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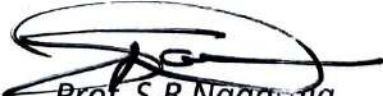
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This is to certify that Prof/Dr/Mr/Ms/Mrs ✓ SHARADA G., Asst. Professor
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THE E-COMMERCE ENIGMA

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THE E-COMMERCE ENIGMA

ABSTRACT:

E commerce is the buying & selling of goods or services, or transmitting of funds and data over an electronic network, primarily the internet. Today online purchase of goods and services have become very popular because of many advantages such as convenience, cost effective, time efficient, anytime access, wider choice etc., At the same time it has its own draw backs. Whenever any dispute arises between the parties engaged in e commerce, the situation becomes murkier as to where to approach for redressal. To put it more precisely, whenever a party to an online transaction has a grievance, which court should he / she approach? Can the aggrieved person approach the regular civil court, whether the transaction is a contract and whether it comes under the regime of the Indian contract act 1872? Another question that arises is whether the online purchaser can be considered a 'consumer' under the Consumer Protection Act, 1986, and whether the suffering party can get proper remedy by knocking at the doors of consumer forum? If the answer is in the affirmative, then the next question is which consumer forum has the territorial jurisdiction to try the matter as the parties may be residing/doing business anywhere under the Sun and by the click of the mouse the contract could have been concluded. Sometimes the parties may belong to different countries. Both the said laws have been enacted many years ago when online transactions were not in vogue and the makers of these laws couldn't have possibly dreamt to make provisions for these complex situations arising out of online transactions. Though the Information Technology Act 2000 is applicable for online transactions the enactment is not adequately equipped to meet these and such other contingencies that may arise. The paper tries to explore all these strange and ticklish situations and discuss the possibility of any relief under the consumer protection bill 2017, likely to be passed shortly to replace the present Consumer Protection Act and the establishment of the new 'Online Mediation Center' the first of its kind at Bengaluru, to try e-commerce cases and establishment of e-courts in India.

INTRODUCTION:

E commerce is the buying & selling of goods or services, or transmitting of funds and data over an electronic network, primarily the internet. ¹According to a recent report by Goldman Sachs, the e-commerce market in India is expected to breach the 100 billion mark by 2020

and if the current projections are anything to go by, India is enroute to becoming the world's fastest growing e-commerce market.

A 2014 statistical report reveals that there are 243 million internet users in India and India ranks 3rd among the country's share of the world internet users.² Income per person which in 2014 was \$ 1,570 could be twice that by 2025. Two thirds of Indians are younger than 35 and their phones give a huge number of them access to the Internet. In December 2014 smart phones accounted for one in five Indian mobiles, according to Goldman Sachs. Just months later, they accounted for one in four. Morgan Stanley expects internet penetration to rise from 32% in 2015 to 59% in 2020. By 2030, India is projected to become billion person digital market.³

Some of the popular ecommerce companies include Amazon, Alibaba, eBay, Netflix, Uber, Flipcart, Zalando, Groupon, Snapdeal etc., and email, shopping carts, Web services and online catalogues are some of the applications through which e commerce is conducted. Either products or services are offered by these companies. The popularity of e commerce mainly stems from speedy and easy accessibility to a wide range of Goods and services by the consumers by just sitting in the living room, 24 x 7 / 365 availability and international reach. Further because of reduced cost for the company, the price of commodities and services are offered at affordable, reasonable and more economical prices. The e commerce business is able to list many different items and the consumers have lots of choices.

The beginning of e commerce can be traced to the 1960s when businesses started using Electronic Data Interchange (EDI) to share business documents with other companies. In 1990s, the rise of eBay and Amazon revolutionized the e-commerce industry. For the first time a model law on e-commerce was adopted in 1996 by the United Nations Commission on International Trade (UNCITRAL). It was adopted by the General Assembly of the UN by passing a resolution on 31st Jan. 1997 and India enacted the IT Act, 2000.⁴

Consumers can now purchase endless amounts of items online. But on the other side there are some blocks attached to e-commerce like the customers not being able to see or touch the products before purchase, credit card fraud, fraud companies that disappear, multiplicity of regulations, expertise needed for e-commerce infrastructure, extraordinarily high reliance on

the website, delay in product shipping, receiving damaged goods, limited customer service etc.,

