



## DETERMINING JURISDICTION OVER E-COMMERCE DISPUTES IN INDIA\*

### ABSTRACT

India is witnessing a digital revolution within a techno-commercial environment known as E-Commerce. This evolution which is characterised by exponential change has successfully created business opportunities for millions and is continuously redefining our economy. In a world made of clearly defined physical boundaries of states, the internet is multi-jurisdictional and boundary-less. E-commerce raises the issue by the fact that one or more of the parties involved in the commercial activity may be located in different jurisdictional areas. Not only do uncertainties arise, as to where commercial activities are taking place, but the activities themselves can have intended and unintended consequences all over the world. This eventually results in uncertainty when it comes to localizing the dispute, identifying the law which is applicable as well as the practicalities of the issue itself. E-commerce involves more than two or more parties to a single transaction, it can be said that disputes are inevitable in the course of the life of such a business, whether online or offline. The business disputes which the enterprise may come across in e-commerce can be contractual like B2B and B2C or non-contractual like copyright dispute, defamation, etc. Henceforth, it is noteworthy that many of the issues such as jurisdictional issues, choice of law issue, high cost of cross-jurisdictional litigation issue, can arise in relation to the diverse categories of disputes. The authors want to highlight the various jurisdictional issues while deciding disputes in e-commerce & also the present legal framework in India governing e-commerce in cyberspace. This paper also highlights how far consumers are protected in cyberspace.

### I. INTRODUCTION

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The advancement in technology has brought with it a new wave of advanced communication, and transactions through virtual mediums have replaced face to face transactions. Today, e-commerce plays a vital role in nearly every sphere of life- with simply just a click of the mouse we can pay our electricity/telephone bills, do online shopping, transfer money to persons in different parts of the globe, conduct business deals etc. 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 regarding jurisdiction of such transactions to the forefront. 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. The traditional approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it. But, with the internet, the question of ‘territorial’ jurisdiction gets complex mainly because it is borderless. Recognizing such a multifaceted concern, this paper throws light upon numerous theories, doctrines and principles developed by courts both in and outside India. Further, the paper also looks into the principles of private international laws concerning issues. Furthermore, the paper also highlights the attempts made by the IT Act 2000 to change outdated laws and provides ways to deal with cyber crimes. This paper highlights the various jurisdictional issues while deciding disputes in e-commerce & also the issue of consumers protection in cyberspace.

## II. E-COMMERCE

E-commerce has received huge popularity because of the automation technique used by it. Due to ease in transactions, the number of e-consumers is growing at high rate and within a very short period it will defeat physical consumer. Today, e-commerce is affecting business. Electronic business not only exchanges information between buyers and sellers of goods, but also provides support and services to consumers. More consumer demands appear on the Internet than any other mediums today. It demonstrates that the internet has a huge potential to grab many customers in a short amount of time, which in turn can become a target market

for growing firms.<sup>1</sup> Internet has changed the economy so much that most of the business activities today are carried out online.

## **II.1. Legal validity of e-commerce**

Electronic contracts are governed by the basic principles elucidated in the Indian Contract Act, 1872, which mandates that a valid contract<sup>2</sup> should have been entered with a free consent<sup>3</sup> and for a lawful consideration<sup>4</sup> between two adults.<sup>5</sup> It also finds recognition under the Information Technology Act, 2000 that provides validity to e-contracts.<sup>6</sup> 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 provides that the evidence may be in electronic form.<sup>7</sup> 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.<sup>8</sup> 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 contracts.<sup>9</sup> The Supreme Court of India, recognizing the distinction between 'postal rules' and 'receipt rules' as elaborated in *Bhagwandas v. Girdharilal*<sup>10</sup>, following the English decision in *En-*

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<sup>1</sup> Mr. Yasir Zafar Khan, 'Challenges and Issues with e-commerce and the role of government in the development of e-commerce in India', *Journal of Information Sciences and Management*, Jan-Jul. 2013.

