save as otherwise agreed between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business."

To understand this let us take an illustration-if a Hotel room is booked by a Complainant over the internet and the booking is also sent by the hotel to the Complainant through email, then these would be dispatches of electronic records. The request for booking of the hotel room would be an offer and the emailing of the confirmation of booking to the consumer would be the acceptance. In terms of Sec. 13 (3) of the I.T. Act, the booking or, in other words, the acceptance of the offer for its purchase, would be deemed to have been received at the Complainant's place of business. Resultantly, the contract for booking of hotel room would be taken to have been made at the Complainant's place of business. Acceptance of the contract would also be deemed to have been communicated there.

Electronic contracts are governed by the basic principles elucidated in the Indian Contract Act, 1872, which mandates that a valid contract⁹ should have been entered with a free consent¹⁰ and for a lawful consideration¹¹ between two adults¹².

The Indian Contract Act, 1872 provides that where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.¹³

Accordingly, both Indian Contract Act, 1872 and Information Technology Act, 2000 needs to be read in consonance to understand and provide legal validity to e-contracts. Further, provisions of the Evidence Act, 1872 also provide that the evidence may be in electronic form¹⁴. Information Technology Act only explains and clarifies, inter alia, when the dispatch and receipt of electronic records take place and is meant purely for ascertaining the time of dispatch and receipt of information, which is a relevant factor in many contracts¹⁵. The Supreme Court of India, recognizing the distinction between 'postal rules' and 'receipt rules' as

⁸The Information Technology Act, 2000, section 10(A)

⁹The Indian Contract Act, 1872, section 2(h).

¹⁰The Indian Contract Act, 1872, section 14

¹¹The Indian Contract Act, 1872, section 23

¹²The Indian Contract Act, 1872, section 10

¹³The Indian Contract Act, 1872, section 16(3)

¹⁴The Indian Evidence Act, 1872, section 3

¹⁵The Information Technology Act, 2000, section 13

elaborated in *Bhagwandas v. Girdharilal*¹⁶, following the English decision in *Entores Ltd v. Miles Far East Corporation*¹⁷, had held that Section 4 of ICA is applicable only in non-instantaneous forms of communication and does not apply to instantaneous forms of communication. Therefore, it may be noted that this method is useful only for non-instantaneous forms of communication like contracts concluded by E-mail and may be inapplicable in instantaneous forms like 'web click' contracts. In case of instantaneous forms of communication, it has been held that a contract is formed when the offeror receives the acceptance. Therefore, in the virtual world, an offer or acceptance is complete when the addressee is in receipt of the electronic record¹⁸ as defined in Section 13(2) of the Information Technology Act, 2000.¹⁹

For civil matters Code of Civil Procedure, 1908 governs the jurisdiction aspect by giving the discretion to the plaintiff to file a suit for compensation for wrongs to person or movables, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts²⁰. The Act further provides that every suit shall be instituted in Court within the local limits of whose jurisdiction the any of the defendant resides or the cause of action arises²¹. Furthermore, it also makes a foreign judgment to be conclusive as to any matter thereby directly adjudicated upon between the same parties or under certain specified conditions²². Talking about the presumptions to foreign judgments the provisions of the Act states that the Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction²³.

Section 11 of the Consumer Protection Act, 1986 provides that a complaint shall be instituted in the District Forum within the local limits of whose jurisdiction.

i. The opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office / personally works for gain, at the time of institution of the complaint; or

ii. Any one of the opposite parties where there are more than one actually and voluntarily resides or carries on business or has a branch office or personally works for gain or has a branch office or personally works for gain at the time of institution of the complaint, provided that the other opposite party / parties acquiesce in such institution or the permission of the forum is obtained in respect of such opposite parties; or

iii. The cause of action arises wholly or in part.

Section 11 of the Consumer Protection Act, 1986 and Section 13 of the IT Act read together shows us that where online transactions are entered into, then 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 him through the internet, including the medium of email. Further, irrespective of the fact whether or not the contract is one made over the Internet, cause of action would also continue to arise at any of the places:

-Where the contract is performed or is to be performed or
-Where money under the contract is either payable or paid or

-Where repudiation of the contract is received, if any

Territorial jurisdiction over a consumer complaint would lie with the Consumer Forum situated at any place where any of the above causes of action arises. A consumer would be legally entitled to pursue his remedy within the territorial jurisdiction of the Consumer Forum having appropriate pecuniary powers at any of the aforementioned places. This is in addition to the other places where a consumer may choose to file a complaint in accordance with the other provisions of Section 11 of the C.P. Act.

4. Cases

Disputes are usually settled within the physical territory where one or both of the parties are located. However, with an online enterprise, customers could be located anywhere in the world. To verify the consumer's location is virtually impossible. A consumer may even be able to pay for services anonymously using the digital equivalent of cash e.g. E-Cash. It is pertinent to note that where goods require a physical delivery, an online enterprise can restrict its customer base to those jurisdictions where it is delivered but with digital goods and services that are delivered online, this is almost impossible.²⁴ In the beginning, courts in different countries began to access the internet merely to use it as a sufficient ground for assuming jurisdiction over internet related transactions. Hence different principles came to be applied in different national jurisdictions in this regard.

