

**E-COMMERCE SERVICES: NON LIABILITY OF ELECTRONIC SERVICE
PROVIDER/ MARKETPLACE ENTITIES LEADING TO INFRINGEMENT OF
CONSUMER RIGHTS**

DISSERTATION

SUBMITTED TO:

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE

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CERTIFICATE

This is to certify that this dissertation titled '**E-COMMERCE SERVICES: NON LIABILITY OF ELECTRONIC SERVICE PROVIDER/ MARKETPLACE ENTITIES LEADING TO INFRINGEMENT OF CONSUMER RIGHTS**', submitted by Mr. Kiran Gopi in partial fulfillment of the requirements of LL.M. Degree for the academic session 2020-21 at National Law School of India University, Bengaluru, is a bonafide research work carried out by him under my guidance and supervision.

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DECLARATION

I, the undersigned, solemnly declare that this dissertation titled as '**E-COMMERCE SERVICES: NON LIABILITY OF ELECTRONIC SERVICE PROVIDER/ MARKETPLACE ENTITIES LEADING TO INFRINGEMENT OF CONSUMER RIGHTS**', submitted to National Law School of India University, Bengaluru for LL.M. Degree (2020-21), is an original and bonafide research work carried out by me under the supervision of my guide. In case the contributions of others are involved, every effort has been made to give due credit to them through reference to the literature. The information contained in this work is true to the best of my knowledge. This dissertation or any part thereof has not been submitted for the award of the degree, diploma, certificate or fellowship not has it been sent for any publication purpose.

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- 2) Consumer Protection Division v. Luskin's, Inc (1998)120 Md.App. 1, 706 A.2d 102, Court of Special Appeal of Maryland
- 3) L'Oreal v Brandworld [CS (COMM)908/2016]
- 4) M/s Luxottica Group S. P. A. & Anr. v M/s Mify Solutions Private Limited & Ors. [CS (COMM) 453/2016].
- 5) Raghubir Singh v.Thakurain Sukhraj Kuar, 1939, AIR Oudh 96 at 99
- 6) Skullcandy Inc v Shri Shyam Telecom & Ors. [CS (COMM) 979/2016]

1. INTRODUCTION

The increase in worldwide use of mobile phones and internet has played a substantial role in the shift from offline retail market to e-commerce. “E-commerce means buying or selling of goods or services including digital products over digital or electronic network”¹. This shift allowed the small and medium enterprises to access global market thereby increasing their market presence, while enabling consumers with access to wider product range with the advent of delivery services. This also provided for more job opportunities and the inclusive access to products across the country reduces the rural urban divide incidentally leading to a wider spread of e-commerce acceptance.

India’s Digital India drive in 2015 and the demonetization move in November 2016 further encouraged the reliance on mobile wallets such as Paytm, Google pay etc, as an alternative payment mechanism for e-transactions. The COVID pandemic in 2019 further accelerated the overall growth of global e-commerce by forcing consumers to resort to it for accessing essential supplies and services. Covid prevention related goods and supplies saw a spike of 807% and toilet paper and other essentials saw 231% increase with the trend pushing the overall online inflation down.²

“According to IBEF, the e-commerce sector is growing across countries with a Compound Annual Growth Rate (CAGR) of 15% between 2014 and 2020 and it is likely to grow at a rate of 25% between 2020 and 2025. While the Indian e-commerce sector will reach US\$ 99 billion by 2024, growing at a rate of 27% CAGR over the period from 2019-2024, with grocery and fashion/apparel likely to be the key drivers of incremental growth”.³ Another report by the IBEF on e commerce growth for the term 2015-2020 based on different studies provides that the growth of Indian retail spending during 2015-2020 was at a CAGR of 22.52% while the CAGR of online spending increased to 35.44% in the same period, which further proves the increasing reliance on e commerce transaction. Now, India envisions a five trillion dollar economy by 2024.⁴

Now with such a drastic and fast paced increase in the dependence on e-commerce, there is a simultaneous increase in the number of consumer complaints, frauds and unfair trade practices as the legislation of every nation is playing catch up. Since e-commerce is ever expanding into new territory and the nations cannot foresee all the challenges that such expansion might bring up, the only method for legislation is to rely on

¹ Consumer Protection Act, 2019, s.2(16)

² Adobe Digital Economic Index Survey- 2020, <<https://business.adobe.com/resources/digital-economy-index.html>>, Accessed 21 Aug 2021.

³ Indian Brand Equity Foundation (IBEF)<<https://www.ibef.org/industry/ecommerce/infographic>>

⁴ E-Commerce growth in India during 2015–2020, (IBEF) <[https://www.ibef.org/news/vision-of-a-new-india-US\\$-5-trillion-economy](https://www.ibef.org/news/vision-of-a-new-india-US$-5-trillion-economy)>, <<http://www.fificci.in/fificci-in-news-page.asp?nid=19630>>, <<https://www.forrester.com/data/forecastview/reports#>>> Accessed 21 August 2021

the method of putting out fires as they pop up. Every legislation has to go through a series of steps such as public opinion, committee reports, getting assent etc which takes a considerable time to finally come up with an enactment. For eg. The work on the amendment to the Consumer Protection Act began in 2004 but the bill lapsed in 2011. Then the work on a new Consumer Protection Act which was introduced as a bill in the houses in 2015, which took another 4 years, and it was finally approved and enacted only in 2019.

This time frame, until the new legislation was finally introduced, is usually a period of weak regulatory oversight allowing businesses to exploit consumers using their better understanding and dominant position in market, by resorting to unfair trade practices such as selling inferior quality goods at higher prices etc for the maximization of profits. When such practices happen in cross border transactions it affects the international standing of the nation, and will negatively affect in International trade.

“Total cross-border fraud during 2020 (till 30 June) was 33,968 with a reported loss of US\$91.95 million as against 40,432 cases with a loss of US\$ 151.3 millions. India was the third country next to France for online fraud reporting in consumer locations, while it was the fifth nation for company location-based reporting”⁵.

Thus the absolute necessity for a strict and stable statutory provision.

1.1 STATEMENT OF PROBLEM

The need of consumer protection is a recognized and accept factor of commerce, at both International and national levels across jurisdictions. Since the consumer laws across jurisdictions will have substantial difference, the UNCITRAL model law was made to recognize the essential consumer protections, that needed to be safeguarded in national legislation of member nations. The importance of protection of Consumer Protection can further be understood by the slew of International organizations working towards the same, and the many Indian laws and amendments made for protecting the consumer.

The issue here is the failure of enforcing consumer protection which are safeguarded across jurisdictions.

These well protected ideas of consumer rights and protection is neglected in an area of e-commerce service involving a electronic service provider/market place entity. Electronic service provider/ Market place entity refers to platform which acts as an intermediary for facilitating services from third parties.

When a consumer uses e commerce service which acts as a platform for facilitating service from third party service providers, the consumer has no opportunity to verify the veracity of the service provider before an agreement is entered into. The electronic service provider/ market place entity is the only party who has a prior contact with the service provider but no liability is put on them if the third party service provider defaults. Thus the consumer loses his right to Consumer safety and his right to conduct due diligence before availing a commercial service, is infringed due to the lack of legislation recognizing the lacuna in the law.

