

LEGAL REGULATIONS OF E-COMMERCE IN INDIA

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Abstract:

Electronic commerce or e-commerce industry is one of the fastest growing industry in India as well as across the world. From the time of its incorporation, it has been a considerable development in this filed. According to the Compounded Annual Growth Rate (CAGR), since 2009 E-commerce industry has marked a 34% growth rate and it is expected to attain CAGR of 63% ~USD 8.5 billion by CY 2016(1). Like any other developing sector, E-commerce industry has also got its own challenges. The inadequate and inefficient legal and regulatory framework is one of the challenges which makes it unable to cope with the ensuring rights and obligations of the contracting parties. This study is all about the present laws and regulations that govern ecommerce and ascertain the challenges and opportunities available for e-commerce under the provision of the present legal rule in India. The study also focusses on finding the effectiveness of the present laws and regulations that deal with the legal issues of e-commerce, currently in the legal system and looks at ways to provide improvement plans that are required for a good legal and regulatory framework to ensure a fair and consumer-friendly e-commerce environment in India.

Keywords: Legal Regulation, Rules, Acts, E-Commerce, Cyber

Introduction:

In the present era, E-commerce is one of the essential needs in our day-to-day life. It has become a must-have for most of the people, especially for the ones in the urban areas. Rather than the traditional physical platforms, alternatively there are many e-commerce platforms available. The services rendered starts from procuring of daily household items till online brokage. In the United

States, since 1980 mail order or catalogue shopping has been prevalent which is considered as the predecessor of online commerce for India post that emerged in 2000.

The present number of internet users in the world is around 3 billion. In India, the total number of internet and broadband subscribers are 259.14 million. Internet and the interest of users to buy products online in the e-commerce websites has created a great impact in the growth in the e-commerce industry. India is in the top position for the growth and development of the e-commerce industry. E-commerce provides great opportunities for retail sector as it has brought drastic change from brick-and-mortar establishments to virtual shops and it operates at very less cost.

E-commerce deals with a varied range of products and services that sells on online platform. The traditional methods of business which is the physical exchange or direct physical contact doesn't happen here. Everything here happens electronically.

The law and order in cyber space is regulated by the Cyber Law or Cyber Space Law or Information Technology Law or Internet Law under the jurisprudence Information and Communication Technology (ICT). In 1996, a Model Law on E-commerce (MLEC) on International Trade and Law (UNCITRAL) was adopted by United Nations Commission. This was subsequently adopted by the General Assembly of United Nations. The main motto of MLEC was to regulate law relating to e-commerce at the international level and manage electronic transactions to the level at par with paper-based transactions. Information Technology Act, 2000 was approved by India. Further, in 2008, India enacted the Information Technology (Amendment) Act to cause effect on the UNCITRAL law on E-Signature (MLES), 2001(2). India has just started off with the e-commerce revolution and would be witnessing a wider range of goods and services on a pan India basis in the nearing days. Ecommerce is generating thousands of new entrepreneurs every year, and that number is expected to grow in multiple thousands per year in a span of two years. In India more than 288 million people are active in e-commerce. The legal and regulatory acts have been a challenge for the growth of e-commerce in India. For the developing economies like India, the different economic and technological set up, the actual and the replica implementation of the 'high-tech' legislation as conceived by the Model law becomes very challenging. Although the legislature fulfils the act of enacting a law, it becomes demanding to enforce and implement

the same in India. Based on the examination of the existing laws and regulations, it has been noticed that various legal issues viz jurisdiction, taxation, intellectual property rights and domain names in E-commerce are still not analysed. Many regulations are required in India for making e-commerce transactions easy and user-friendly.

