'LEGAL CHECK' ON E-COMMERCE – DIGITAL INDIA PERSPECTIVE

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Abstract: Online business is ever so booming since its inception and now at the peak as the Government decides to allow 100% FDI in online retail of goods and services in automatic route. Contributing significantly to the Indian economy though, mechanism behind electronic commerce or e-commerce is hardly understood explicitly by a large number of people. These attract hackers, crackers and every individual with the knowledge of exploiting loopholes in an arrangement. Briefly defined as a method of business through electronic platform, it's rising very fast and so does the need of robust system to regulate and protect. The regulatory framework governing e-commerce is evolving, albeit not at the desired pace. Previously the Government tried to address the issues involved in e-commerce with the prevailing commercial laws which regulate the offline world of commerce. Now the situation certainly has changed with its enormous growth and intervening nature to intersect with FDI norms, Competition Act, IT Act, consumer protection laws, investment laws, taxation and intellectual property issues. This Article aims at finding an exhaustive understanding towards the legal regime to regulate e-commerce and indicate the best possible approach to govern the same.

Introduction: With the advent of online business or e commerce through developments in the Internet and Web-based technologies, India has shifted its economy into digital economy and moved towards becoming digital India. No doubt it's an evidence of growth. The e-commerce industry in India is emerging at a remarkable pace due to high incursion of internet and sophisticated electronic devices. This rapid growth of the e-commerce industry is certainly bringing a massive change in the economy but coupled with some issues that the legal system of the country has been faced with. Since its inception the law and regulatory framework is trying hard to match its usage and perceptive but still not successful as e-commerce is not only changing day by day but also shaping into ever newer forms. This calls for an in-depth understanding of the legal regime and comprehensive regulatory framework for monitoring of all e-commerce transactions.

Understanding the Key Concepts/ Business models of E commerce: Though much talked about, there is no statutory definition of e-commerce. According to the FDI Policy "E-commerce activities refer to the activity of buying and selling by a company through the e-commerce platform" But this definition rather categorization is structured on the basis of foreign investment. In short the term e-commerce or electronic commerce can be described as a method of conducting business through electronic means rather than through conventional physical means. Therefore the business activity conducted through electronic means falls within e-commerce. Such electronic means include 'click & buy' methods using computers as well as 'm-commerce' which make use of various mobile devices or smart phones. This term takes into account not just the act of purchasing goods and /or availing services through an online platform but also all other activities which are associated with any transaction such as:

- Delivery,
- Payment facilitation,
- Supply chain and service management.

E commerce can be classified on the basis of business and nature of participants. Classification of e commerce can be understood through the models discussed below:

Business to Business E-commerce (B2B): In this type of ecommerce, both participants are businesses. As a result, the volume and value of B2B ecommerce can be huge**.** E-commerce has enabled various businesses to build new relationships with other businesses for efficiently managing several of their business functions. B2B e-commerce could comprise of various models, which may include distribution services, procurement services, digital / online market place like services etc.

Business to Consumer E- commerce (B2C): This is the most common type of e commerce. Most people are aware of this type of B2C ecommerce only. That is why a name like Amazon.com pops up in most discussions about ecommerce. Elimination of the need for physical stores is the biggest rationale for business to consumer ecommerce. But the complexity and cost of logistics can be a barrier to B2C ecommerce growth.

Consumer to Consumer E- commerce (C2C): Traditionally consumers have had dealings with other consumers, but only few of those activities were in a commercial sense. E-commerce has made it possible to bring together strangers and providing a platform for them to trade on. This form of ecommerce could also be called C2B2C ecommerce (consumer to business to consumer ecommerce). The popular example of this type of e commerce could be ebay.com.

Consumer to Business E- Commerce (C2B): This relatively new model of commerce and is a reverse of the traditional commerce models; here consumers (i.e. individuals) provide services/ goods to businesses and create value for the business. This type of transaction can be seen in internet forums where consumers provide product development ideas or in online platforms where consumers provide product reviews which are then used for advertisement purposes.

Business to Business to Consumer E- Commerce (B2B2C): A variant of the B2C model wherein there is an additional intermediary business to assist the first business transact with the end consumer.