1) ⁵ Neelam Chawla, Basanta Kumar, E Commerce and Consumer Protection in India: The Emerging Trend, (2020) Journal of Business Ethics, (20th december 2020) <E-Commerce and Consumer Protection in India: The Emerging Trend (springer.com)>

There is also the larger threat against the safety of consumers availing services, from third parties who are not adequately vetted by the electronic service provider/ marketplace entity.

1.2 IMPORTANCE OF STUDY

Electronic commerce is an area, where its scope cannot be drawn down due to the ever expanding nature of the sector. A legislation on protecting consumer rights or regulating the e-commerce market, made today to deal with the existing issues might not be effective tomorrow when a new technology is introduced in the market which changes the dynamics of how commercial transactions are done. Eg. Something similar to what the advent of Internet and e-commerce did to previous Consumer protection regulations.

Thus it is essential that all aspect of consumer interaction with e-commerce be scrutinized to ensure that the rights of consumers are protected. Further the shift in consumer attitude towards availing more services at the comfort of home is only going to expand in the future. Thus it is essential to flash a spotlight on the existing deficiencies in the electronic commerce service sector, so that more research may be done on the area, leading to new legislation addressing the issues, thereby ensuring the rights and safety of consumers.

1.3 AIM OF THE STUDY

The electronic commerce service sector is an area of e-commerce which has been working for years now without ever getting much focus or attention. The same laws that protect the consumer rights in sale of goods is stretched to the needs of e-commerce services, which falls insufficient.

The aim of this study is to

- 1) Understand how the existing consumer protection laws are applicable in the area of electronic commerce services.
- 2) To identify the inherent gaps and flaws within the legislative framework of Consumer protection in E-commerce service.
- 3) To identify if the existing consumer protection laws ensure safety of consumers engaging in e commerce services.
- 4) To suggest reforms to address the aforesaid flaws and gaps in the legislation in order to accomplish the accepted norms of consumer protection and ensure safety of consumers.

1.4 HYPOTHESIS

The existing Consumer protection laws are insufficient to protect the safety and rights of consumers engaging in an e-commerce service transaction using an electronic service provider/ marketplace e-commerce entity (such as Urban Company) which facilitate service from third party service providers, as no liability can be enforced on the electronic service provider.

1.5 RESEARCH QUESTION

On the basis of the hypothesis taken, the researcher attempts to answer within the scope of the present study, the following research question;

- 1) Whether the existing consumer protection laws are sufficient to ensure the safety of a consumer availing services through a electronic service provider/ Marketplace e commerce entity.
- 2) Whether the recently introduced Consumer Protection Act,2019 and Consumer Protection (E Commerce) Rules, 2020 identify the legislation gap in protecting e-commerce services.
- 3) If not, then how does the existing laws in consumer protection and other associated legislation fails to prevent infringement of consumer rights in an e-commerce service transaction.

1.6 RESEARCH METHODOLOGY

The researcher has adopted a combination of descriptive and analytical research methods. The researcher has undertaken to analyse the data available as Parliament Bills, Committee reports, FAQs to understand the evolution of the law and the gaps it was intended to fill. Further a doctrinal method was used to study the existing provision of law which fails to cover the research gap. Thus, both quantitative and qualitative approach have been adopted for the analysis of scope of law thereby inferring the gap in law.

1.7 MODE OF CITATION

OSCOLA Citation Guide (4th edition)

1.8 SCOPE AND LIMITATION OF STUDY

The study is limited to finding consumer right infringement when a consumer of a an E-Commerce service which uses a marketplace e commerce entity/ electronic service provider, to facilitate service from a third party service provider. The study therefore is limited to the provisions relevant to e-commerce services. This study not not extend to the other provisions of consumer protection involving sale of goods. This study uses the public consumer complaint forum to find issues faced by consumers using this mode of e-commerce and resorting to find a remedy through existing provisions in law.

In preparation of the dataset, reliance has been placed upon the information published as Committee Reports, Bills, FAQs, published by the relevant authorities. Relevant case laws has also been used to complete the data set.

The limitation to the present study is that due to COVID-19 the empirical research was not possible and further due to the shutdown of the University library extensive research was hindered.

1.9 REVIEW OF LITERATURE

The article, 'E-commerce and Consumer Protection in India: The Emerging Trend'⁶ authored by Neelam Chawla and Basanta Kumar, provides a general idea as to the working of e-commerce and the provisions of laws that is applicable towards consumer protection. The study analyses the rapid growth and the emerging trend of e-commerce to understand how the present legal framework protects consumer interest. The study focuses on the changes in consumer preferences in the last few decades and the methods in which the online e-commerce can be strengthened. It concludes by highlighting the importance of a secure and reliable system for e-commerce firm to maintain trust of the consumers, and following it up with other provisions such as cash on delivery, effective customer care services etc to ensure the trust of the consumers.

The article, E-commerce and Consumer Protection: A Critical Analysis of Legal Regulations⁷ (2012), authored by Rajiv Khare and Gargi Rajvanshi talks about the need for consumer protection legislation when e-commerce was booming and before the introduction of Consumer Protection Act,2019. The article looks at the need and significance of consumer protection and its interplay in an e-commerce medium so as to find the challenges to a consumer contracting through electronic commerce. The article also provides a deeper analysis on to the Indian and International perspective of Consumer protection and gives the reader a perspective on the evolution of consumer protection laws and rules.

The article, 'Intermediaries,users and the law - Analyzing Intermediary liability and the IT rules'⁸, as the name suggests provides an extensive view of intermediaries, safe harbour rule under sec 79 of the Information Technology Act and the Information Technology (Intermediary Guidelines),2011. The article talks about how the Intermediary Guidelines rules are arbitrary and in contrast to the IT Act.

The Ninth report of Standing Committee on food, Consumer affairs and Public Distribution, The Consumer Protection Bill (2015)⁹ provides a detailed discussion on the priorities and issues that the subsequent Consumer Protection Act,2019 was intended to cure. The report explains the then existing e-commerce conditions which was marred by the widespread unfair trade practices. To this end the report suggests the establishment of Central Consumer Protection Authority(CCPA), new provisions such as 'Product liability' and the requirement of faster dispute resolution mechanism through mediation. The report also contains the

⁶ Ibid (n.4)

⁷ Rajiv Khare and Gargi Rajvanshi, E-commerce and Consumer Protection: A Critical Analysis of Legal Regulations (2013), International Journal on Consumer Law and Practise (IJCLP) Vol.1, <Vol-1 | Chair on Consumer Law & Practise (nls.ac.in)> accessed on 25th August 2021

⁸ Intermediaries,users and the law - Analyzing Intermediary liability and the IT rules (2012), Software freedom Law centre, <<https://sflc.in/sites/default/files/wp-content/uploads/2012/07/eBook-IT-Rules.pdf>> accessed on 25th August 2021

⁹ E commerce Bill, (April 2016) <Parliament of India, Lok Sabha> accessed 21 August 2021

consultation procedure and the subsequent Q&A which suggests that the prime focus of the Act was to curb the unfair trade practices, and providing for a framework for consumer protection.