<sup>2</sup> The Indian Contract Act, 1872, § 2(h).

<sup>3</sup> The Indian Contract Act, 1872, § 14

<sup>4</sup> The Indian Contract Act, 1872, § 23.

<sup>5</sup> The Indian Contract Act, 1872, § 10.

<sup>6</sup> The Information Technology Act, 2000, § 10(A).

<sup>7</sup> The Indian Evidence Act, 1872, § 3.

<sup>8</sup> The Indian Contract Act, 1872, § 16(3)

<sup>9</sup> The Information Technology Act, 2000, § 13.

<sup>10</sup> AIR 1966 SC 543.

tores Ltd v. Miles Far East Corporation<sup>11</sup>, had held that Section 4 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 record<sup>12</sup> as defined in Section 13(2) of the Information Technology Act, 2000.<sup>13</sup>

### **II.2.E-commerce dispute**

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 e-cope up with such broad exposure. 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, and the enterprise may have to rely on the truthfulness of the customer's information regarding their location.

### **II.3.Types of e-commerce dispute**

Electronic commerce brings both comforts and discomforts to its users. The comforts include on the spot sales and purchase, competitive costs, convenience, saving of time, etc. The discomforts include frauds and cybercrimes committed against e-commerce users. At times there are disagreements and dissatisfactions as well among buyers and purchasers that

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<sup>11</sup> (1955) 2 QB 327.

<sup>12</sup> The Information Technology Act, 2000, § 2

<sup>13</sup> Dr. 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 Impact Factor: 1.855

cannot be resolved using traditional litigation methods.<sup>14</sup> Thus, it can be said that disputes are inevitable in the course of the life of a business, whether online or offline. The business disputes which the enterprise may encounter in e-commerce are:

**A. Contractual Disputes:** Disputes that arise out of some non-fulfilment of any contractual obligation are said to be known as Contractual disputes. There are numerous kinds of contractual disputes existing in the corporate arena, some of which are:

1. Disputes between the enterprise and the Internet Service Provider: These are the dispute that arises between the enterprise and the Internet Service Provider or web-hosting services provider, including disagreements over interruptions in service, breach in data security etc.

2. Business-to-business disputes: These kinds of disputes usually take place between the enterprise and its suppliers such as non-performance of contractual obligations, misrepresentations, and complaints from customers regarding services provided by suppliers.

3. Business-to-consumer disputes: These disputes are common between the enterprise and its customers such as non-payment for goods or services, non-performance of contractual obligations, poor performance of contract, misrepresentations, breach of the privacy policy, and breach of security of confidential information. It is between the enterprise and its customers that lies the greatest possible scope for disputes.<sup>15</sup>

**B. Non-contractual disputes:** Non-contractual disputes are basically those disputes that arise due to non-observance of any statutory obligation on part of the parties to the transaction. These are the common kinds of non-contractual disputes that may arise in an online enterprise.<sup>16</sup>

1. Dispute over Copyright: The enterprise might be liable for copyright infringement if it uses copyrighted material in excess of fair use, and without permission.

2. Failure in Data Protection: The enterprise may be liable for sharing or revealing confidential data of customers, as discussed in the segment on Privacy.

3. Right of Free Expression: The enterprise may be subject to defamation suits for defamatory material posted online.

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<sup>14</sup> Sadat Mulongo Lunani, 'E-commerce and Consumer Rights: Applicability of Consumer Protection Laws in Online Transactions in East Africa', *International Journal of Scientific Research and Innovative Technology*, Vol. 4 No. 1; January 2017

<sup>15</sup> Praveen Kumar Mall, 'Emerging Trends Of E-Consumers & Determining Jurisdictional Disputes In India', *International Journal Of Legal Insight*, ISSN: 2456-3595, Volume I, Issue 1.

<sup>16</sup> Ibid

4. Competition law, Domain Name Disputes: The enterprise may be subject to trademark infringement suits if it infringes a registered or otherwise legally recognized trademark.