M-commerce (mobile commerce): It is the recent change in the industry of e commerce. M-commerce is the buying and selling of goods and services through wireless technology-i.e., handheld devices such as cellular telephones and personal digital assistants. Japan is seen as a global leader in m-commerce. As content delivery over wireless devices becomes faster, more secure, and scalable, some believe that m-commerce will surpass wire line e-commerce as the method of choice for digital commerce transactions. This may well be true for the Asia-Pacific where there are more mobile phone users than there are Internet users.

Mechanism to Address the Legal Issues of E Commerce and Troubles Faced: The Internet has posed significant challenges to the legal structure. The application of traditional law to the online business is not always straightforward. On top of that the ever changing e- commerce industry is branching into many other divisions and these attract each commercial law to govern the same.

FDI in E- Commerce: India's current FDI Policy permits FDI up to 100% in e-commerce activities engaged in B2B e-commerce under the automatic route. However, no FDI is permitted in e-commerce companies engaged in single brand retail trading or multi brand retail trading. Although FDI in single brand retail and multi brand retail has been liberalized, FDI in B2C e-commerce companies continues to be restricted. These express restrictions on FDI in B2C businesses have led to development of market place models, where the online platform acts as a trading platform rather than a trader. The single most contemporary issue governing the interplay of the FDI Policy and e-commerce is the question whether e-commerce companies should be treated as retailers engaged in B2C commerce selling directly to the customers or as wholesalers undertaking B2B trading between business entities. As a consequence, e-commerce companies with foreign investments, as a measure of economic sustenance, in some sense have developed, the "marketplace model", in which the e-commerce companies themselves do not carry out any retail transactions or directly sell anything to a purchaser by provide a platform, instead, for third party sellers to sell their goods to the purchasers. In other words, e-commerce companies with foreign investment cannot undertake an inventory based model, wherein they are the owners and sellers of the goods being offered to the end customers. Fundamental to the above dispute is the fact that there is no clear definition of e-commerce and the FDI Policy is silent on the marketplace model.

Competition Law and E- commerce: E-commerce has already generated a lot of competition with ever increasing players and acquisition of several old players in the market and has enabled development of new services, new distribution channels, and greater efficiency in business activities. Creation e-hubs can lead to certain competition issues (such as abuse of dominance) if they appear to have developed sustainable market power resulting from network effects and/or engaging in strategic acts to preserve or maintain their market power. Competition Commission of India (CCI) is the regulatory body against any anti competitive agreements and abuse of dominance under the competition Act, 2002. Though the issues that has raised and dealt with are preliminary complaints of predatory pricing and regulation of distribution channel by CCI, in future potential issues for e-commerce players would be price fixing or tacit collusion or anti-competitive discrimination or refusal of access to third parties.

Contract Law: Electronic contracts are governed by the basic principles provided in the Indian Contract Act, 1872 which mandates the pre requisites of a valid contract in section 10 and 11 of the Act. Section 10A of the Information Technology Act, 2000 (IT Act) provides validity to e-contracts. So, both Indian Contract Act and Information Technology Act need to be read in conjunction to understand and provide legal validity to e-contracts. Section 3 of the Indian Evidence Act, 1872 provides that the evidence may be in electronic form.

Most commonly used e contracts in online business are click wrap (contracting party's affirmative acceptance is taken by means of checking on an *'I accept"* tab), browse wrap (intended to be binding on the contracting party by the mere use of the website.) and shrink wrap (contracting party can read the terms and conditions only after opening the box within which the product is packed.). In these form of e contract what needs to be examined is how the requirements of the Indian Contract Act would be fulfilled. Though the Information Technology Act provides fortification for the validity of e-contracts, but there is no means to ensure. For example the criteria of being a major to enter into a contract cannot be ensured, same with the requirements of signature or stamping.

Consumer Protection: It is always important to keep consumer protection issues in consideration with online merchandise. The Consumer Protection Act, 1986 governs the relationship between consumers and goods & service providers and there are no specific provisions related to online transactions. Liability for a goods/service provider arises when there is "deficiency in service" or "defect in goods" or occurrence of "unfair trade practice". The CPA specifically excludes the scope of any service rendered free of cost. So, if only the actual sale is taking place in the online medium, the users will be considered as consumers under the CPA. The goods/service providers may be asked to remove defects/deficiencies, replace the goods, return the price already paid, compensate and discontinue the unfair trade practice or the restrictive trade practice and not repeat them.