The Two Hundred and Forty Fifth Report of Rajya Sabha, on The Consumer Protection (E Commerce) Rules, 2020 by the Committee of Subordinate Legislation¹⁰ explains the interest behind the enactment of the E Commerce Rules. The Committee analyzed the lacuna in law after the enactment of the Consumer Protection Act and found risks in areas of consumer activity such as Information sharing, ordering of Product, Payment, Delivery and Support. Thus the committee report suggests the rules to be filled in the framework built by the Consumer Protection Act, by providing for duties and liabilities of E-commerce entities and sellers in marketplace e-commerce entities. The Q&A session and the recommendations of the committee further explains that the whole focus was on curbing unfair trade practices such as predatory pricing and ensuring privacy and safety of the consumers. The Q&A also provides insights that the committee has not considered the safety issues of consumers contracting through a electronic service provider as no such issue was mentioned.

1.9.1 **RESEARCH GAP**

All the provisions of legislation and the reports of committee making the Consumer Protection Act and E commerce Rules are focused on curbing the widespread unfair trade practices in the e-commerce sector. They are focused on E-commerce as an online platform for delivery of goods. The bulk of the law is thus tailored on ensuring protection to this area of sale of goods in e-commerce. The availing of services through a electronic service provider is an area of e-commerce which is expanding rapidly ever since the pandemic, but the legislation that regulates this is tailored for delivery of goods and thus falls short in protecting the consumers in this area. Thus when the consumer enters into a contract with a third party service provider using a electronic service provider/ marketplace entity, his safety and consumer rights are not adequately protected by the existing legislation.

1.9.2 **CONTRIBUTION OF THE STUDY**

The study aims at an in-depth analysis of existing consumer protection laws to focus a spotlight on the particular area of e-commerce, where a consumer avails third part services from a electronic service provider, which is an area neglected under the existing consumer protection laws. The study focuses on the subsequent infringement of consumer rights and safety that the lack of legislation has caused and aims to highlight the need for immediate action. The study also provides suggestions on possible measures to curb these issues and highlights the requirement of further research in this field.

1.10 **CHAPTER SCHEME**

¹⁰ Presented on 24th March, 2021 <245 Report (rajyasabha.nic.in)> accessed 21 August 2021

In Chapter 2 THE ISSUE OF CONTRACTING THROUGH E-SERVICE PROVIDER , the issues faced by a consumer while availing the services of an electronic service provider is elaborated by using the case studies of Urban Company, Ola and other Electronic service providers. The lack of legislation ensuring liability on these electronic service providers allows them to waive consumer rights for monetary benefits. This is highlighted in the chapter using the terms and conditions of these electronic service providers.

Chapter 3- Consumer Rights : International, explains the International accepted standards of Consumer Protection which India is bound to follow. The chapter elaborates on the available International Organizations who all work together to ensure the consumer safety and rights, highlights the paramount need of legislation to ensure consumer protection.

Chapter 4 - The second part of this study focuses on the existing consumer Protection laws in India. Chapter 4, is an in-depth analysis of the Consumer Protection Act,2019 to find the provision which are applicable in the present scenario. The lack of the provisions leaves the consumer vulnerable as explained in the chapter.

Chapter 5, Consumer Protection (E-Commerce) Rules, 2020 is an in-depth analysis of the enactment to find the provisions of the law applicable in this scenario. The lack of the rules and its subsequent issues are dealt in this chapter.

Chapter 6, Information Technology Act & Information Technology (Intermediary Guidelines), 2011 looks at the safe harbour provision for Intermediaries as provided under Sec 79 of the Act and the Rule 3 of the Intermediary Guidelines which explains the duties of these intermediaries to be qualified for the exception. The chapter also looks at hte decision in Christian Louboutin case which set the standard regarding marketplace entities availing the Sec 79 exception.

Chapter 7, Conclusion and Suggestion gives a summary of the whole study and enumerates the issues that present legislation is incapable to address. The study highlights the need for legislation regulating the area of study and the need for further research.

CHAPTER 2

THE ISSUE OF CONTRACTING THROUGH E-SERVICE PROVIDER

The current idea of e-commerce is mostly synonymous with the purchase of goods from e-commerce platforms such as Amazon, Flipkart etc. Thus it is no wonder that most of the laws relating to e-commerce deals with protecting the consumer rights in issues relating to the delivery of goods and the standards and regulations these entities has to follow to to conduct transaction in online platforms.

Since the increasing availability of Internet and the widespread use of mobile in the consumer market, new avenues of e-commerce is bursting up. This phenomenon was exacerbated by the COVID pandemic which forced all consumers inside their home and increasing reliance of e-commerce.

The inability to go out during the pandemic flashed a spotlight on these websites and mobile apps promising services, traditionally availed by visiting brick and mortar shops, at the comfort of the home.

Electronic Commerce service here refers to the e-commerce sector where consumers avail services through an electronic service provider (Consumer Protection Act) or a market place commercial entity, who provides a platform for hiring services from third party service providers, without having any legal liability on failure to ensure quality of service and subsequent damage to consumer.

“Urban Company” previously known as Urban Clap (UC app) is an electronic service provider or a marketplace e commerce entity which provides a platform for availing services curated by them, such as Saloon, Spa, Electrician, Carpenter, Pest control, repairs etc at home. It is available in 32 cities across India where the consumers can install the mobile application and hire any of these services from a list of third party service providers designated by the UC app. Basic details of the service providers are provided in the app, based on which the consumers can book their services at prescribed time slots.

Now the issue that arose in availing these services is the uncertainty in the quality of the service provided as the service providers are hired from a small list of service providers who have registered with the UC app. Traditionally before availing theses services, due to their personal nature, would have the consumer check the reputation, past history of work and other due diligence before contracting the work to an outsider. But such an option is not available and the consumer is forced to trust that these due diligence was done by the UC app, before adding these service providers to their app. It is based on this trust that the consumer contracts the service providers and subsequently gives access to the private space of consumer’s home.

A quick look through the consumer complaints forum such as Indian Consumer Complaints Forum¹¹ shows more than 700 complaints with most of them being about the quality of the service provided leading to damage and harm caused to the consumer. The same page also show more than 1000 complaints for taxi services such as Ola, Uber etc. This is relevant because the same issue is applicable when a consumer avails a taxi service from either of these applications, these taxi is randomly selected for the consumer by the application. Further the terms and conditions of these application are similar in the sense that they both expressly declare their non liability in their terms and conditions.

2.1 HOW E SERVICE PROVIDER AVOIDS LIABILITY

The Privacy Policy¹² of the Urban company acknowledges that the service providers associated with the them maybe subjected to background verification by a person contracted by the UC. The service providers are required to furnish such details as required by the person verifying them, before gaining access to the UC app as a verified service provider.