It is no doubt convenient for a customer to procure goods / services from any corner of the world at the click of a mouse in an internet driven market. But the use of new technology and its proliferation in the global market has opened up a Pandora's Box of legal issues.⁵ Hence, though e commerce has changed the way people buy goods and avail services, it sometimes comes with hidden surprises in the form of wrong orders or damaged goods landing at the buyer's doors step.⁶ It invariably gives rise to many disputes by the consumers purchasing the products from e-commerce websites and these disputes can be termed as e-disputes. E-disputes encompass the conventional disputes relating to sale / purchase of goods, auctions, software development, copyright, defamation, fraud, privacy, deceptive trade practices etc., although with an added dimension to the specific issue owing to the peculiar nature of internet as a medium of communication.⁷

LEGAL ISSUES RELATING TO E- CONTRACTS:-

- There is no formal 'E- commerce Disputes Resolution Regulatory Mechanism' in India as we have no dedicated e- commerce laws in India. In fact many e- commerce websites are not following Indian laws at all and they are also not very fair while dealing with their consumers. Allegations of predatory pricing, tax avoidance, anti competitive practices etc., have been leveled against big e -commerce players of India.⁸
- The unsatisfied customers have no option than to approach a regular civil court alleging breach of contract, or raise a consumer dispute before the consumer court established under the Consumer Protection Act, 1986. The e-commerce related issues are not easy to manage and they are more challenging because of peculiar nature of situations involved and usage of latest technological innovations.
- They are governed by the basic principles provided in the Indian Contract Act, 1872, which mandates that a valid contract should have been entered with a free consent and for a lawful consideration between two adults. Whether the consumer has entered with the free will is again a question as the party is forced to enter into the contract as

the terms and conditions are incorporated by the company and the consumer has no say in the matter and the contract is a standard form of contract and the contract can be set aside due to undue influence. In *Bragg Vs Linden Research*⁹ it was held that arbitration clause in the contract could not be used as it was unconscionable. According to Sec 16(3) of the Indian Contract Act, 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 the 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. Here the burden is on the e-commerce provider to prove.

- Section 10A of the Information Technology Act, 2000, provides validity to e-contracts. Further section 3 of the Evidence Act provides that the evidence may be in electronic form. The Supreme Court in *Trimex International FZE Ltd. Dubai Vs Vedanta Aluminum Ltd.*¹⁰ has held that emails exchanges between parties regarding mutual obligations constitute a contract.
- In an online environment, the possibility of minors entering into contracts increases, more so with the increasing usage of online medium among teenagers and their preference to shop online or utilize services. According to the Indian Contract Act, 1872, a contract with a minor is void ab initio and hence not enforceable. It becomes crucial for an online business portal to keep such possibility in consideration and qualify its website or form stating that the individual with whom it is trading or entering into a contract is a major.
- Stamping of contract is yet another issue. An instrument that is not appropriately stamped may not be admissible in evidence unless the necessary stamp duty along with penalty has been paid. This is not possible in the case of e- contracts. However as the payment of stamp duty has gone online and e stamp papers are available, it can become a possibility later that stamp duty might be asked on e- contracts as well.¹¹
- There are enormous possibilities of trademark, patent infringement, or copyright in online medium.

- In Civil Cases, the jurisdiction of court is determined by various provision of CPC, 1908. It is either where the defendant resides, or where the cause of action arises. But that is the exact impediment we face while deciding the cyber jurisdiction. The term cyber jurisdiction refers to the jurisdiction of those matters which were in conflict while parties contracted with each other through cyber space.

The emerging trend as to matters relating to jurisdiction can be seen in the following cases:

Banyan Tree holding (P) Limited V/s A. Muralikirshna Reddy and another 2009.
(Delhi High Court)

WWE V/s M/s Reshma Collections on 15th Nov. 2014 by Hon'ble Mr Justice Bala Durrex. Ahamed and Hon'ble Justice Vibh Balakrishna. The Honb'e court held in this case that a company would be deemed to have jurisdiction in place where people make online purchases or where they live.

Dhodha House V/s S.K. Maingi 2006 (9) SCC 41.

Taking into consideration the above stated issues and the non availability of precedents and the e- commerce cases still in the stage of infancy, let us consider whether an alternate solution exists for settlement of e- commerce disputes wherein a win-win situation could be created for both the parties.