U.S. Courts follow the "minimum contract rule" for determining territorial jurisdiction of online transactions as laid down in the leading judgment of *International Shoe Co v. Washington*²⁵. It is a requirement that must be satisfied before a defendant can be sued in a particular state. In order for the suit to go forward in the chosen state, the defendant must have some connections with that state. For example, advertising or having business offices within a state may provide minimum contacts between a company and the state. This test allows for jurisdiction over a non resident when such contract exists between the defendant and the forum state so long as maintenance of the suit does not offend the traditional; notions of fair play and substantial justice. The Indian position theoretically matches with the US rule of minimum contract.

This principle was refined in the *Zippo* case²⁶ in the U.S. It required the courts to look at something more than mere internet access to assume jurisdiction. That "something else" could be interactive web form for the website or any such factor. A substantial refining on the subject of jurisdiction came about in the year 2001 in the case of *Yahoo! France*, wherein

¹⁶AIR 1966 SC 543

¹⁷(1955) 2 QB 327

¹⁸The Information Technology Act, 2000, section 2

¹⁹Dr. Ramesh Moturi, 'Catalytic Role of E-Commerce And Consumer Protection In India', International Journal of Academic Research', Vol.2, Issue-4(3), October-December, 2015

²⁰The CPC, 1908, Section 19

²¹Ibid, Section 20

²²The CPC, 1908, section 13

²³Ibid, section 14

²⁴<http://cyber.law.harvard.edu/ecommerce/disputes.html>

²⁵326 U.S. 340 (1945).

²⁶*Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997).

two groups in France complained to the court that Yahoo! France's auction website sold Nazi memorabilia and Third Reich related goods, which were banned under the French law and it was prayed that the related activities of Yahoo! France be banned. Yahoo's plea was that since the company was incorporated in U.S., its conduct was beyond the jurisdiction of the French courts. Besides, it was technically infeasible to ban all Nazi memorabilia and content from its website. The French court ruled that the auction sites—which outlawed the sale—violated French law. After hearing from a panel of experts that it was technically possible to block 70 to 90 per cent of French users from a website, the court gave Yahoo! 90 days to block French users or face a fine of 100,000 Franc for each day of noncompliance. When *Yahoo!* approached the U.S. court seeking it to declare the judgment of the French court as unenforceable in the U.S., the court upheld that the decision of French court could not be enforced in the U.S. However, it respected the judgment of the French court as it was passed in the peculiar facts relating to France and thus leaving the door open for the foreign courts to step in. Yahoo! voluntarily banned the sale of hate group related merchandise. The above ruling of the U.S. court underlines the fact that orders of a foreign court against a legal entity of another country would not automatically become operable in the country of origin, but would need scrutiny by the court of country of origin with reference to its laws and constitution. Thus, the ruling is a deterrent to unnecessary assumption of jurisdiction on internet related matters²⁷.

In the context of internet, a website operator will not normally limit its viewers or customers to those residing in a certain state. The courts have determined jurisdiction based on the level of interactivity and commercial nature of the exchange of information that occurs on the website and have categorized the website to into three areas: Fully interactive sites where users purchase goods or services, exchange information or files, or enter into agreements; Fully passive sites where information is available for people to view; and, Sites somewhere in the middle, with limited interaction.²⁸

Courts are likely to take jurisdiction over the out- of- state operator of fully interactive sites, unless the operator forbade the sale in the state or did not target them. Fully passive websites are not likely to be subject to jurisdiction as they operate from outside the state. In the middle courts, the facts of the interaction would determine the existence of jurisdiction on out- of- state operators. Companies that do not wish to be subjected to jurisdiction in foreign states and countries should consider limiting their websites to passive activity.²⁹

In the case of *Casio India Co. Ltd. vs Ashita Tele Systems Pvt. Ltd.*³⁰ there was a passing-off action where the Defendant was carrying on business from Bombay. The Defendant had managed to get a registration of domain name www.casiointia.com and Defendant no. 2 was the Registrar with whom the domain name had been registered. The Plaintiff, on the other hand, claimed to be a 100% subsidiary of Casio

Computer Ltd., Japan (Casio Japan) which was the registered owner of the trade mark Casio in India used for a large number of electronic and other products. He had also obtained the registration of large number of domain names in India like CasioIndia Company.com, CasioIndia.org, CasioIndia.net as well as Casio India.info, CasioIndia.Biz. Defendant no. 1 had managed to get the registration of these domain names during the time when it held a distributorship agreement with the Plaintiff. The H'ble Delhi High Court has observed that once access to the Defendants website could be had from anywhere else, jurisdiction could not be confined to the territorial limits of the place where the Defendant resided and the fact that the Defendants website could be accessed from Delhi was sufficient to invoke the territorial jurisdiction of a court in Delhi.