At the same time the Services clause in Terms and Agreements states that “the service provided by the company is limited to 1) arrange and schedule home-based services with third party providers of those services, who have an agreement with the UC, and 2) facilitate the payment the payment to third party providers for the service and receive receipts for such payments”¹³. The terms also state that the UC app does not endorse these service providers, (even though they are the only party who verifies the authenticity and quality of these service providers) and is not liable for any acts of the service providers. The Disclaimer provision further says that they are not liable for any personal injury or harm caused due to the services availed through the UC app, and their liability is only up to an amount not exceeding 10,000/- rupees. This basically means that the consumers are compromising their safety, as the consumer has to invite a strangers into the safety of home, at the recommendation of a platform, who takes no subsequent liability over the acts of the service provider.

These terms and conditions are also similar for taxi services such as ola cabs or uber etc. The disclaimer of the application limits their liability “IN ADDITION, AND WITHOUT LIMITING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT WILL OLA’S AGGREGATE LIABILITY ARISING OUT OF OR IN CONNECTION WITH THESE USER TERMS OR THE SERVICES RENDERED HEREUNDER, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE, PRODUCT LIABILITY, OR OTHER THEORY), WARRANTY, OR OTHERWISE, EXCEED THE AMOUNT OF Rs. 1000/- (Rupees One Thousand only)”¹⁴.

¹¹ Indian Consumer Complaints Forum <<https://www.consumercomplaints.in/urban-company-b115885>>

¹² Privacy Policy, Uurban Company., <<https://www.urbancompany.com/terms>> accessed 21 August 2021

¹³ Terms and Conditions, Ibid

¹⁴ Ola Cabs Terms and Conditions, r.13.9, <<https://www.olacabs.com/tnc?doc=india-tnc-website>>

These are the same issues in other e-commerce entities such as Food delivery services, which have the same disclaimers and limitation clauses. These Disclaimers and limitation clauses also limit the liability of the e-service provider up until the sharing of platform for availing the service of a third party service provider. The consumer complaints against taxi services such as Uber, Ola cabs are in the 1000s¹⁵ with complaints ranging from instances of lack of professionalism by the cab drivers, to assault on the consumer passenger leading to physical injury. Similar instances of complaints is seen in food delivery services, where a woman was allegedly assaulted by the delivery agent.¹⁶ Though the case involved cross-allegation leading to a “he-said-she-said” situation, this hints at the larger issue of lack of structure and regulatory mechanisms to ensure safety standards to the consumers as envisioned under the Consumer Protection Act.

¹⁵Indian Consumer Complaint Forum, (ICCF) <<https://www.consumercomplaints.in/uber-india-b11148>>, accessed 21 August 2021

¹⁶zomato delivery boy case: Police book model for framing Zomato delivery boy, The Economic Times, (March 18 2021) <[zomato delivery boy case: Police book model for framing Zomato delivery boy - The Economic Times \(indiatimes.com\)](https://www.economictimes.com/india/zomato-delivery-boy-case-police-book-model-for-framing-zomato-delivery-boy)>

CHAPTER 3
CONSUMER RIGHTS : INTERNATIONAL

The need for consumer protection is a well recognized right and had been enforced for decades in most countries through either specific consumer protection laws or through provision in a wide array of acts and laws. Consumer protection means protection of consumers from a large number of unfair trade practices which are detrimental to consumer rights so as to avoid customer exploitation at the end of business community.¹⁷ In *Consumer Protection Division v. Luskin's, Inc.*, the court viewed “that the worst affected victims of these commercial organizations need to be protected and hence the consumers need to be protected through adequate consumer protection mechanism to uphold their rights in commercial transactions and save them from commercial exploitation at the end of business organizations .”¹⁸ These protections are essential because in practise, commercial organizations stands at a higher footing than their consumers as these commercial organizations are better organized, have strategic market information, and a dominating market position thereby being able to manipulate market conditions in detriment to consumers. In 1962 the United States of America introduced the Bill of Consumer Rights which provided for 1) Right to Consumer safety 2) Right to Information 3) Right to choice and 4) Right to be Heard. These basic rights have been evolving over time due to substantial shift in the way commercial transactions are conducted. In 2016 The Consumer International¹⁹ enumerated the consumer rights as:

- 1) Access - The ability to access essential goods and services
- 2) Inclusivity - Protection of Vulnerable and disadvantaged consumers
- 3) Safety - Protection from hazards to health and safety
- 4) Protection of Economic Interests - Promotion of value for money and protection from risk
- 5) Information - Access to clear, accurate information to enable informed choices
- 6) Education - Assistance to understand consumer transactions, and the environmental, social and economic consequences of specific choices
- 7) Redress - Availability of Effective Dispute resolution services and redress mechanisms

¹⁷ *Raghubir Singh v. Thakurain Sukhraj Kuar*, 1939, AIR Oudh 96 at 99

¹⁸ (1998)120 Md.App. 1, 706 A.2d 102, Court of Special Appeal of Maryland

¹⁹ Consumer International (CI) is a group of around 250 consumer organizations in over 100 countries representing and defending consumer rights in international policy forums and the global marketplace.

8) Representation - the freedom to form consumer groups and have views included in relevant decision making processes

9) Sustainability - the promotion of sustainable consumption patterns

10) E commerce Rights - Equal protection for consumers dealing with organizations online and offline

11) Privacy - the protection of consumer privacy and global free flow of Information.

These rights which were accepted by the United Nations Guidelines for Consumer Protection (UNGCP) acts as the touchstone for all its members while formulating national consumer protection laws.

3.1 CONSUMER PROTECTION: INTERNATIONAL ORGANIZATIONS

Organization of Economic Cooperation and Development (OECD) is an intergovernmental forum where it works with governments for economic, social and environmental changes. The OECD in its guidelines published in 1999 states three essential dimensions of consumer protection in e-commerce:

1) All consumers need to have access to e-commerce

2) Building consumer's trust and confidence in e-commerce by providing for transparent and effective consumer protection mechanisms to keep a check on fraudulent and unfair trade practices.

3) Creation of effective redress mechanisms.

These recommendations were amended in the 2016 guidelines "to address the growing challenges of e-consumers' protection by stimulating innovation and competition, including non-monetary transactions, digital content products, consumers-to-consumers (C2C) transactions, mobile devices, privacy and security risks, payment protection and product safety"²⁰. United Nations Conference on Trade and Development (UNCTAD) in its 2017 notes provided similar recommendations for enhancing e commerce.

Other International Organizations tasked with the protection and promotion of e commerce are:

1) European Union Consumer Protection Cooperation Network (CPC)

which is responsible for the enforcement of consumer protection laws across European Union, Iceland and Norway with powers to investigate possible consumer law breaches to protect the collective interest of consumers.²¹

2) European Consumer Centre Network (ECC-Net)

Is a network of 30 offices based on 28 European Union nations, Iceland and Norway. It provides free of charge help and advice to consumers on their cross border purchases in any of these 30 countries.²²

²⁰ Consumer Protection in E Commerce OECD Recommendations, (2016), Digital Economy Policy Legal Instrument <<https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>> accessed 21 August 2021

²¹ responsible for enforcing EU consumer protection laws to protect consumers' interests in EU and EEA countries; European Union Consumer Protection Cooperation Network <https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/consumer_protection_cooperation_network/index_en.htm>

3) ASEAN Coordinating Committee on Consumer Protection (ACCCP)

Protects the Southeast Asian market consumers with proper information and redress, stopping unfair commercial practices and rogue traders, and ensuring only safe products are placed in the market.