Legislation on E-commerce in India

The first law approved by the Government of India on e-commerce was the Information Technology (IT) Act 2000. This was passed to have an effect on the UNCITRAL Model Law on Electronic Commerce, 1996. The General Assembly of the United Nations, on January 30, 1997, appreciated the Model Law on Electronic Commerce for a complementing the Member States as a Model Law when they approve or revise their laws, in order to have uniformity in the law which is considered as an alternative to paper-based methods of transaction and storage of information. The IT Act aims facilitating and governing e-commerce and also ensuring legal recognition for all the transactions accomplished by electronic data transfer and through various other electronic means of communications i.e. (e-commerce). IT Act 2000 in the country. Provisions are made for Legal recognition of electronic record and digital signatures rules which attributes to the e-record, and also for mode and manner of acknowledgement, for determining time and place of transmit and receipt of electronic records. A regulatory framework which lays down punishment regimes for various cyber-crimes and offences are also included in the Act(3). The Act also covers Certification authority which is the focal point around which this Act revolves. Many provisions are related to Regulation of Certification Authorities viz., appointment of a Controller of CAs, grant of license to CAs, recognition of foreign CAs and duties of subscribers of digital signature certificates¹. Hacking, damage to the computer source code, release of information which is obscene in electronic form, confidentiality and privacy breach, and fraudulent use of digital signatures are considered punishable. Civil liability are provided for Cyber contraventions and criminal violations, penalties, establishment of the Adjudicating Authority and the Cyber Regulatory Appellate Tribunals. The related provisions of the Indian Panel Code, 1860, the Indian Evidence Act, 1872, Banker's Book Evidence Act, 1891 and the Reserve Bank of India Act, 1934

¹ Rajendra Madhukar Sarode, "Future of E-Commerce in India Challenges & Opportunities" 1(12) IJAR 646 (2015).

have been amended to sort out the issues related to electronic commerce, electronic crimes and evidence, and also to enable further regulation with regards to electronic fund transfer².

Information Technology (Amendment) Act, 2008

India integrated the Information Technology (Amendment) Act, 2008 to give accomplishment of the UNCITRAL Model Law on Electronic Signatures, 2001. The IT Act of 2000 was enforced to make it technology-neutral and also to recognize electronic signatures over restrictive digital signatures. Many changes were brought in like introduction of the concept of e-signature, amendment of the definition of intermediary and a lot more. Specific power was given to the state to control websites and protect privacy and also to check possible misuse leading to tax evasions. Legal validity and enforceability of the digital signature and electronic records were recognised for the first time in India. Emphasis was laid on secure digital signatures and secure electronic records. The above changes were introducing to lessen the incidence of electronic forgeries and also to facilitate e-commerce transactions.

Legal Validity of Electronic Transactions

There are various legal issues relating to the formation and validity electronic transactions which includes online contracts and enforcement issues.

I. Formation of an E-Contract

The common forms of e-contracts include click wrap, browse wrap and shrink-wrap contracts. Each contract has its own terms and conditions which are available to the contracting party that is mainly different from the usual paper contracts. With regards to click wrap contract, the contracting party's acceptance is taken by checking on an 'I accept' tab. The contracting party can view the terms and conditions using the scroll box.

A browse wrap agreement is considered to be binding on the contracting party by use of the website.

² Dr. Jyoti Rattan, "Law Relating to E-commerce: International and National Scenario with Special Reference to India" 1(2) IJSSEI 7 (2015)

Shrink wrap agreements is not directly related to e-commerce platforms but it is relevant in the context of e-commerce. It is because of the kind of goods that are associated with shrink-wrap agreements. In a shrink-wrap agreement, the contracting party can go through the terms and conditions after opening the box in which the product (commonly a license) is packed³.

I. Validity of Online Contracts

The crux of any transaction including an e-commerce transaction is the availability of a valid contract forms. E-contracts in India is like any other contracts that are governed by the basic principles of governing contracts in India which are the Indian Contract Act, 1872 (“Indian Contract Act”), There are a certain mandatory pre-requisite for a valid contract such as free consent and lawful consideration(4). An analysis has to made on how the requirements of the Indian Contract Act can be fulfilled with relation to e-contracts. Information Technology Act, 2000 i.e., the IT Act provides fortification for validating e-contracts.

