

BRINGING ELECTRONIC RETAIL UNDER THE CONSUMER PROTECTION ACT, 1986

- Rishima Rawat*

I. INTRODUCTION

The e-commerce sector has witnessed tremendous growth in the recent past. Riding on the advancements in internet penetration and cell-phone technology, this sector has started generating sales of over 150 billion US dollars in revenue in countries such as US and China.¹ There has been a paradigm shift in the conduct of business, with traditional business houses looking to establish their presence online. E-commerce primarily consists of the following business models- business-to-business (hereinafter B2B), business-to-consumer (hereinafter B2C), consumer-to-consumer (hereinafter C2C), consumer-to-business (hereinafter C2B), business-to-government (hereinafter B2G) and government-to-business (hereinafter G2B). E-commerce offers many advantages like low transaction costs, convenience, the expedient flow of goods and information, engaging a wider consumer base and improved customer service. Various factors like favourable demographics, wider reach of online shopping portals in smaller towns, greater internet penetration and accessibility, convenience and a conducive, regulatory environment have contributed to this growth.² A major aspect of the e-commerce sector is electronic retail (hereinafter e-tail) which is the primary focus of this paper. It involves selling goods to the consumer over an online platform. The companies who engage in e-tail are known as e-tailers.

The Indian economy has witnessed a tremendous boom in its e-tail sector. The rapid rise of home-grown portals like Flipkart and entry of multi-national players like Amazon have changed the trajectory of the e-tail market. According to the global analytics company, Credit Rating Information Services of India Limited (hereinafter CRISIL), online sales in India are set to touch \$8.3 billion by 2016.³ If the growth of e-tail continues

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¹Price Waterhouse Coopers, *Evolution of E-commerce in India: Creating the Bricks Behind the Clicks* (August 2014) <www.pwc.in/assets/pdfs/publications/2014/evolution-of-e-commerce-in-india.pdf> accessed 20 December 2015.

²Rajat Wahi, 'Hot & Happening' (*The Aware Consumer*, October 2014) <www.consumerconexion.org/pdf/ACQ_OCTOBER_ISSUE.pdf> accessed 26 December 2015.

³ N Nagarajan, 'Online Shopping Needs to be Regulated in India' *The Statesman* (11 September 2014).

at the current rate, the size of the industry is estimated to reach 102 billion US dollars by 2020.⁴ Both Flipkart and Amazon follow two different business models. Flipkart follows the 'marketplace' model where it brings the buyer and seller together on one platform, facilitates a transaction and gets a commission for its services. On the other hand, 'warehousing-based' model is followed by Amazon whereby it stores the goods and sells them to consumers.⁵ While e-tail serves as a lucrative sector for investors and will lead to economic growth, there are certain issues related to its functioning that need to be addressed. These issues came into limelight after Flipkart's ignominy from its 'Big-Billion Day Sale' in 2014 attracted the attention of enforcement and regulatory agencies towards the e-tail market. Issues related to competition law, like predatory pricing and internet law, like data protection, surfaced. From the perspective of consumer law, the major issues concerned the liability of online portals for delivery of defective goods, non-delivery of goods and the existence of a grievance redressal mechanism.

This paper is divided into five parts. Part A discusses the issues in respect of consumer protection when an Indian consumer purchases goods from an e-tail portal. Part B examines the arguments presented by the government in favour of regulation of e-tailers and the counter arguments given by the online shopping companies. Part C looks into the governance of e-commerce in the United Kingdom and the United States of America and how the authorities there have been quick in adapting the laws to the changing business environment. Part D discusses the proposed amendment to the Consumer Protection Act, 1986 (hereinafter CP Act) and its effectiveness. The concluding Part E emphasises the need for consumers to undertake responsibility in order to maintain the efficacy of the consumer protection framework.

II. ISSUES IN E-TAIL

The Indian e-tail sector was fairly active prior to the period of its exponential growth. Rediff Shopping and Indiatimes Shopping were some of the first e-tailers in the market. Even then, consumer protection issues had become common. One of the first online portals to get embroiled in controversy was Timtara. It faced numerous complaints from consumers regarding delivery of defective products and non-delivery even after

⁴ Malini Bhupta, 'India set to become world's fastest growing e-commerce market' (*Business Standard*, 6 February 2015) <http://www.business-standard.com/article/companies/india-set-to-become-world-s-fastest-growing-e-commerce-market-115020601227_1.html>accessed 1 December 2015.