4) APEC Electronic Commerce Steering Group

promotes the development and use of electronic commerce in the Asia Pacific Economic Cooperation region, by supporting the creation of legal regulatory policies. It performs a coordinating role for APEC e-commerce activities, based on the principles set out in the 1998 APEC Blueprint for Action on Electronic Commerce.

5) Iberoamerican Forum of Consumer Protection Agencies

formed by the governmental agencies of Latin America, Spain, and Portugal with an objective to provide a forum for the analysis of public policy of consumer protection.

6) Unsolicited Communications Enforcement Network

7) Global Privacy Enforcement Network

8) Consumer International

Is a not-for-profit, non-government organisation which works with its members and partners globally, to empower and champion the rights of consumers, and ensure they are treated safely, fairly and honestly.

In 2016, the Consumer International expanded and published a list of consumer protections which was accepted by the United Nation Guidelines for Consumer Protection as essentials to be followed in national legislation of member nations.²³

All these International forums working across nations with the objective of protecting consumer rights in cross border transactions emphasizes the importance of consumer rights at a global level. They emphasize the consumer rights to free and easy access to e-commerce mechanism including cross border e-commerce transaction, Consumer safety, Protection of Economic interests and Right to effective redressal mechanisms among others, which are also rights protected under Indian consumer protection legislation.

²² Established in January 2005 by the European Commission

²³ International Consumer Protection and Enforcement Network. <<https://icpen.org/consumer-protection-around-world>>

PART II
CONSUMER PROTECTION : INDIA

CHAPTER 4
CONSUMER PROTECTION ACT, 2019

The initial Consumer protection act, 1986 was a pioneer act which provided a legal framework for the promotion and protection of consumer rights by establishing a three tier quasi judicial consumer dispute redressal mechanism at the District, State and National levels. These court had the jurisdiction to adjudicate on any complaints related to consumer goods and services in a faster and cheaper way than through the civil courts. But the market conditions changed quickly with the internet and cell phone penetration in customer population leading to the expansion of the e-commerce, cross border online transactions, emergence of global supply chain etc which the old act was unable to regulate.

The Consumer Protection Act, 2019²⁴ (CPA), was intended to catch up with these requirements and to curb the unfair trade practices it brought along due to the lack of regulatory legislation. Towards this end the Central Consumer Protection Authority (CCPA) was established. Chapter III of the act provides for the establishment of CCPA²⁵ which acts as a regulator in setting industry standards but also acts as an executive agency acting on behalf of the consumer to prevent unfair trade practices or any consumer detriment act at any stage of consumer engagement with the market. Other key additions in the new act includes a chapter for resorting to mediation as a form of dispute settlement²⁶, the introduction of provision of product liability and other provisions for simplifying the adjudicatory process.²⁷

While the new consumer protection act has a more robust mechanism to protect the overall rights of the consumers, the act is largely focused on the delivery of goods method of e-commerce and has not put provisions for ensuring those same standards to services provided by service providers through e-services.

4.1 RIGHTS AND LIABILITIES UNDER CONSUMER PROTECTION ACT,2019

²⁴ Consumer Protection Act,(CPA) 2019

²⁵ Ibid s.10

²⁶ Ibid Chapter V ss74-81

²⁷ Ninth Report, Standing Committee on Food, Consumer affairs and Public Distribution, Consumer Protection Bill, sixteenth Lok sabha, <[Parliament of India, Lok Sabha](#)> accessed 21 August 2021

A consumer is “any person who buys any goods,[hires or avails any service] for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods...but does not include a person who obtains such goods for resale or for any commercial purpose”.²⁸

A consumer can sue a service provider for engaging in unfair trade practices or restrictive trade practices²⁹ or if such services availed suffer from any deficiency³⁰, excessive charging of price or when a service provider provides a service which he knows to be injurious to life and safety³¹.

As per the definition clause in CPA, “Consumer rights include:

(i) the right to be protected against the marketing of goods, products or services which are hazardous to life and property;

(ii) the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;

(iii) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;

(iv) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;

(v) the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and

(vi) the right to consumer awareness;”³²

But these rights and liabilities are largely centered around sellers of goods and third party service providers while the liability of electronic service provider is ignored. Even the newly implemented provision of PRODUCT LIABILITY³³ which requires the consumer to be compensated for any harm caused to him by a defective product or service, exempts electronic service providers³⁴. “Product liability means the responsibility of a product manufacturer or **product seller**, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto;”. The definition for product seller clearly exempts any electronic service provider.³⁵

Electronic service provider is defined in the act as “a person who provides technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer and includes any

²⁸ CPA Ibid (n.18), s.2(7)

²⁹ Ibid s.2(6)

³⁰ Ibid s.2(6)(iii)

³¹ Ibid

³² Ibid s.2(9)

³³ Ibid ss. 82-87

³⁴ Ibid s. 2(17)

³⁵ Ibid s.2(37) (c) (III)

online market place or online auction sites”. This definition thus includes the likes of Urban Company, Ola cabs, Zomato etc.

4.2 GAP IN PROTECTION OF CONSUMER RIGHTS

The exemption of electronic service provider from product liability leads to a scenario where the internationally accepted and nationally enforced principles of consumer rights are infringed.

This can be better understood from an illustration drawn from the Consumer complaints forum page of Urban Clap.

For eg. When a consumer uses an Electronic service provider such as “Urban company” to avail any service such as home painting service or saloon service at home, the consumers are choosing these services based on the offerings provided in the app. The service provider through this gets access to private spaces of a consumers home in the course of his service and uses this access to commit theft, destruction of property or any injury³⁶ or harm to property or person.

Every consumer before availing any service does a due diligence and conducts a check on the quality and reputation of the service provider. These are usually done by meeting the service provider in person and making the necessary inquiries and due diligence. This is a consumer right ensured by the consumer protection act. But while using the Urban company platform for hiring these services the consumer are forced to choose from the available third party service providers who are contracted by the platform. The consumer has to give up his consumer right and trust that the electronic service provider has done the due diligence in verifying the authenticity of the service provider, the service providers background and track records.

The electronic service providers are the only party in direct contact with the service provider and who conducts the background check and asks for information from these service providers to be furnished before accepting them into their platform.

But the law does not provide for any specific liability on the electronic service providers in the CPA, and thus these electronic service providers escape liability by giving a statutory disclaimer that they are not liable for any harm caused by the third party. Thus the only party who can enforce the consumer right of conducting due diligence etc is left off without any liability.

Thus the rights of a consumer (i) to be protected against the marketing of goods, products or services which are hazardous to life and property;

(ii) the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;

(iii) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices are infringed in this instance.

³⁶ “injury” means any harm whatever illegally caused to any person, in body, mind or property;

Further, in the instance of a harm³⁷ or injury done to the consumer by the service provider. It gives the consumer a right to sue for product liability under Chapter VI of the Consumer Protection Act. But Section 82 of the CPA limits the scope to “...for any harm caused by a defective product manufactured by a product manufacturer or serviced by a product service provider or sold by a **Product seller**.”³⁸

The definition of Product Seller expressly provides that a product seller “... is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider”³⁹.