Henceforth, it is significant to note that although many of the issues such as jurisdictional issues, choice of law issue, high cost of cross-jurisdictional litigation issue, which arise in relation to the different categories of disputes, are similar, the difficulties are perhaps more pronounced in respect of business to consumer dispute transactional disputes which are often of small monetary value. Traditional methods of resolving cross jurisdictional commercial disputes, such as international commercial arbitration, are often too costly, inconvenient and burdensome in the context of consumer disputes.

### III. WHAT TILL NOW HAS BEEN DECIDED REGARDING JURISDICTION OF E-COMMERCE DISPUTES?

Delhi High Court has many times tried to determine the jurisdiction of any disputes on the virtual space of World Wide Web. One such endeavor was done by the Hon'ble court in *Banyan Tree Case*<sup>17</sup> in 2009. The preliminary objection in the present case is the jurisdiction of the Delhi High Court. Interestingly, the Plaintiffs here did not rely on Section 134 of the Trademark Act to establish the jurisdiction of the Courts, but instead used Section 20<sup>18</sup> of the Code of Civil Procedure. 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**

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<sup>17</sup> *Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr.* on 23 November, 2009 by HON'BLE THE CHIEF JUSTICE and HON'BLE DR. JUSTICE S. MURALIDHAR

<sup>18</sup> Section 20. Other suits to be instituted where defendants reside or cause of action arises. Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or(c) the cause of action, wholly or in part, arises.<sup>1</sup>[\* \* \*][Explanation].-A corporation shall be deemed to carry on business at its sole or principal office in<sup>3</sup>[India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

**availed**” itself of the jurisdiction of the forum court. For this it would have to be prima facie shown 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 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.<sup>19</sup>

Another judgment regarding jurisdiction of ecommerce transactions came in 2014 from Delhi HC only. It was in *WWE v. M/S Reshma Collections*<sup>20</sup>. The Division Bench at the very outset agreed with the WWE that the issue of territorial jurisdiction is a mixed question of fact and law, and therefore, ought to be adjudicated at the final stage of the suit, and not at a preliminary stage of admission. Adding to this, the Division Bench held that the learned single Judge erred in returning the Plaint, as at the preliminary stage, only the averments of the Plaint should be seen, and if, on a demurrer, a case for territorial jurisdiction is made out, the plaint ought not to be returned.<sup>21</sup> In my opinion, the judgment of division bench had fundamental and basic errors. It is as simple as that we cannot climb the cliff with our first step directly on its peak. Similarly, when any case is decide, we need to go step by step and the first step. How can we first let the court solve decide the dispute and then determine if it was competent to do so or not? If it was incompetent then, what was the need to waste the court’s as well as parties’ time in arguing the case before a court which the court was not even eligible to hear. This is nothing but, logically senseless.

The Division Bench further clarified the law in relation to territorial jurisdiction by pointing out that in the *Dhodha House v. S.K. Maingi*<sup>22</sup>, case itself, the Supreme Court had clearly observed that for the purpose of carrying on business, the presence of the person con-

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<sup>19</sup> Supra 2

<sup>20</sup> On 15 October, 2014 By Hon’ble Mr Justice Badar Durrez Ahmed And Hon’ble Mr Justice Vibhu Bakhru

<sup>21</sup> Ibid

<sup>22</sup> 2006 (9) SCC 41

cerned 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”.

The Division Bench, while extending the principles with respect to conclusion of contracts over the telephone to the facts of the case at hand, stated just how the Supreme Court in the *Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.*<sup>23</sup> held that as the draftsman of the Indian Contract Act had not envisaged the use of the telephone as a means of personal conversation between parties, they had not intended to make any rule on those grounds. Similarly, “This applies with greater vigour insofar as commerce and business over the internet is concerned”. In deciding this, the Division Bench held that a contract formed over the Internet, just like a telephonically concluded contract, would not have been envisaged by the legislature. Thus, the legislature could not have intended to make any rule in that regard. The Division Bench accordingly interpreted the interactive website of WWE to constitute “invitation to an offer” for the sale of the Appellant/Plaintiff’s goods. The acceptance of this invitation by a customer in Delhi becomes an ‘offer’ made by the customer.

