
E-COMMERCE IN THE EPOCH OF THE COVID-19 PANDEMIC AND ESTABLISHING ODR AS A TECHNIQUE TO ENSURE CONSUMER PROTECTION

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Part I

E-commerce during the Pandemic

The days before e-commerce sites like Amazon, Flipkart, Myntra as such are not remembered by many since shopping from the comfort of one's home brought in unprecedented 'cash-backs', 'discounts', 'flash sales', and 'buy-one-get-one-frees', whether it is to procure online services or to purchase Fast moving consumer goods. WorldPay from FIS's *Global Payments Report, 2021* reported based on following the trends in 40+ markets that digital commerce has accelerated during the Covid-19 pandemic¹ and is expected to grow further in the coming years. Sufficient to say that in India, the upsurge was unlike anything witnessed before. As per the Indian E-commerce Industry analysis of the Indian Brand Equity Foundation's (IBEF) report, the Indian e-commerce is expected to grow to US \$ 111.40 billion by 2025, US \$ 350 billion, from just US \$ 46.2 billion as of 2020. Despite SARS-Cov-2, in 2021, the e-commerce market continued to grow steadily at 5% in India. Of all the contributing factors to this, accelerated growth can be traced back to the increase in internet connectivity and digital literacy owing to the 'Digital India' programme, which saw about 784.59 million connectivities out of which about 59% are from rural India.² Other reasons which contributed to this ecosystem of growth of e-commerce in India could be various Governmental initiatives such as 'Make in India', 'Start-up India', 'Skill Development Initiative', Department of Promotion of Industry and Internal trade's (DPIIT) 'Open Network for Digital Commerce'

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1 Kim Snider, DIGITAL WALLETS ECLIPSE CASH GLOBALLY AT POINT OF SALE FOR FIRST TIME DURING PANDEMIC, FIS STUDY FINDS BUSINESS WIRE (2021), <https://www.businesswire.com/news/home/20210224005222/en/Digital-Wallets-Eclipse-Cash-Globally-at-Point-of-Sale-for-First-Time-During-Pandemic-FIS-Study-Finds> (last visited Feb 27, 2022).

2 E-commerce in India: Industry Overview, Market Size and Growth, IBEF (2021), <https://www.ibef.org/industry/ecommerce.aspx#:~:text=The%20Indian%20E%2Dcommerce20market,52.57%20billion20recorded%20in%202020> (last visited Feb 28, 2022).

regime to set protocols for vendor and price discovery and for cataloguing, etc. The key takeaway is that Covid-19 pandemic has interestingly caused a benchmark shift in consumer demand and created a new space within the e-commerce ecosystem³, with several e-commerce websites citing an increase in first time users after the pandemic⁴.

With the penetration of digital platforms for commerce and increase in consumption patterns of the people, sophistication has to be ensured in handling consumer disputes and in protection of consumer rights, especially in a country like ours where even traditional mechanisms of redressing consumer disputes have mediocre impact despite latest initiatives such as advertising consumer rights on social media, or e-filing in Consumer Councils. The problem is not policy making. It is in the execution of the grievance mechanism and the lethargic fashion in which the disputes are being resolved in comparison to other countries. Since the inception, of 5,485,267, which are the total number of cases in all the Consumer Councils in the country at State, district and National level put together, only 4,930,342 have been disposed off, as of 31.08.2021.⁵ Presently, the number of pending cases are 554,925 national wide. Markedly, not much credible data was available to inspect various facets of consumer disputes in Indian e-commerce specifically. The US's Federal Trade Commission's 'Covid-19 and Stimulus Reports' available on its website displays 62,076 fraud reports in just 'Online shopping' between January 1, 2020 to Jan 29, 2022 alone⁶. This must not be construed as more consumer frauds happen in the US in comparison to that of India, but as an example to show that 'more number of consumer frauds are *reported* in the US in comparison to in India'. This could be the lack of consumer awareness, or wilful disregard to available remedies due many hindrances such as inconvenience of procedure involved, lengthy time frame in getting a favourable decree, triviality of the cost of the product in contrast to the legal fees, etc.

As the scope of e-commerce grows, so do the challenges. The fundamental problem in e-commerce is not that of consumer dissatisfaction alone, but of the lack of proper mechanisms

3. Aparna Bharadwaj et al., HOW THE PANDEMIC DID-AND DIDN'T-CHANGE INDIAN CONSUMERS BCG IN (2021), <https://www.bcg.com/en-in/publications/2021/impact-of-covid-19-on-indian-consumers> (last visited Feb 27, 2022).