⁵ Sangeeta Thakur Verma, Interview with G Gurucharan, Additional Secretary to the Government of India, Department of Consumer Affairs, 'The Aware Consumer: Unlocking Consumer Potential' (October 2014) <www.consumerconexion.org/pdf/ACQ_OCTOBER_ISSUE.pdf>accessed 20 November 2015.

payment.⁶ There were allegations of fraud against the company which eventually led to the arrest of its founder and CEO and complete shutdown of the company.⁷ This incident brought to light a host of issues related to the business practices in this field which still continue to be relevant. On perusal of available literature, some specific issues can be pointed out – jurisdiction, defective goods, delay/non-delivery of goods and cancellation/refund of orders.

As a business practice, e-tailers have contracts in a standard form. These enlist the terms and conditions (hereinafter ‘T&C’) that bind the consumer when he buys goods online. Clicking on ‘Confirm Order’ indicates that the consumer has read and accepted the T&C. Besides laying down conditions for the use of the website, these T&C contain clauses that limit the liability of these portals and exclude jurisdiction. They also contain return/cancellation policy governing certain goods while excluding other types of goods from this facility. As is the case with the standard form of contracts, these T&C are unilaterally decided by the e-tailer without consulting the consumer. The consumers hardly read the terms governing their use of the website. Even if they do, the terms are worded in such a manner that it becomes difficult for a layman to understand their implications.

The CP Act, at present, does not cover consumers who shop online under its ambit. Thus, a consumer cannot approach the consumer forums against these online sites. Consumers have to rely on the grievance redressal mechanism of the portal from which he/she has purchased the goods. The government seeks to resolve this issue by including e-commerce in the CP Act through the Consumer Protection (Amendment) Bill 2014 (hereinafter the Bill).⁸

I) JURISDICTION

The most important and contentious issue involved in electronic transactions is that of jurisdiction. Since the internet cuts across boundaries, determining appropriate jurisdiction is a tedious task. As far as the CP Act is concerned, consumer complaints can be filed where the company carries on business or has a branch office or where the cause of action, wholly or in part, arises.⁹ But in the case of online shopping, the

⁶Mamta Sharma, ‘Noida-based Portal Tintara in a Fix’ (*The Economic Times*, 18 May 2012) <articles.economictimes.indiatimes.com/2012-05-18/news/31765519_1_customer-care-e-commerce-portal-sales-forecast> accessed 6 November 2015.

⁷K Brindaalakshmi, ‘E-commerce Shop Tintara Shuts Down: Report’ (*Medianama*, 6 May 2013) <www.medianama.com/2013/05/223-tintara-shuts-down/> accessed 5 November 2015.

⁸Consumer Protection (Amendment) Act, 2014.

⁹Consumer Protection Act 1986, s 11, s 17.

consumer may be in city X and the company may be having its branch office at city Y. Such situations give rise to complexities. The consumer will have to prove that the cause of action arose in his city in order to sue the e-tailer there.

The issue of jurisdiction was meticulously considered in *ABC Laminart Pvt Ltd v AP Agencies, Salem*.¹⁰ Whether a court has exclusive jurisdiction over a dispute depends upon the language of the contract. All e-tailers exclude the jurisdiction of other courts by using the word 'exclusive'. The contract being one of a standard form poses difficulty for the consumer to challenge it. Although the *ABC Laminart* case held that a suit can be filed at the place where the contract was made or where it should have been performed,¹¹ application of same to cases of online shopping can be problematic – should the contract be deemed to have been made at the place where the acceptance was communicated or where the goods were delivered?