Data Protection and Privacy in E- commerce: Safeguarding the privacy of those who engage in online purchasing is one of the greatest challenges to e- commerce industry as consequential to the disclosure of their confidential personal information. As part of online transactions, e-commerce firms inevitably gain direct or indirect access to user information. The information typically comprises directly of users personal and certain financial information and indirectly of personal choices and preferences and patterns of search. The e-commerce industry is confronted with a multitude of challenges, of which maintaining security of user data is arguably one of the most formidable ones in the wake of exponential increase in cybercrime. As it happens, the right to privacy is not specifically recognized under any Indian legislation, and is only recognized judicially. So far as data protection is concerned, S.43A of the Indian Technology Act, 2000, provides for award of compensation for failure to protect data. Further, Information Technology (Reasonable security practices and procedures and sensitive data or information) Rules, 2011 lay down the legal framework relating to 'sensitive personal data or information'. The IT Act and the rules framed there under impose civil criminal liability on persons if they are in breach of privacy and confidentiality. The IT Act tried to formulate rules and regulations for data protection and privacy but a robust regulatory framework still needs to be evolved.

IPRs: The Internet is a limitless and unregulated medium and therefore the protection of intellectual property rights (IPRs) is a challenge and a growing concern amongst most e-businesses. The existing laws in India that protect IPRs in the physical world, the efficacy of these laws to safeguard these rights in e-commerce is uncertain. Some of the significant issues that arise with respect to protecting IPRs in e-commerce are new forms of IPRs breaking through the traditional concepts of IPRs like copyright or trade mark. Design of the website, functionality of a software, computer programs are new forms of IPR and in India there exists hardly any mechanism to provide patent protection or otherwise to all these newly invented IPRs. For example computer program does not get patent protection. Other major issues related to IPRs may be owners of IP in the design and functionality of the website and in the content, registration of domain names, fair dealings etc. E-commerce websites are designed and made by other parties and often the content is also created by third parties. Unless the agreements between the parties specifically provide the IP rights, there can be serious ownership issues of IPR. As a consequence there are possibilities of trade mark, copyright or patent infringements in online medium.

Taxation Issue related to E- Commerce: Tax authorities have been trying to tax e-commerce in a manner that contradict with international approaches resulting disputes between global enterprises serving Indian customers and there has been significant litigation in this respect, especially in relation to characterization of income and withholding taxes. Therefore, it becomes important to carefully structure e-commerce business models so as to mitigate tax risks, especially risk of taxation in more than one country. Taxation of income in India is governed by the provisions of the Income Tax Act, 1961. Under the Income Tax Act, residents are subject to tax in India on their worldwide income, whereas non-residents are taxed only on income sourced in India.

With respect to taxation of income generated by non-residents from e-commerce transactions, primarily, there are two main issues: a) Characterization of income i.e. whether income earned with respect to the use or sale of goods particularly software and electronic databases, sale of advertising space etc. is royalty or business income or capital gains, and b) permanent establishment (PE) issues that may arise due to the presence of a server / other electronic terminal in India, hosting of websites or other technical equipment, etc. The other issues may be the "free" services to the user are not entirely free because the platform collects valuable data about the user in exchange for the service, the definition of the Service Provider is ambiguous in terms of taxation. Is he a "dealer" of goods (since it deals in selling of valuable goods i.e. consumer data); or a "service" since he provides service to the user; or is he both? Whether the provision of a "free" service as referred to in the above point can be considered truly free and therefore exempt from any form of sales tax (VAT or GST)? These are some open ended question related to taxation issues in online business.

Conclusion: The common perception of e-commerce is that it is an online shop similar to the shops we are familiar with in real space. However it is much more than that, and therefore it is appropriate to lay out the basic concepts of the technology involved. For developing countries like India, e-commerce offers significant opportunities; e- commerce diminishes existing advantages of cost, communication, and information, and may create new markets for indigenous products and services. The expediency provided by online business transactions is the reason why large number of users are turning to the Internet for their buying and selling. This is not only changing the face of retailing and rewriting the rules of the game but also throwing up new challenges to the legal, policy-making and other governing bodies at a pace that they are ill-equipped to deal with. The future of business is online business. Hence much more needed to handle the issues more conveniently and regulate, probably a new set of policy must be brought and adhered too.

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