ALTERNATE DISPUTE RESOLUTION:

Mediation, Negotiation and Arbitration are different methods of disputes resolution under 'Alternate Dispute Resolution' with or without the help of a neutral party, and have been existing from time immemorial. Lord Krishna was the earliest known negotiator and conciliator between the warring kauravas and the Pandavas according to Hindu puranas. Mediation, negotiation and arbitration have been recognized as alternative methods to traditional adversarial approach of disputes resolution in domestic as well as international disputes and law and the same has been given recognition under CPC and arbitration and conciliation Act, 1996.

The supreme court of India in *M/s Afcons Infra Ltd V/s M.s Cherian Varkey construction company Ltd and others* held that all consumer disputes including disputes where a trader / supplier / manufacturer / service provider is keen to maintain his business / professional

reputation and credibility or product popularity can be referred to ADR.¹² Apart from traditional mediation integrated in the judicial approach, mediations are also practiced by some governmental agencies, non-profit bodies, consumer associations, business organizations and even International organizations. The application of mediation to consumer related disputes can be advantageous to both the parties in terms of problem solving and sustainable relations.

ON LINE CONSUMER MEDIATION CENTER:

Going a step further in finding innovative ways to quick and easy disputes settlements, 'Online Disputes Resolution' (ODR) has emerged as a branch of dispute resolution which is online equivalent of alternative dispute resolution mechanism.

On line consumer mediation center (OCMC) National law school of India University, Bengaluru, the first of its kind in India was inaugurated on the National consumer rights day on 24th December 2016 by Shri Ram Vilas Paswan, Hon'ble Minister for consumer affairs, Food and Public Distribution, Govt. of India along with other dignitaries including Hon'ble Justice Shri D.K. Jain, President, National Consumers disputes Redressal Commission (NCDRC) at Vigyan Bhavan, New Delhi. The project is funded by Ministry of Consumer Affairs which has presently given one crore rupees to this center which is headed by Prof. Ashok. K. Patil, Chair- Prof., Consumer law and practices.¹³

The Mediation center has developed an online platform with motto 'any time any where Dispute resolution'. A website which is user friendly, transparent and secure has been set up. An advisory committee has been setup which assists in appointment of panel members who act as mediators and who are experts in different fields. As a pilot programme, the center is confined to mediation service for consumer disputes in e- commerce only. The vision of the center is better access to justice to the parties involved in E-commerce through easy and quick redressal mechanism and also opportunity for business to maintain better consumer relations.¹⁴

ODR involves the carrying out of most of the dispute resolution procedures online, right from filing of complaint, appointment of neutral party, evidence procedures, hearings or negotiations and rendering of final award, binding settlements etc., The online dispute resolution services may be processed utilizing email, chat or messaging software, audio or video conferencing software for communication etc., Thus consumerism in the digital age has

acquired an altogether different landscape, with the use of information and communication technology being used not only for the purpose of carrying out electronic transactions but also has a burgeoning application in terms of dispute resolutions. From the point of view of consumers, OCMC means easy accessibility, security, confidentiality, cost effective and neutrality. Its values include low cost, satisfied customer, confidentiality, scalable and neutrality from business point of view.¹⁵

At the same time on its flip side, OCMC may face the following challenges:¹⁶

- 1) The consumer might already be bound by a clause relating to dispute resolution which is dormant at the time of entering into online transaction.
- 2) Secondly it may be difficult to enforce and check the validity of the settlement arrived at through OCMC as it is impersonal in nature.
- 3) There might be chances of interception of sensitive information exchanged between parties to mediations as a result of which security and confidentiality may be compromised.
- 4) Though internet access has grown to a large extent, still many consumers are not computer savvy and hence the need for creation of consumer education about online mediation.
- 5) If more and more consumers are going to choose online mediation, the ODR providers may have to handle big data. Hence the need for stronger, technological infrastructure is required.
- 6) Online mediation can also fail because of programme errors.
- 7) At the initial stage online mediation is confined to purchases made through online transactions and hence consumers who have purchased in regular shops may not have access to it.
- 8) The actual online mediation may run for several hours and days too. It may cause inconvenience to the parties because of lengthy and prolonged usage of internet, disturbance or lack of clarity in audio or visual communication.