Below are the important requirements of a valid contract under the Indian Contract Act:

- The contract can be entered only with the consent of the contracting parties.
- The contract should be abided by the law.
- The parties should be eligible to have the contract
- The objective of the contract is that it should be lawful

E-contracts like click-wrap agreements which would be enforced and valid if the requirements of a valid contract as per the directive of Indian Contract Act are fulfilled and there should not be any prohibition under any statue. The terms and conditions that are related with an e-commerce platform are of most important to determine and ensure that e-commerce transactions meet all the requirements of a valid contract.

The IT Act may not be relevant in case of negotiable instruments, power of attorney, trust, wills contracts for sale or for conveyance of immovable property.

³ Jayanth Pattanshetti Associates, “Ecommerce Laws In India: Foreign Investment And Retail Trade” 2-3 available at:
<https://Pattanshettiassociates.Wordpress.Com/2015/01/02/Ecommercelawsinindiaforeigninvestmentandretailtrade/> (Visited on June 3, 2016)

A. Signature Requirements

As per the Indian Contract Act, there is no need to have written contracts physically signed. But there are some statues that contain signature requirements. An assignment of copyright has to be signed by the assignor says the Indian Copyright Act, 1957 (“Copyright Act”)⁴. In this scenario, the IT Act links electronic signature with physical signatures. The competent authorities under the IT Act can only issue the electronic signature but till date of this study, the Central Government has not released any notification on electronic signatures.

B. Contracts with Minors

In e-commerce it is impossible to check the age of anyone who is doing business online. This creates a problem and also a means of liability for e-commerce platforms. As per the Indian law, a minor is not authorised to enter into any contract and such a contract is not valid. In India, a person is considered major on attaining 18 years.

C. Stamping Requirements

In India, all the instrument under which rights are created or transferred needs to be stamped under the specific stamp duty legislations approved by different states provinces. An instrument which is appropriately stamped may not be considered as evidence in front of a competent authority unless the prescribed stamp duty and the requisite penalty have been paid⁽⁵⁾. Person involving in intentional evasion of stamp duty may be subject to criminal liability and the procedure of paying stamp duty as claimed under the stamp laws is relevant in case of physical documents and is not workable in cases of e-contracts.

Security Issues in E-Commerce

I. Authentication and Identification

With the internet technology, the need for physical contact is not required. However, the fact that all forms of contract or transaction should be authenticated and in recorded too in case of need.

⁴ M.M.K. Sardana, “Evolution of E-Commerce in India: Challenges Ahead (Part 2)” 3 available at: <http://www.isid.org.in/pdf/DN1408.pdf> (Visited on June 6, 2016)

There are many authentication technologies developed over a period of time for the purpose of authenticating documents. It also ensures the identity of the parties who are entering into online transactions. In e-commerce business platform, processing payments is a vital part in any transaction. Various payment systems have also evolved to facilitate payment to be made on e-commerce business.

All the consumer related transactions especially in the internet are usually between the parties who do not have any pre-existing relationship. It may be a point of concern on the person's identity and authenticity with regards to issues on the person's capacity, authority and legitimacy to enter into the contract. Electronic signatures are one of the methods used to ascertain the authority and legitimacy of the person in order to authenticate an electronic record.

The IT Act authenticates any information by fixing an electronic signature if it is in compliance with the manner as mentioned under the IT Act(6). A regulatory framework of electronic signatures including issuance of electronic signature certificates are provided by the IT⁵.

As per the IT Act provides, an electronic signature shall be considered to be a secure electronic signature if:

- i. The signature creation data, while affixing the signature, was exclusively controlled by the signatory and no other party involved;
- ii. The signature creation data was saved and affixed in a complete way as prescribed.