While there is no settled position on the issue of jurisdiction in online shopping transactions, the West Bengal State Commission held in a case that the courts of place from where online purchases were made would have jurisdiction.¹² The issue was extensively considered by the Meghalaya State Commission in *The Managing Director, Air Deccan v Ram Gopal Agarwal*. The commission, after examining various judgments and the scheme of the CP Act held that the place from where the consumer made the online purchases will also have jurisdiction over a dispute. It reiterated that CP Act was a beneficial legislation and it had to be interpreted in a way which is favourable to the consumer.

II) DEFECTIVE GOODS

Often the e-tailers supply goods which are defective. While in an offline transaction, the consumer would fall within the definition given in the CP Act and such a conduct on part of the retailer would amount to a deficiency in service,¹³ the online purchases will not be governed by the CP Act since it does not extend to e-tailing and e-consumers yet. The general recourse taken by the consumer is to contact the e-tailer for making good the defect. In most of the cases, the companies do not respond and the consumer is left with no remedy but to bear the loss. The standard technique adopted by the companies is to issue a unique complaint ID corresponding to the order number. The consumer is left with the job of following up on the complaint.

¹⁰ *ABC Laminart Pvt Ltd v AP Agencies, Salem* AIR 1989 SC 1239.

¹¹ *ibid* 15.

¹² *Col (Retd) PK Choudhury v M/s Make My Trip (India) Pvt Ltd and National Aviation of Company Ltd* West Bengal SCDRC SC Case No FA/288/20009.

¹³ Consumer Protection Act 1986, s 2(1)(g).

III) DELAY/NON-DELIVERY OF GOODS

Another common issue in online shopping is the delay and non-delivery of goods. According to a survey conducted among consumers, 32% of them had faced problems relating to delay/non-delivery of products.¹⁴ Many times, the website had furnished no reasons for the inconvenience.¹⁵ This irregularity was a pertinent reason for the shutdown of many earlier e-tailing websites. Non-redressal of consumer's grievances leaves the consumer helpless and results in reducing his trust in e-tailing. It may have larger implications for the e-tail sector as a whole if the consumer loses faith in its functioning.

IV) CANCELLATION/EXCHANGE/REFUND OF ORDERS

Every e-tailer has its respective policy for dealing with these issues. These are incorporated in the T&C and are subject to be modified by the e-tailer without notifying the consumer. In instances where the online site does not offer the consumer an option to cancel exchange or get a refund of the order, the consumer is left with no remedy. However, *eBay India Private Limited v Ajay Kumar*¹⁶ was an appeal from a judgment of district forum which admitted the complaint of the consumer against the online shopping website. The state commission held that eBay was liable to refund the amount to the consumer for the defective product and could not exclude its liability by arguing that it was merely an intermediary.

III. REGULATING E-TAILERS

The meteoric rise of e-tail has got the brick and mortar retailers worried who have started lobbying the government to regulate these online portals.¹⁷ From the consumer protection perspective, the government has proposed to include e-commerce under the purview of the CP Act; thereby allowing consumers who shop online to take these companies to court in the case of dispute. The government argues that e-commerce involves the interplay between different departments such as financial services, electronic, consumer affairs and commerce. The stakes involved are high. In order to

¹⁴ Priyanka Joshi and Hemant Upadhyay, 'E-tailing in India' (*Consumer Voice*, January 2014) 39.

¹⁵ *ibid.*

¹⁶ 2014 Indlaw SCDRC 103.

¹⁷ Anubhuti Vishnoi & Ravish Tiwari, 'Casting a Net' (*India Today*, 22 October 2014) <<http://indiatoday.intoday.in/story/e-commerce-online-shopping-consumer-protection-act-flipkart-sale/1/397164.html>> accessed 5 November 2015; 'No proposal under consideration to regulate e-commerce: Ram Vilas Paswan' *Press Trust of India* (13 March 2015) <<http://ibnlive.in.com/news/no-proposal-under-consideration-to-regulate-ecommerce-ram-vilas-paswan/533748-37-64.html>> accessed 5 November 2015.

ensure that e-tailers bear liability, there is a need to include them in the CP Act.¹⁸