The product liability clause does not provide a remedy for any harm done while availing any service .

Thus the party which has the most access to a service provider and with an ethical duty to protect consumer rights are exempted from any liability and the consumer is left with infringed rights. The consumer is also at the risk of failed redress mechanisms against these service providers, as they does not have the same financial capability and social standing as the electronic service provider to ensure confidence in the consumer.

³⁷ Ibid s.2(22); “harm”, in relation to a product liability, includes— (i) damage to any property, other than the product itself; (ii) personal injury, illness or death; (iii) mental agony or emotional distress attendant to personal injury or illness or damage to property; or (iv) any loss of consortium or services or other loss resulting from a harm referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii),

³⁸ Ibid s.2(6)(vii)a claim for product liability action lies against the product manufacturer, **product seller** or product service provider, as the case may be;

³⁹ Ibid s.2 (37)(c)(III); “product seller”, in relation to a product, means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes— (i) a manufacturer who is also a product seller; or (ii) a service provider, but does not include— (a) a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats; (b) a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction; (c) a person who— (I) acts only in a financial capacity with respect to the sale of the product; (II) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider; (III) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

CHAPTER 5

CONSUMER PROTECTION (E-COMMERCE) RULES, 2020

5.1 DUTIES OF ENTITIES

Sec 94 of the CPA 2019⁴⁰, enables the central government to take necessary steps in protecting the interest of the consumer and to prevent unfair trade practices in e commerce. Sec 101 of CPA⁴¹ provides of making rules for this effect, resulting in the Consumer Protection (E Commerce) Rules 2020. “The act has been brought to regulate all goods and services bought and sold over digital or electronic network including digital products; all models of e-Commerce, including marketplace and inventory models of e-Commerce; all e-Commerce retail, including multi-channel single brand retailers and single brand retailers in single or multiple formats; and all forms of unfair trade practices across all models of e-Commerce.”⁴²

The act defines “e-commerce entity as any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity”⁴³. It further divides entities owning inventory of goods as “inventory e-commerce entity”⁴⁴ and entities facilitating only a market place as “market place entities”⁴⁵.

The rules then delves into the duties and liabilities of e commerce entities which can be summarized as :

- 1) Appointing of Nodal officer - who is a resident of India to ensure compliance of rules.⁴⁶
- 2) Furnishing of details⁴⁷ - such as name, address, website and contact information of the e commerce entity.

In case of marketplace e commerce entity, along with these information they shall furnish all these details of the sellers⁴⁸ and make them available to the consumers⁴⁹.

⁴⁰ CPA Ibid s..94; Measures to prevent unfair trade practices in e-commerce, direct selling, etc.— For the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers, the Central Government may take such measures in the manner as may be prescribed

⁴¹ Ibid s.101; Power of Central Government to make rules.—(1) The Central Government may, by notification, make rules for carrying out any of the provisions contained in this Act

⁴² Consumer Protection (E Commerce) Rules, 2020, r. 2

⁴³ Ibid r.3(b)

⁴⁴ Ibid r.3(f)

⁴⁵ Ibid r.3(g)

⁴⁶ Ibid r.4(1) “Where an e commerce entity... it shall appoint a nodal officer or an alternate senior designated functionary who is resident in India, to ensure compliance with the provisions of the Act or the rules made thereunder”

⁴⁷ Ibid r.4(2)

⁴⁸ Ibid r.5(3)(a)

⁴⁹ Ibid r.5(3)(b)

3) Provision against any unfair trade practices⁵⁰

4) Establishing a Grievance Redressal mechanism⁵¹ - with information of a grievance officer and other procedures to follow through in case

5) No Manipulation of Prices⁵² - or writing fake reviews on goods by the inventory e-commerce entities⁵³

6) Advertisement for goods in e-commerce entities have to be consistent with the actual characteristics of the goods or services provided by the seller⁵⁴

7) Country of Origin needs to be denoted and all other details regarding the imported good be made available.⁵⁵

5.2 DUTIES OF SELLER

Section 6 of the E-commerce rules, provides for an elaborate list of rules to be followed by a seller offering goods or services through a marketplace e-commerce entity as follows:

1) Seller shall not adopt any unfair trade practice.

(2) shall not falsely represent itself as a consumer and post reviews about goods or services or misrepresent the quality or the features of any goods or services.

(3) seller shall not refuse to take back goods, or withdraw or discontinue services on defective, deficient or spurious good or services.⁵⁶

(4) Seller shall have a prior written agreement with e-commerce entity

(5) appoint a grievance officer for consumer grievance redressal

(6) ensure that the advertisements for marketing of goods or services are consistent with the actual characteristics, access and usage conditions of such goods or services.

(7) provide to the e-commerce entity its legal name, principal geographic address of its headquarters and all other essential details.

(8) seller shall display:

(a) all contractual information required to be disclosed by law,

⁵⁰ Ibid r.4(3); 6(1)

⁵¹ Ibid r.4(4)

⁵² Ibid r.4(11)

⁵³ Ibid r.6(2)

⁵⁴ Ibid r.6(4)(c)

⁵⁵ Ibid r.5(d)

⁵⁶ Ibid r.6(3) No seller offering goods or services through a marketplace e-commerce entity shall refuse to take back goods, or withdraw or discontinue services purchased or agreed to be purchased, or refuse to refund consideration, if paid, if such goods or services are defective, deficient or spurious, or if the goods or services are not of the characteristics or features as advertised or as agreed to, or if such goods or services are delivered late from the stated delivery schedule:

- (b) total price in single figure of any good or service, along with the breakup price for the good or service,
- (c) all mandatory notices and information provided by applicable laws, the expiry date of the good being offered for sale, where applicable;
- (d) all relevant details about the goods and services offered for sale by the seller including country of origin
- (e) the name and contact numbers, and designation of the grievance officer for consumer grievance redressal or for reporting any other matter;
- (f) name and details of importer, and guarantees related to the authenticity or genuineness of the imported products;
- (g) accurate information related to terms of exchange, returns, and refund including information related to costs of return shipping in a clear and accessible manner, delivery and shipment and any relevant guarantees or warranties applicable to such goods or services

While the act provides for a comprehensive set of rules to be followed by both e-commerce entities and sellers in a e-commerce market place. The only way in which a consumer of e-commerce service can hold a seller liable under the act is by using the duty of seller in a market place e-commerce entity to refund consideration taken for goods or service which are **defective**, deficient or not of the same characteristic or feature as advertised⁵⁷. The term **defective** as defined under the CPA can be extended to include “any act of negligence or omission or commission by such person which causes loss or injury to the consumer”⁵⁸ and can be thus used to sue the seller alone.

Now these rules while being much more improved and focused on setting safety standards and specific rules of conduct for these e-commerce entities, is still largely focused on e-commerce entities as an avenue to purchase of goods. The rules only require e-commerce entities to collect basic details such as address of place of business and contact information on grievance, does not provide for stricter standards to prevent or reduce the occurrences of defect or harm in service. Also e-commerce entities who have the most access to the service provider is still not held liable for the acts of the service provider they allowed into their platform.