4. EDOARDO TOTOLLO & HEMANT BAIJAL, HOW A PANDEMIC-INDUCED BOOM IN E-COMMERCE CAN RESHAPE FINANCIAL SERVICES WORLD BANK BLOGS (2020), <https://blogs.worldbank.org/psd/how-pandemic-induced-boom-e-commerce-can-reshape-financial-services> (last visited Feb 28, 2022).

5. NCDRC, STATISTICS NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION (2021), <http://ncdrc.nic.in/stats.html> (last visited Mar 2, 2022).

6. Federal Trade Commission, FTC COVID-19 AND STIMULUS REPORTS FREE DATA VISUALIZATION SOFTWARE (2022), <https://public.tableau.com/app/profile/federal.trade.commission/viz/COVID-19andStimulusReports/FraudLosses> (last visited Mar 2, 2022).

which offer a fool-proof solution to redress any violation that could potentially occur. One should not disregard the existence of consumer rights violations on absence of evidence and instead endeavour to find a solution that is 'one shoe fit for all'. In e-commerce, consumer protection becomes especially difficult owing to the in-principle disadvantages to the end-customer and the obvious advantages of the e-commerce business:

Firstly, the classic case of *imbalanced bargaining power* in contract. When the consumers to an e-commerce website/app sign up to the services, more often than not, the individual decidedly overlooks the 'terms of usage' or the 'terms and conditions' and blindly follows through and sometimes, the consumers are automated into accepting the terms of a template curated for the public as a whole, and deselecting such an option would not allow them to avail the services. This is potentially risky, given as the individual essentially agrees to all such terms unilaterally decided by the e-commerce platform. This impersonal nature of the transaction coupled with unilateral automation of contract could potentially lead the consumer to sign up for such terms restraining his/her freedom to seek redress in courts, and be forced upon him/her the burden of financing ADR mechanisms by him/herself, or limit the business' liability.

Secondly, the problem of '*liability diversion*'. Some of the e-commerce entities do not sell their own products or do not engage in manufacturing products of their own at all, but instead allow other retailers to sell online on their platforms. Although the latest amendment to the CPA brought in 'Product liability' which makes product manufacturers, sellers and service providers equally liable, when consumers are automated into the terms of the e-commerce entities precluding them from liability, enforcement to uphold consumer rights becomes difficult. When any defect, deficiency, or discrepancy of legality occurs, this becomes the primary hindrance as the e-commerce platform would more often than not, dust their hands off any liability, and would neither mediate nor resolve the dispute arising between the e-consumer and sellers/manufacturers. While this seems logical to some extent, there is an underlying danger to this functionality. This would not make the e-commerce platform accountable for any consumer right violation that could occur because of using such a product(s), even as the e-commerce platform intensely advertises the products by offering attractive incentives to boost the commission on sales with a view to increase profits. This causes information disparity and confusion to the e-consumers in seeking an appropriate remedy except those which he/she

would have agreed to. The whole process only becomes further complicated if any cross-border transaction is involved. *{Christian Louboutin SAS vs Nakul Bajaj and Ors case}*

Thirdly, a case where *counterfeit products* are involved. The Authentication Solution Providers' Association or ASPA's report states that India suffers a loss of over One Trillion Rupees in a year due to the sale/purchase of counterfeit goods by consumers across all sectors.⁷ The Covid-19 pandemic has surprisingly lead to an increase in trade of illicit products whether it is due to newly emerged governance gaps, supply chain vulnerabilities, or increase in overall consumer demand.⁸

Intellectual Property laws have obviously failed to deter the rampant supply of counterfeit. While, some consumer behaviour shows no repulsion towards counterfeit products especially in the clothing industry, conscious consumerism prevails in pharmaceuticals or beauty industry. Unfortunately, most consumers are not aware of employing techniques to determine whether the products they received are genuine or counterfeit. Some of the techniques in determining the genuineness of a product include holograms and RFID. However, improved packaging methods of counterfeit could easily replicate them, despite such illegal mechanisms being costlier. Notably, one latest technique has come into limelight - wherein the product is algorithmically coupled⁹, monitored and protected by algorithms and artificial intelligence on the cloud in a way that if someone tries to replicate the product, it is immediately recorded and the copied product gets invalidated letting the consumer know. Of course, not every consumer can avail these techniques, mostly due to lack of knowledge.