It is only when the transaction is confirmed and the payment is made to WWE through its website that WWE accepts the offer. Thus, under the provisions of the Indian Contract Act, 1872 read with the principles expounded in the *Bhagwan Goverdhandas* case<sup>24</sup>, since the transaction between the two parties takes place instantaneously, the acceptance of the offer by WWE is communicated to the customer in Delhi, meaning that the contract is concluded in Delhi.

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<sup>23</sup> AIR 1966 SC 543

<sup>24</sup> Ibid

Consequently, the Division Bench found that since the offer is made in Delhi, the contract is concluded in Delhi and the money would emanate from Delhi, WWE is carrying on business within Delhi as the essential part of the transaction takes place there. Accordingly, the Division Bench held that “When the shop in the physical sense is replaced by the virtual shop because of the advancement in technology, in our view, it cannot be said that the appellant/plaintiff would not carry on business in India”, and therefore found that territorial jurisdiction may still be invoked by the Delhi High Court.

As per this decision (*WWE v. Reshma Collections*), the Plaintiff can institute the case where sales are made by it. Hence, the choice of forum is now as per the choosing of the Plaintiff if it makes sales across India. It means that it can now institute a suit in a civil court or a high court having original jurisdiction in such matters across India which is quite absurd because filing a suit anywhere in India might trouble the defendant and would defeat the very purpose of CPC. Also, this decision is limited to cases of copyright and trademark infringement and does not extend to passing off matters. For passing off matters (in which the trademark is not registered but has acquired secondary meaning), the High Court decision in *Banyan Tree* still holds the field.

Another point is that the number of available forums for the Plaintiff, especially an ecommerce retailer is large. The criticism by the Single Judge of this indicating the possibility of forum shopping by the Plaintiff seems credible. Many ecommerce and online retailers have forum selection clauses with customers. Usually they will be inapplicable to such cases since an alleged infringer is usually a third party and not a customer bound by the contract and hence the clause. However, if given a peculiar fact situation where this does occur, there is uncertainty how the Division Bench’s decision in *WWE v. Reshma Collections* will be applicable.

In the same year, there came another case- *Christian Louboutin v Nakul Bajaj*<sup>25</sup> where the defendant sold the plaintiff’s products without permission through its website [www.darveys.com](http://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

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<sup>25</sup> On 26 September, 2014 In The High Court Of Delhi By Hon’ble Mr. Justice Manmohan Singh

luxury brand irreparable harm. The court granted an interim injunction restraining the defendant from selling unauthorized products.<sup>26</sup>

The Delhi High Court recently restrained online retailer Brand world from using the brand name L'Oreal to sell or supply any goods, on any website or in any other manner, after the cosmetics company alleged that counterfeit products bearing its trademark were being sold by the merchant on its shopping website [www.ShopClues.com](http://www.ShopClues.com).<sup>27</sup>

#### IV. INDIAN STATUTES AND E-COMMERCE JURISDICTION

In short, 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.

Information Technology Act, 2000 and E-Commerce: The objectives of the Information Technology Act, as outlined in the preamble, are to provide legal recognition for E-commerce transactions, facilitate Electronic Governance and to amend the Indian Penal Code, 1860; Indian Evidence Act, 1872; the Banker's Book Evidence Act, 1891 and the Reserve Bank of India Act, 1934. The Act also establishes a regulatory framework for cyber laws and lays down punishment regimes for different cybercrimes and offences. The provisions of this Act enables the act applicable also to those offences or contraventions committed outside India by any person irrespective of his nationality if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.<sup>28</sup> The IT Act 2000 attempts to change outdated laws and provides ways to deal with cybercrimes. Let's have an overview of the law where it takes a firm and justified the reason for which it was framed.<sup>29</sup>

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<sup>26</sup> <http://www.worldtrademarkreview.com/Intelligence/IP-Lifecycle-India/2015/Articles/Protecting-brands-in-the-digital-space> last accessed on 2nd June, 2017.