The e-tailers, on the other hand, argue that they are mere intermediaries who bring buyers and sellers together and facilitate transactions between them. They exclude their liability in the T&C by stating that the buyers and sellers themselves shall be responsible for the contractual terms. Section 2(w) of the Information Technology Act, 2000 (hereinafter 'IT Act') defines 'intermediaries' and section 79¹⁹ of the Act provides a safe harbour to intermediaries from liability in certain cases. Then there are the Information Technology (Intermediary Guidelines) Rules, 2011 that the intermediaries are required to follow in order to comply with the IT Act. But these considerations hail from the technological perspective required to run the e-tail website. With respect to consumer protection, the e-tailers argue that they have a fairly liberal consumer protection framework.²⁰ Each website has its own policy to deal with consumer complaints but their effectiveness is questionable considering the number of disputes that arise and are left unresolved.

IV. E-COMMERCE REGULATIONS IN UK AND USA

While India lags behind in addressing the issue of consumer protection in e-commerce, the European Union (hereinafter 'EU') has been quick in responding to the changes taking place. The EU adopted the Electronic Commerce Directive in 2000 (which became effective in 2002) to address issues relating to jurisdiction, data, and consumer protection, information requirements for online service providers and limited liability of intermediaries. Its primary aim is to create a uniform legal regime for electronic commerce. It allows an EU consumer who has purchased goods online to sue the seller "either in the EU country in which the consumer resides or in the EU country in which the seller is physically located, even if the seller has no business operations or employees in that country."²¹

To incorporate this into its domestic law, UK passed the Consumer Protection (Distance Selling) Regulations, 2000 which were later replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, 2013. These regulations generally apply the 'country-of-origin-principle' to contracts. According to this principle, as long as a business established in the UK complies with the Regulations, it does not have to comply with the laws of every other member nation that deals with

¹⁸ Verma (n 275).

¹⁹ The Information Technology Act 2008.

²⁰ Anubhuti (n 287).

²¹ Kah-Wei Chong, Len Kardon & others, 'E-Commerce: An Introduction, Sessions 5: Disputes' <<http://cyber.law.harvard.edu/ecommerce/disputes.html#jurisdiction>> accessed 22 February 2015.

the same subject matter. However, this principle does not apply to consumer contracts. It means that the terms and conditions of an e-commerce site in the UK have to comply with the laws of all the member states that can buy its products. With respect to entering into online contracts, these regulations lay down the requirements to be fulfilled in order to transact business.²² Before entering into a contract with the consumer, the sellers are required to bring certain 'pre-contract information' to the consumer's knowledge. This includes delivery charges and the seller's complaint policy.²³ In the case of distance contracts, it has to be clarified to the consumer that confirming an order will impose an obligation upon the consumer to pay the required amount.²⁴ The legislation also governs the procedure for cancellation, delivery, and refund of the transactional amount.

In the US, the Uniform Commercial Code contains a major portion of the commercial law. It is supplemented by various commercial laws of all the states dealing with B2B and B2C transactions. In addition to this, the Federal Trade Commission oversees all business transactions. In 2010, the US congress enacted the Restore Online Shoppers' Confidence Act (hereinafter 'ROSCA') to deal with two important aspects of online shopping, namely 'data passing' and 'negative option marketing'. 'Data passing' refers to the situation when a company passes a customer's information to a third party seller who may sell his goods or services to such customer without latter's consent. The consumer is left with the impression that he is buying from the company but in reality, he is transacting with a third party who will charge him/her for the purchase. The ROSCA prevents a company as well as a third party from passing on the data or charging the consumer without his/her consent. It also lays down condition for 'negative option marketing',²⁵ that is when the seller interprets the consumer's silence as an acceptance of the offer if the consumer fails to reject the goods or cancel the agreement.²⁶ ROSCA has been strictly implemented in the US. Recently, a complaint filed against Internet Order, a company carrying on business online, alleged violations of the provisions of ROSCA, more specifically the negative option marketing. The court ordered the company to pay one million dollars in restitution to consumers nationwide.²⁷

²² The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, 2013
<www.legislation.gov.uk/ukxi/2013/3134/contents/made> accessed 5 November 2015.

²³ *ibid.*

²⁴ *ibid.*

²⁵ Confidence Act 2010, s 4.

²⁶ Federal Trade Commission's Telemarketing Sales Rule, pt 310, Title 16, Code of Federal Regulations.