Another leading judgment is of (*India TV*) *Independent News vs India Broadcast Live*³¹. Here the Delhi High Court differed with its earlier judgment in *Casio India*. The Court holds that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state but yet held that if the Defendants website is interactive, permitting browsers not only to access the contents thereof but also to subscribe to the services provided by the owners/operators, then court's jurisdiction at the place where the website is accessed from is permissible. The High Court of Delhi ruled that it did not have jurisdiction over the domain name www.indiatvlive.com, because the defendant was based in Arizona. The court relied on the US circuit case *Compuserve Inc. v. Patterson*, which referred to a three-part test for deciding jurisdiction:

- The defendant must purposefully avail itself of acting in the forum state or causing a consequence in the forum state
- The cause of action must arise from the defendant's activities there
- The acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make exercise of jurisdiction over the defendant reasonable.

In *Banyan Tree Holding (P) Ltd v. A. Murali Krishna Reddy and Anr*³² the preliminary objection in the present case is the jurisdiction of the Delhi High Court. The Plaintiffs averred in the plaint that the Court possessed the requisite jurisdiction since the services of the Defendants were being offered to residents of Delhi through brochures. Secondly, that the defendants' website is interactive and is accessible from anywhere in India, and that "universality, ubiquity, and utility" of the Internet and the World Wide Web, all are indicative that the High Court possessed the jurisdiction to hear the matter. However, the court held that for the purposes of a passing off action, or an infringement action where the Plaintiff is not carrying on business within the jurisdiction of a court, and in the absence of a long-arm statute, in order to satisfy the forum court that it has jurisdiction to entertain the suit, the Plaintiff would have to show that the defendant "**purposefully availed**" itself of the jurisdiction of the forum court. For this it would have to be prima facieshown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the specific targeting of the forum state by the Defendant

²⁷ Chauhan, Abha, "Evolution and Development of Cyber Law: A Study with Special Reference to India", Social Science Research Network. (2013)

²⁸ M.M.K. Sardana, "Evolution of E-Commerce in India: Challenges Ahead (Part 2)", ISID Discussion Note

²⁹ Ibid

³⁰ 2003 (3) RAJ 506

³¹ 2007 (35) PTC 177 Del

³² CS (OS) 894/2008

resulted in an injury or harm to the Plaintiff within the forum state. Mere hosting of a website which can be accessible from anyone from within the jurisdiction of the court is not sufficient... Also a 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.³³

The Division Bench further clarified the law in relation to territorial jurisdiction by pointing out that in the *Dhodha House v. S.K. Maingi*³⁴, case itself, the Supreme Court had clearly observed that for the purpose of carrying on business, the presence of the person concerned at a particular place is not necessary, and must only conform with the three conditions to be fulfilled, namely that the agent must be a special agent who attends exclusively to the business of the principal; that the person acting as agent must be an agent in the strict sense of the term; and that to constitute 'carrying on business' at a certain place, the essential part of the business must be performed at that place. Acknowledging the growing concept of e-commerce models and the possibility of an entity conducting business only through a virtual presence rather than brick and mortar sales through a physical presence in a place, the Division Bench refined the applicability of this judgment, with emphasis on how to interpret what is actually meant by "carrying on business".

In the same year, there came another case- *Christian Louboutin v Nakul Bajaj* where the defendant sold the plaintiff's products without permission through its website www.darveys.com, thus creating doubts as to the quality of those products in the minds of consumers. The plaintiff alleged that the defendant's activities also affected the reputation of its brand and consumer goodwill towards it, and that continued use of its name would cause its luxury brand irreparable harm. The court granted an interim injunction restraining the defendant from selling unauthorized products.³⁵

5. Conclusion:

At present with the rising growth of e-transactions, we must realize that the laws governing these transactions are yet to emerge and develop. Although we have the IT Act in place which lays down admissibility of electronic records, penalties for cyber-crimes etc, it is not sufficient to deal with online transactions in India. 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 constitutes a valid contract. There is an urgent need for a specific legislation to be enacted to determine issues involving jurisdiction for e-commerce disputes.

6. Suggestions

As cyberspace is a communication system that surpasses all territorial boundaries and the users are free to access information from unknown physical locations, geographical borders should not apply in determining the proper jurisdiction

for a cause of action. So there must be an evolution of new and entirely independent rules to govern the jurisdiction on the net. It is high time that a non-state organization such as UNCITRAL must come out with some model law on jurisdictional issues. Even though the states have to compromise with their sovereignty to some extent but for the greater good and as a mark of respect to private international law the states must do so before they are too late. But until such a law is prepared the contracting parties must opt for Alternate Dispute Mechanism to resolve disputes. These provisions to an extent would solve the contractual problems but the disputes arising out of moral issues would not get solved until detailed rules are prepared and accepted by the states.

³³ ibid

³⁴ 2006 (9) SCC 41

³⁵ <http://www.worldtrademarkreview.com/Intelligence/IP-Lifecycle-India/2015/Articles/Protecting-brands-in-the-digital-space>