5.3 PROPOSED AMENDMENT

Due to the widespread complaints of cheating and unfair trade practices, the Ministry of Consumer Affairs, Food and Public Distribution on 21st July⁵⁹ proposed a new amendment to the E-Commerce rules.⁶⁰ The

⁵⁷ Ibid

⁵⁸ CPA Ibid s.2(11)

⁵⁹ Press Release 21st June 2021, Ministry of Consumer Affairs, Food and Public Distribution, <<https://pib.gov.in/PressReleasePage.aspx?PRID=1729201>>

⁶⁰ Consumer Protection (E-Commerce) Rules, 2020 - Proposed Amendments (2021), BananaIP Reporter (July 21, 2021), <Consumer Protection (E-Commerce) Rules, 2020 – Proposed Amendments (2021) | BananaIP Counsels>

proposed amendment do provide for certain provisions which directly ties in with the crux of this dissertation, they are:

- 1) **Rule 3(b)** of proposed amendment suggests for a more elaborate definition of e-commerce entity by adding "...including any entity engaged by such person for the purpose of fulfillment of orders placed by a user on its platform and 'any related party' ..." ⁶¹.
- 2) **Rule 3(d)** of the proposed amendment introduces "fallback liability which means the liability of a marketplace e-commerce entity, where a seller registered with such entity fails to deliver the goods or services ordered by a consumer due to negligent conduct, omission or commission of any act by such seller in fulfilling the duties and liabilities in the manner as prescribed by the market place e-commerce entity which causes loss to the consumer" ⁶²
- 3) **Rule 3(k)** defines "mis-selling as an e-commerce entity selling goods or services by deliberate misrepresentation of information by such entity about such goods or services as suitable for who is purchasing" ⁶³.
- 4) The proposed amendment also suggests that the duties of e commerce entity include for the appointment of a "Chief compliance officer who shall be responsible for ensuring compliance with the act and rules made thereunder and shall also be liable in any proceedings relating to any relevant third party information, data or communication link made available or hosted by that e-commerce entity where he fails to ensure that such e commerce entity observes due diligence while discharging its duties under the Act and Rules made there under" ⁶⁴.
- 5) The proposed amendment also suggests that these entities do not indulge in any form of mis-selling and elaborates on the other duties and liabilities of both sellers and e-commerce entities.

The proposed amendments is a right step towards curing the defects in the law as it for the first time recognizes the need for holding the electronic service provider liable for the acts of the third party service provider. Further the introduction of "mis-selling" and the requirement of a Chief compliance officer ensures a vested interest in him to ensure compliance with the law. These suggestions are a strong first steps for dealing with the issue at, as more elaborate rules of sanction is necessary to ensure that the entity complies with these laws. Further these are only suggestions made by the Ministry of Consumer Affairs, food and and Public distribution and therefore does not have any real power.

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ 5(a) Ibid

CHAPTER 6
THE INFORMATION TECHNOLOGY ACT, 2000 &
INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES), 2011

6.1 EXCEPTION UNDER SEC 79

The Information Technology Act, 2000 (IT Act) was enacted in line with the model law of electronic commerce issued by the United Nations Commission on International Trade Law (UNCITRAL). The act provides for a 'Safe Harbour' provision where the intermediaries are exempted from any liability.

Sec 2(w) of the IT Act defines Intermediary as "...any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes"

The Act in Sec 79 provides that an intermediary is not liable for any third party information, data, or communication link made available or hosted by him, provided that the intermediary is acting only in a technical and passive way.

Sec 79(3) provides for two circumstances when the exemption is not applicable:

“(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner”.

Rule 3 of the Information Technology (Intermediaries Guidelines) 2011 (IT Rules) elaborates on the due diligence to be followed by the intermediary which includes publishing the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource, has no active role in the transmission and has done all the requirements under law in notifying authorities and parties etc.

6.2 Christian Louboutin Sas V. Nakul Bajaj and Ors⁶⁵

The issue was whether an E-commerce platform can be termed as an intermediary exempted under Sec 79. The case of the plaintiff's is that the "Christian Louboutin" shoes sold by the defendants through their website 'darveys.com' are impaired or are counterfeits and thereby infringed the plaintiffs intellectual property rights. Further the defendants used the images and brand logo of the founder of the plaintiff as meta

⁶⁵ 2018 SCC OnLine Del 12215 : (2018) 253 DLT 728 : (2018) 76 PTC 508

tags, thereby attracting internet traffic. Plaintiffs further allege that these shoes are only sold through authorized retailers which the defendants were not.

The defendants claimed that they are not selling the products and are merely facilitating the booking orders through their website. The defendants had no knowledge of the intellectual property breach and had no active participation and thus claimed the exception under Sec 79 IT Act.

The issue before the court was a method to determine active participation by the intermediary and the court thus formulated the 26 tasks to determine the same:

- i. "Identification of the seller and providing details of the seller;
- ii. Providing transport for the seller to send his product to the platform's warehouse;
- iii. Uploading the entry of the said product;
- iv. Providing quality assurance after reviewing the product;
- v. Providing authenticity guarantees;
- vi. Creation of the listing of the said product;
- vii. Providing reviews or uploading reviews of the product;
- viii. Enrolling members upon payment of membership fees;
- ix. Promoting the product amongst its dedicated database of customers;
- x. Advertising the products on the platform;
- xi. Giving specific discounts to members;
- xii. Providing assistance for placing a booking of the product, including call centre assistance;
- xiii. Accepting an order on a particular payment gateway promoted by the platform;
- xiv. Collecting the payment through users registered for electronic payment modes;
- xv. Packaging the product with its own packing, instead of the original packing of the trade mark owner or changing the packaging in which the original owner's product is sold;
- xvi. Transporting the product to the purchaser;
- xvii. Employing delivery personnel for delivering the product;
- xviii. Accepting cash for sale of the product;
- xix. Transmission of the payment to the seller after retaining commission;
- xx. Promoting its own affiliated companies on the basis of more favourable terms than other sellers;
- xxi. Entering into favourable arrangements with various sellers;
- xxii. Arranging for exchange of the product if there is a customer complaint;
- xxiii. Providing/arranging for service if the product
- xxiv. Booking ad-space or ad-words on search engines;
- xxv. Using trade marks through meta-tags or in the source code of the website in order to attract traffic;
- xxvi. Deep-linking to the trade mark owner's website"⁶⁶

⁶⁶ Ibid Para 59

Applying these tests to the present case the court found that the defendants were engaged in storing the counterfeit goods and was also using the trademark to prepare invoices for the counterfeit goods. They were also providing for the advertising and packaging for those goods. According to the darvey's website, they provided huge discounts on original products sourced from foreign countries exclusively for its members. Further their terms of agreement provided that they will indemnify if any of the product were counterfeit. All these instances added together makes the defendant an active participant in the illegal act and thus they are not eligible to be protected under the safe harbour clause.

The Court also held that the conduct of intermediaries, in failing to observe 'due diligence', could amount to 'conspiring, aiding, abetting or inducing' unlawful conduct and would disqualify them from the safe harbour exemption, as per Section 79(3)(a) of IT Act.