²⁷ *State of Washington v Internet Order LLC* (2015) (Case 2:14-cv-01451-JLR, filed on 31 August 2015, United States District Court) <<http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Internet%20Order.pdf>>

V. PROPOSED AMENDMENT TO THE CP ACT 1986

Realising the growing trend of online shopping and the need to protect its consumers, the government proposed amendments to the CP Act by introducing the Bill. It seeks to amend the definition of 'consumer' by adding explanation 2 to section 2(1)(d). This will include those consumers who buy goods or hire/avail services online. As seen from the cases mentioned above, some consumer forums already consider such class of consumers to be 2015 covered by the CP Act. This inclusion gives such consumers a concrete status under the CP Act. Another addition to the Act is section 2(1)(hh) which defines 'electronic intermediary' to include online marketplaces. They are also proposed to come under unfair trade practices by including the words 'including by way of electronic record' in section 2(1)(r) which defines unfair trade practices. Section 2(1)(r)(7) mandates sellers to provide a transaction record, like cash memos or bills, along with the products. This has been added to ensure action against fraudulent sellers since a bill acts as an important tool to prove that the consumer is a bona fide consumer. While reputed e-tailers provide a bill, there are some who do not follow the practice. Making it mandatory under the CPA will help rein in such e-tailers. In a bid to impose liability on sellers who sell their products through online marketplaces, the Bill proposes to add a new clause to unfair trade practices in terms of section 2(1)(r)(8). Consumers will be able to file a complaint against sellers who refuse to take back goods and refund consideration within thirty days of their receipt if the consumer finds them defective as long as he/she failed to inspect them and bought them through advertisements. This will be a strong safeguard for consumers and should act as an effective tool to redress their grievances. For example, all the online shopping portals have their respective policies governing cancellation/return and refund of orders. A condition made applicable by one portal may not be applicable to the other. With numerous options available to consumers, their rights vary according to the T&C of the respective portal. By introducing this provision, consumers will be assured of their right regardless of the e-tailer they choose.

It is yet to be seen whether the Bill is passed and to what extent it proves to be effective in its objective. However, the government could have utilised this opportunity to come up with a set of guidelines for e-tailers to make them more consumer-friendly. They should be mandated to simplify an essential T&C of their policy and make it known to the consumer. These should be placed at a prominent place on their online portal where the consumer can easily notice them. Usually, e-tailers place their T&C at the far end of the website in fine print which is not readily noticeable. This practice should be eliminated to ensure that the consumer makes an informed choice. All other relevant information regarding the portal's contact details and consumer helpline numbers should be prominently displayed. These measures will be fruitful if all the e-tailers, and not just a few reputed ones, incorporate these into their modus operandi.

VI. CONCLUSION

While developing consumer protection models for these e-tailers, we need to take into account their changing roles as intermediaries and suppliers.²⁸

The safeguards offered to the intermediaries by the IT Act should be kept in mind while formulating consumer protection guidelines to ensure that the latter does not infringe on the former. E-commerce offers numerous prospects both in terms of economic capabilities and consumer satisfaction. Therefore, if consumer protection is strengthened, it will eventually lead to improved consumer trust as more consumers will switch to online shopping given its convenience. This, in turn, will have economic implications and will lead to further growth of e-commerce. However, it is a tedious process as it involves the interplay between consumer protection and information and communication technology. While liability of the e-tailers is continuously debated, consumers present at the other side of the bargain also need to be aware of their responsibilities. Observing basic safeguards such as getting information about the company, giving only relevant personal information, knowing the company's privacy policy and more importantly, shopping with reputed e-tailers can prevent disputes. But in cases where disputes arise, consumers need to bring them to the forums so that the authorities can take necessary action and the entire framework of consumer protection is able to function effectively.

²⁸ Prasad Krishna, 'Minimizing Legal Risks of Online Intermediaries while Protecting User Rights' (*The Centre for Internet and Society*) <<http://cis-india.org/internet-governance/events/minimising-legal-risks-of-online-intermediaries-while-protecting-user-rights>> accessed 5 November 2015.