A. Identity Theft and Impersonation

- The IT Act says that the identity of a person shall be considered to have been stolen when the unique identification of a person like their electronic signature or password is fraudulently or dishonestly used. This imposes a penalty of imprisonment for up to 3 years and fine up to 1 lakh(5).

⁵ Nishith Desai Associates, "E-commerce in India, Legal, Tax and Regulatory Analysis" available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/E-Commerce_in_India.pdf (Visited on June 6, 2016)

- The IT Act provision states that whoever, by means of any communication device or computer resource cheats by impersonation, shall be punished with imprisonment for up to 3 years and with fine of upto 1 lakh.
- The IPC claims that any person who cheats by impersonation shall be deemed punishable with imprisonment of up to three years with/ without fine.

III Privacy

For an e-commerce platform, it is tough to complete online transaction without collecting any form of personal information of the users like details about their identity and financial information. Aside these details, e-commerce platforms may also require a other indirect information like the users' personal choices and preferences and patterns of search.

E-commerce platform has the vital role of maintaining the privacy of the users. Here are the two primary concerns a user of e-commerce platforms might have:

- i. Unauthorized access to personal information
- ii. Misuse of such personal information.

The concept of privacy and data protection have not been addressed in any Indian legislation. When the specific legislation is not available, the Union of India acknowledged the “right to privacy” as a subcategory of the larger “right to life and personal liberty” as prescribed in Article 21 of the Constitution of India(7). Any right under the Constitution can be acknowledged only against any government action. Violations of privacy initiated by nonstate may be dealt under principles of torts like defamation, trespass and breach of confidence as deemed applicable.

The IT Act works with the concept of violation of privacy in a limited way. It means the privacy of a person is considered to be violated when images of her private body parts are captured, published or transmitted without her knowledge and in circumstances where she might have had a expectation of privacy and this prescribes for a punishment of imprisonment for up to 3 years and/or fine of upto 2 lakhs.

II. Data Protection

In the year 2011, India has amended rules under Section 43A of the IT Act, which is titled as the “Reasonable practices and procedures and sensitive personal data or information Rules, 2011”. This consists of a framework for the protection of data in India i.e., “Data Protection Rules”.

A. Kinds of Information covered under the Data Protection Rules

The two basic categories of information that are covered under the IT Act that needs to be considered with regards to data protection are:

- i. Personal information – PI is defined as any information that is related to a normal person, which directly or indirectly is in combination with the other available information or likely to be available which has a body corporate, and is capable of identifying that person(8).
- ii. Sensitive personal data or information -SPDI which is the means such PI of a particular person which comprises of
 - a) Password
 - b) Financial information viz Bank account or credit card /debit card / any other payment instrument details
 - c) Physical, physiological and mental health conditions
 - d) sexual orientation
 - e) Medical history
 - f) Biometric information.

The Data Protection Rules has set compliances to protect SPDI in electronic medium by a corporate entity which owns, deals with or handles such SPDI like:

- a) The need to have a privacy policy in line with the parameters set in the Data Protection Rules
- b) The need to obtain consent in a prescribed manner from the provider of SPDI
- c) The need to provide an opt out option to the provider of SPDI
- d) The need to maintain reasonable security practices and procedures in line with the conditions of the Data Protection Rules

CONCLUSION

The expeditious growth of the e-commerce industry indicates the increasing receptiveness of the public. On the other hand, it has also brought out the legal issues that the country has been facing.

Internet was a new concept in the previous years and now it has become the basic need for every family in most metropolitan cities. The e-commerce industry has developed and come a way long. The legal system has consistently attempted to keep posted mainly with the enactment of the rules under the IT Act in order to deal with a lot of issues arising from the use of internet. The IP issues in e-commerce transactions have taken a new shape with users getting to find the loop holes to not only replicate the material but also mislead other users and many things are needed to regularise the tangled web.

The need of the hour for this growing e-commerce industry requires an in-depth understanding of the legal regime and the possible issues faced by an e-commerce business along with an effective risk management strategy.

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