The criterion established in this case was subsequently used in multiple cases such as

L'Oreal v Brandworld [CS (COMM)908/2016], Skullcandy Inc v Shri Shyam Telecom & Ors. [CS (COMM) 979/2016], M/s Luxottica Group S. P. A. & Anr. v M/s Mify Solutions Private Limited & Ors. [CS (COMM) 453/2016].⁶⁷

⁶⁷ Ibid (n.8)

CHAPTER 7
CONCLUSION AND SUGGESTIONS

The indepth analysis into the provisions of the act makes it clear that the new Consumer Protection Act, 2019 along with the Consumer Protection (E Commerce) Rules 2020 provides for a far better protection than before. The Act introduced new provisions such as Product liability, introduction of mediation as a dispute resolution mechanism and other provisions for dispute redressal strengthens the existing laws. The Rules specifically provide for the duties of both marketplace e-commerce entities and the inventory e-commerce entities. Further the provision enumerating the duties of a seller in a marketplace e commerce entity also gives defines the strict boundaries between legal and illegal acts in e commerce.

My research question going into this dissertation was:

1) Whether the existing consumer protection laws are sufficient to ensure the safety of a consumer availing services through a electronic service provider/ Marketplace e commerce entity.

The existing laws clearly does not provide for any provisions to ensure safety of a consumer who contracts service of a third party service provider through an electronic service provider. There is no legal obligation under any of the existing laws which absolutely requires these service providers to verify the veracity of these third party service providers. From the terms and conditions of likes of Urban Company and Ola its clear that the entire provision of doing background checks on the service providers before introducing them into their platform is discretionary at best. Further their terms and conditions explicitly provides that they are not responsible for the acts of the seller and hence limits there liability to very small amounts.

2) Whether the recently introduced Consumer Protection Act,2019 and Consumer Protection (E Commerce) Rules, 2020 identify the legislation gap in protecting e-commerce services.

While the recently introduced Consumer Protect Act 2019 and the Consumer Protection (E-commerce) Rules, 2020 certainly provides for a more robust legislation by clearly demarcating the duties and liabilities of the e-commerce entity and sellers in market place e-commerce entity, they does not provide for the safety and protection of consumer and consumer rights, when a consumer contracts with a third party service provider through a electronic service provider. The proposed amendment to the E-commerce Rules, 2020, through its fallback liability provisions, ensures that the liability is on the electronic service provider for the acts of the service provider and the personal liability on the Chief Compliance Officer also gives him a vested intrest in the welfare of the consumer. Further other provisions such as ‘mis-selling’ and compliance requirements also increases the stake of electronic service provider in ensuring the safety and rights of the consumer. But this is only the first step, it requires more rules enumerating the sanctions and personal liability on electronic service provider and more importantly these are just proposed amendments and as such cannot be counted as enforceable law.

3) If not, then how does the existing laws in consumer protection and other associated legislation fail to prevent infringement of consumer rights in an e-commerce service transaction.

i) There is no liability on the electronic service provider to do a background check of the third party service providers they contract with. The law only requires that the electronic service provider/ market place entity collect basic information such as name and place of business etc of the service provider. This while might be helpful in suing the seller after the fact, does not ensure safety of the consumer.

ii) Every consumer has a right to do due diligence before entering into a contract. Further the Consumer Protection also provides that E-commerce consumer should have all the rights available to him in a normal consumer situation. In this case of availing services, the consumer has no option to do due diligence, but rather have to trust that the electronic service provider has done the due diligence for him. But since the law does not bind any liability on electronic service provider, they have no real incentive to ensure a proper background check on service providers. Thus the safety and the consumer rights of a consumer is compromised.

iii) Since the electronic service provider is the only party who has a relationship with the service provider before entering into a contract, they are ethically bound to safeguard the safety of consumer by doing background checks to verify the veracity third party sellers. Since there is no legislation providing sanction on failure to do so, the electronic service providers escape liability by providing for a disclaimer. Thus in effect breaches :

(a) Right to be protected against the marketing of goods, products or services which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices are infringed as the consumer is forced to contract with the limited third party service providers that the electronic service provider has contracted with.

iv) Product liability provision introduced in the CPA, 2019 provides for an avenue to sue the service provider if injury or harm is done to the customer. But Section 82 of the CPA limits the scope of liability by expressly exempting e-commerce service provider from the ambit of product seller.

Thus the hypothesis with which I began this research :

The existing Consumer protection laws are insufficient to protect the safety and rights of consumer engaging in an e-commerce service transaction using an electronic service provider/ marketplace e-commerce entity (such as Urban Company) which facilitate service from third party service providers, as no liability can be enforced on the electronic service provider.

This seems to be true as all the existing laws on consumer protection does not address the safety concerns of a consumer availing services from a electronic service provider nor does they ensure complete protection of consumer rights for such consumers. The present law fails in providing the consumer with a way to conduct

due diligence, ensure quality or safety of service availed at a pre-contract stage. The only option available for the consumer is to enforce Rule 6(3) "No seller offering goods or services through a marketplace e-commerce entity shall refuse to take back goods, or withdraw or discontinue services purchased or agreed to be purchased, or refuse to refund consideration, if paid, if such goods or services are defective, deficient or spurious, or if the goods or services are not of the characteristics or features as advertised or as agreed to, or if such goods or services are delivered late from the stated delivery schedule". This allows the consumer to sue the seller for any harm done to the consumer.

Further the provisions of the proposed amendment to the E-commerce Rules, shows promise for a more robust legislation in this area, still does not cure the defects as its only a proposal. Thus it is clear that the existing law is not able to fill the gap when a consumer contracts through electronic service provider, as these service providers have no liability to ensure safety of the consumers.

7.2 **Suggestions**

1) Acknowledge the gap in the Legislation

Acknowledging this gap in law will lead to further research on the area and would provide more ingenious ideas to tackle the issue.

2) Amending the Consumer Protection Act to provide liability on electronic service providers while facilitating a third party service provider

The proposed amendment to the E-commerce Rules can be considered as a first step towards this measure, as the proposed amendment do provide fall back liability on the electronic service provider. Further the liability on mis-selling is also another proposal which shift the burden on to the electronic service provider. Further rules enumerating the specific liability of electronic service provider is required along with rules providing sanctions on breach of these rules are also required to ensure that these electronic service providers are held accountable.

3) Amending the Rules to provide for Joint liability of electronic service provider and service provider, their by providing indemnity to the consumer on harm caused by the service provider.

This measure ensures that the consumer is always protected. In case of a breach or harm caused to the consumer, the consumer is indemnified by the electronic service provider, and subsequently the electronic service provider can take action against service providers. This also balances the power imbalance at play between the consumer and seller.

4) Set of rules elaborating on the levels of checks that needs to be done by the electronic service provider, including police verification, before allowing them on to the application.

Since background checks are essential before a third party service provider is introduced into the platform, a set of rules requiring certain benchmarks to be met by the service providers would ensure further security to the consumer. A specific rule enumerating the detailed checks that electronic service provide needs to fulfill before introducing third party into the platform is essential.

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