THE CURRENT POSITION OF E COMMERCE DISPUTES SETTLEMENT IN INDIA:

The consumer courts currently have the jurisdiction to entertain all sorts of e-commerce cases and the Government of India is also in favour of popularizing

OCMC. The mission of the centre in adopting OCMC is to provide innovative technology for consumers and organizations to manage and resolve conflicts and to propel online mediation as a first choice to resolving consumer disputes. It will be a boon to thousands of consumers who are placed in far off locations and who want to make small claims.

The Consumer Protection Act, 1986 ("CPA") guarantees and protects the rights of consumers vis-à-vis providers of goods and services in India. Since in India most of the e-commerce websites work on the marketplace model, as such an ambiguity existed whether they can be considered to be service providers for the purposes of CPA. This ambiguity on the applicability of CPA to online transactions was cleared in a written reply by the Minister of State for Consumer Affairs, Food and Public Distribution wherein he stated that all business transactions by consumers, whether online or otherwise, is covered under the CPA and complainants can approach various consumer fora provided under the CPA for resolution of their grievances.¹⁷

RECOMMENDATIONS:

- Though European Union and other nations are increasingly using online dispute resolutions for resolving many aspects of e commerce disputes, yet ODR in India is still in its infancy.
- Establishment of e-courts in India can also facilitate early and effective e-commerce disputes resolutions in India.
- More e- commerce lawyers and law firms in India providing expertise in this field should be established.
- Further amendments must be made in the existing Acts like IT act, 2000, Arbitration and conciliation act 1996.
- CPA is more than 30 years old and is not geared towards protecting consumer rights in the digital era. Since its objective is to empower and protect consumers, redressal agencies must not remain toothless, but be effective even in an online market place. The consumer protection bill 2017 must be passed in the Lok sabha immediately without any further delay.¹⁸

The consumer affairs ministry has drafted the fresh consumer protection bill recently in the year 2017 after incorporating the suggestions of a parliament standing committee to the earlier bill made in 2015 and hope to introduce it in the ongoing session. The government has made sweeping changes in the bill to provide huge penalties on celebrities endorsing misleading advertisements. It also seeks to create a consumer protection authority to fast track grievance redressal of consumers on the line of US & European countries.¹⁹ The bill has a provision for product liability and penalties in certain cases of food poisoning. It will also address the issues of jurisdiction, scope of bill, executive action against unfair trade practices and alternate dispute resolutions and establishment of mediation centres across the country.²⁰

CONCLUSION:

So far the Indian legal system has regulated e-commerce under the same set of laws which regulate the offline world of commerce. The conventional wisdom has been that when it comes to e-commerce only the via media changes, the key players and products remain the same, and as such we do not need a separate set of laws to regulate e-commerce. However, increasingly the policy makers have sought to address the various regulatory facets of e-commerce such as the issues of FDI norms, competition law, data privacy and the evolution in consumer protection laws in a focused manner.

Our Hon'ble Prime Minister Shri Narendra Modi launched 'Digital India' programme in 2014 to boost digital power which aims to transform the country into a digitally empowered society and knowledge economy. Among the visions areas in terms of infrastructure, the programme aims at providing high speed internet access to all up to Gram Panchayat levels. The programme also aims at digital empowerment of citizens and emphasizes need for universal digital literacy. With the developments of ICT infrastructure at such grass root level, it will be possible for a common consumer to access to online mediation from any corner of the country. This would specially benefit farmers and self-employed consumers to resolve their disputes from their respective towns and villages, instead of having to travel each time to reach the nearest consumer Redressal agency.

Further our Prime Minister who is a staunch supporter and an advocate of technological advancement sweeping our nation, even devised an unusual equation to describe the future of the country while inaugurating the Supreme Court's ICMS, a digital service which will enable people to file complaints online.

IT+IT=IT which means as follows:

Information technology + Indian Talent = India Tomorrow.

He pointed out that the country needs to embrace technology in a more collective manner and it must be embraced by all the sections of the society for it to have real benefits and that e-governance is easy, effective and economical.²¹

Hence under the above circumstances the common man has no option other than to fall in line with the rest of his fellow men and be a part of the technological storm that is sweeping across our country which is more so after demonetization. Otherwise he would be left alone and lost.

Lastly on the part of the judiciary, the interpretation of a statute must make allowance for change in social conditions and technology, adopting a rational approach without technicalities as in cases of *(India TV) independent news V/s India Broadcast live. (legal proceedings can be filed at the place from which the website was accessed)*²²

Till that time e-commerce enigma would continue to haunt the country hindering our progress.

END NOTES

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