The problem lies in the fact that these electronic platforms often allow the sellers with counterfeit products to run free until they are subjected to scrutiny on receiving complaints and accusations. This is extremely counterproductive. To curb this, the e-commerce entities must preliminarily obtain certificates/declarations of genuineness from the sellers and obtain

7 Muralidhar S, THE SALE OF COUNTERFEIT GOODS IS NOT JUST AN ONLINE PROBLEM THE HINDU BUSINESSLINE (2020), <https://www.thehindubusinessline.com/opinion/columns/s-murlidharan/the-sale-of-counterfeit-goods-is-not-just-an-online-one/article31171431.ece> (last visited Mar 2, 2022).

8 OECD, CORONAVIRUS (COVID-19) AND THE GLOBAL TRADE IN FAKE PHARMACEUTICALS- OECD OECD (2020), <https://www.oecd.org/gov/illicit-trade/coronavirus-covid19-and-the-global-trade-in-fake-pharmaceuticals-brief.pdf> (last visited Mar 3, 2022).

9 Satyanarayan Iyer, STARTUP USING AI ALGORITHM TO TRACK DOWN FAKE PRODUCTS TIMES OF INDIA (2018), https://timesofindia.indiatimes.com/business/startups/people/this-startup-uses-ai-algorithms-to-crack-down-on-fake-products/articleshow/67000983.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. (last visited Feb 2, 2022).

guarantee as to the authenticity and impose consequences of violating them as demanded by Rule 5(2) of the Consumer Protection (E-commerce) Rules, 2020. Where the e-commerce platform aggressively advertises and provides incentives on buying such products, which later turn out to be counterfeit or defective, the platform must eventually participate in the liability to some extent.

Part II

Enforcing a different ODR technique to ensure Consumer Protection in electronic transactions

Presently, there are two fundamental legislations in place to ensure consumer protection in e-commerce; one, the Consumer Protection Act, 2019, and two, the Consumer Protection (E-commerce) Rules, 2020. The Act prescribes aforementioned rules under which fraud and unfair trade practices are prohibited in e-commerce, whether inventory model or marketplace model. Although certain facets of e-commerce have been regulated by the Information Technology Act and the IT Intermediary due diligence guidelines under the IT Intermediary Guidelines and Digital media ethics Rules, 2021, the regime doesn't protect or enforce consumer rights or regulate unfair trade practices. The Consumer Protection (Mediation) Rules, 2020 prescribe Mediation as an ADR technique to speed up the resolution procedure, however, these Rules are not specific to e-commerce alone. Incorporating Mediation mechanism under the Consumer Protection Mediation Rules, 2020 is challenging as it is, owing to sometimes the geographical differences between the consumer and seller/manufacturer/e-commerce entity, communication disparities, and sometimes hefty legal fees is involved in contrast to the cost of the actual product. In case of a class action, however, mediation could work. In a recent NITI Aayog report, it is stated that Indian judiciary has shifted from it being a place where justice is delivered to justice being a service now.

“Online Dispute Resolution (ODR) has the potential to help reduce the burden on courts and efficiently resolve several categories of cases. It may also be integrated to support the judiciary through technology integration in court-annexed Alternative Dispute Resolution (ADR) centres, via e-lok adalats, and can also be introduced within Government Departments for resolving internal disputes.”¹⁰

10 Annual Report, 2021, NITI AAYOG (2021), https://www.niti.gov.in/sites/default/files/2021-10/TOC_Sep_%202021.pdf (last visited Mar 3, 2022).

Under the chairmanship of Supreme Court Justice (Retd) AK Sikri, a committee has been constituted by the NITI Aayog on ODR, and consequently an ODR report has been released in November 2021, in which the reference of ODR as a technique to resolve low-value high-volume e-commerce disputes has been made.

The European Union has established an Online Dispute Resolution (ODR) platform to make safer, fairer online e-commerce platforms by providing access to its public quality dispute resolution tools. An ODR platform is created, the link of which and the e-mail address for the platform, must be provided by all online retailers and traders in the EU, Iceland, Liechtenstein or Norway, under Article 14 of the Regulation (EU) No 524/2013. If any online platform is contacted by the ODR Platform, it essentially means that some consumer has an unresolved problem with the goods from such e-commerce store, or service provided by it, and chose to resolve it by opting for ODR. If the consumer and e-entity opts to resolve the dispute amongst themselves and not opt for ODR, the same shall be notified.