<sup>27</sup> Ibid

<sup>28</sup> The Information Technology Act, 2000, § 75.

<sup>29</sup> Dr.Harish Kumari, 'Commerce In India-Challenges And Legal Issues', International Journal Of Business Management, Vol. 2(1), 2015. Available at [www.ijbm.co.in](http://www.ijbm.co.in).

1. The E-commerce industry carries out its business via transactions and communications done through electronic records. It thus becomes essential that such transactions be made legal. Keeping this point in the consideration, the IT Act 2000 empowers the government departments to accept filing, creating and retention of official documents in the digital format. The Act also puts forward the proposal for setting up the legal framework essential for the authentication and origin of electronic records communications through digital signature.

2. The Act legalizes the e-mail and gives it the status of being valid form of carrying out communication in India. This implies that e-mails can be duly produced and approved in a court of law, thus can be regarded as substantial document to carry out legal proceedings.

3. The act also talks about digital signatures and digital records. These have been also awarded the status of being legal and valid means that can form strong basis for launching litigation in a court of law. It invites the corporate companies in the business of being Certifying Authorities for issuing secure Digital Signatures Certificates.

The Indian Penal Code, 1860: The Act provides for punishment<sup>30</sup> of offences committed beyond the four walls of India, but which by law may be tried within, India. It states that any person liable, by any Indian law to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India. There does not seem too much jurisprudence in India on the issue of jurisdiction in cases of e-commerce. However there are some instances where in the courts had in the preliminary stages assumed jurisdiction over a matter.

The Code of Civil Procedure, 1908: The Act gives 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 Courts.<sup>31</sup> The Act further provides that every suit shall be instituted in Court within the local limits of whose jurisdiction the any of the

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<sup>30</sup> The Indian Penal Code, 1860, § 53.

<sup>31</sup> The Code of Civil Procedure, 1908, § 19.

defendant resides or the cause of action arises.<sup>32</sup> 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 conditions.<sup>33</sup> 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 jurisdiction.<sup>34</sup>

## V. CONCLUSION

As the present field we talked about is an emerging field in itself and so, it is quite obvious that the law related to it will also take some time to emerge and develop. Though India has started dealing with it by enacting IT Act, 2000 but, it still lacks a lot as no specific legislation governs online transactions and IP issues in India. The Information Technology Act, 2000 provides for the admissibility of electronic records and sets out offences and penalties for cybercrimes, etc. But, this is just an enabling statute to facilitate online transactions and thus has to be read in conjunction with the Contract Act in order to determine whether an online transaction constitutes a valid contract or not. The present Act too is not complete in itself and indicates that our legislature still requires to work a lot on this.

Further, when e-commerce takes place as B2C that is, business to consumer, then Consumer Protection Act, 1986 obviously has its role to play but, alas! It too does not talk about online transactions and on account of jurisdiction of various consumer forums, it gives only the brief account of pecuniary jurisdiction of the forums. There is a dire need for specific provisions for online transactions where directly consumer is involved. All businesses engaged in e-commerce should ensure that they take account of consumer protection issues.

Despite all the discussions, the gist of the article is that our country needs a specific law to decide the jurisdiction of Courts where dispute related to e-commerce transaction arises. This is

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<sup>32</sup> The Code of Civil Procedure, 1908 , § 20.

<sup>33</sup> The Code of Civil Procedure, 1908, § 13

<sup>34</sup> The Code of Civil Procedure, 1908, § 14.

so because a website can be accessed anywhere in India and thus, according to the precedents till now, plaintiff can institute the suit anywhere he wants without taking into account any of the defendants' convenience thus infringing his right to fair, convenient and speedy justice.