I believe, in India ODR has to be made as a mandatory pre-litigation resort to any consumer dispute arising out of e-commerce transactions between consumers and seller/e-commerce entity/manufacture, which shortens down the time invested by the Courts should the ODR fail. In India especially, there is a greater need to arrive at a newest Justice Delivery mechanism to reduce the burgeoning caseload burden on the Courts. The usual ADR mechanism has a clear demarcation between party autonomous ADR and Court annexed ADR. When it comes to ODR in e-commerce consumer disputes, a quasi-judicial ODR must be established under the Consumer Protection Act, 2019, which shall have the same powers and responsibilities as any Consumer Council under the Act, only it shall operate online with the power to hear e-commerce disputes only. Although, e-filing is now available to file complaints online in Consumer Councils, I believe my proposal is far more beneficial as involvement of parties is lesser, which avoids undue delays and separates e-commerce consumer disputes from other consumer disputes.

Any consumer dispute arising out of an e-commerce transaction, whether regarding the quality, quantity, deficiency, authenticity, or defectiveness (etc.) of a good/service, must be allowed to be referred to this ODR directly by the Consumer on clicking a hyperlink that would attach the unique transaction ID along with the history of product delivery, amount debited/credited, any photos of the product uploaded on the e-commerce platform both by the seller/e-entity/manufacture and the consumer on receiving the product, coupon codes applied,

authenticity algorithm (as proposed earlier) etc., to an automatic form of complaint, and immediately send notice to the e-commerce entity and the seller, and generate a registration ID. This would not require the Consumer to file documents, evidences, photos as such physically and wait for them to be processed for a month or more in bureaucratic delays. This automation would allow the Consumer to just wait for the progress of inquiry to be announced to him instead. A quasi-judicial ODR is beneficial for all the parties instead of e-commerce entities hiring an ODR service provider themselves because, in the former case, there is no scope for bias, accountability and transparency problems, while also imbalance in contractual power is eliminated. Since this is a quasi-judiciary ODR platform, matters that involve exemplary damages may be taken up also if such a power is willed in the Statute. After a preliminary inquiry is made, an online ADR can be called for at the behest of the parties. Where no ADR is sought, the matter shall be heard as per the provisions of the CPA and the Rules and Regulations therein. If either or both the parties are not satisfied with the reward, an appeal can lie, unless, of course, if the parties had decided to go for Online ADR.

Based on the number of disputes resolved, and the quality of service provided, every e-commerce entity may be ranked. Not only this could help the consumers make an informed decision, it can also help the government in putting checks and balances on the unfair trade practices and/or price manipulations faster than before.

Part III

Conclusion

Presently, there are two fundamental legislations in place to ensure consumer protection in e-commerce; one, the Consumer Protection Act, 2019, and two, the Consumer Protection (E-commerce) Rules, 2020. The Act prescribes aforementioned rules under which fraud and unfair trade practices are prohibited in e-commerce, whether inventory model or marketplace model. Although certain facets of e-commerce have been regulated by the Information Technology Act and the IT Intermediary due diligence guidelines under the IT Intermediary Guidelines and Digital media ethics Rules, 2021, the regime doesn't protect or enforce consumer rights or regulate unfair trade practices.

Although the CPA and applicable rules therein are enacted, a complete code of ethics have to be guided by the State and ensure Service providers and e-commerce entities are encouraged to follow them, and not leave it to their internal business policy. This educates the

E-commerce entities to establish best-practices in ensuring consumer protection, which in turn helps their businesses to flourish, as it creates a competitive edge as against the other businesses in the industry.

Special attention have to be given to the time taken in processing ‘refunds’, and delivery of the ‘distant order’. Or when an e-entity apply extra costs or additional donation, the check-box must not be pre-ticked, but must be left empty so that the consumer can exercise his/her *right to choose*. Most often, the e-commerce entities charge a certain sum as a cost for choosing ‘Cash on Delivery’ method. Although there is a certain amount of risk involved, the e-entity here would create a class within the consumer base arbitrarily without an intelligible ground, which is counteractive to the provisions of the Consumer Protection (E-commerce) Rules. Or differentiate in services provided for ‘free’ or ‘non-premium’ service recipients.

The pandemic has been successful in shifting the e-commerce ecosystem into a more formalised economic sector of its own. As such, more governmental control is required to ensure all the parties and participants are protected. The latest Consumer Protection Rules and Regulations along with the 2019 Act has shown a tremendous improvement. However, to achieve success, where we stand today in enforcement is mediocre at best. Therefore, newest techniques must be employed and for this taking inspiration from other countries where the laws are on par with technological advancements is a start-point.