

E-COMMERCE AND CONSUMER PROTECTION: A CRITICAL ANALYSIS OF LEGAL REGULATIONS

Rajiv Khare* and Gargi Rajvanshi**

A customer is the most important visitor on our premises; he is not dependent on us. We are dependent on him. He is not an interruption in our work. He is the purpose of it. He is not an outsider in our business. He is part of it. We are not doing him a favor by serving him. He is doing us a favor by giving us an opportunity to do so...

Mahatma Gandhi

I. Introduction

The advent of “Information and Communication Technology” has an effect on almost all the spheres of human life and buying and selling of goods and services is not an exception to it. Information technology has given birth to technologies like electronic data interchange¹ and electronic fund transfer,² the facilitation of which with the help of ‘Internet’ has developed into Information technology enabled commercial transactions called e-commerce’. Hence an effect of the quick adoption of internet³ enabled facilities (from 16 million internet

* Professor of Law, National Law Institute University, Bhopal, Madhya Pradesh

** Assistant Professor of Law, National Law Institute University, Bhopal, Madhya Pradesh

1 Electronic Data Interchange (EDI) is the structured transmission of data between organizations by electronic means. It is used to transfer electronic documents or business data from one computer system to another computer system, i.e. from one trading partner to another trading partner without human intervention. See “Beginners Guide for EDI” Available on <http://www.xtranslator.com/prod/beginninguidex12.pdf> (Last Accessed on July 13, 2012).

2 Electronic funds transfer (EFT) is the electronic exchange or transfer of money from one account to another, either within a single financial institution or across multiple institutions, through computer-based systems.

3 Internet World Stats, *Internet Growth Statistics: Today’s road to E-Commerce and Global Trade Internet Technology Reports Available at* <http://www.internetworldstats.com/emarketing.htm> (Last accessed on July 13, 2012).

users on December 1995 to 2280 million internet users on March 2012⁴) and commercialization of activities over internet has provided the world with a diverse and enhanced experience for their commercial and business activities. A conduct of commercial activities through electronic medium (EDI & EFT technologies) under the arena of internet is called e-commerce. E-commerce can be defined⁵ as the buying and selling of products or services over electronic systems such as the Internet and other computer networks. Electronic commerce draws on such technologies as electronic funds transfer, supply chain management, Internet marketing, online transaction processing, electronic data interchange (EDI), inventory management systems, and automated data collection systems. Modern electronic commerce typically uses the World Wide Web at least at one point in the transaction's life-cycle, although it may encompass a wider range of technologies such as e-mail, mobile devices and telephones as well. The e-commerce transactions with its three unique features of a) virtuality,⁶ b) unboundedness,⁷ and c) multiplicity⁸ serve a number of benefits to the human kind in their commercial and business activities. Hence e-commerce transactions with the aid of internet allow consumers and entrepreneurs to conclude contracts for the exchange of goods and services worldwide, with no physical boundaries at 24/7 basis. No doubt these features are supporting the immense growth of e-commerce at global level, but at the same time there are some limitations too.⁹ On one hand e-commerce has number of advantages in the form of lower cost, economy, higher margins to company, better customer cost, quick and comparative shopping, knowledge market etc, but on the other hand it has

4 *Ibid.*

5 V. Zwass, 'Structure and macro-level impacts of electronic commerce: From technological infrastructure to electronic marketplaces', <http://www.mhhe.com/business/mis/zwass/ecpaper.html>(Last Accessed on June 10, 2012).

6 E-commerce is carried out in a virtual online environment where the buyer and seller do not engage in face-to-face contact. Instead, consumers use a computer to obtain information about sellers, the products and services they offer, terms and pricing.

7 As the Internet has no physical boundaries, online transactions can be performed wherever an Internet connection is available. For consumers this means that shopping on the Internet is not constrained by time or space, lowering the financial costs of searching for products and services as well as saving time and energy. For online traders this means that they are also not constrained by time or space.

8 A number of actors in addition to the consumer and the seller are involved in the e-commerce trading process to ensure verification.

9 Rao & Metts, *Electronic Commerce Development in Small and Medium Sized Enterprises: A Stage Model and its Implications* 9 (1) Business Process Management Journal 11-32 (2003).

introduced some challenges too in the form of information sharing, threats to data privacy, security and data integrity, lack of loyalty in consumers relations, and threat to the violation of consumers' variety of rights in e-commerce.¹⁰ While there are various challenges in the conduct of e-commerce transactions, the consumer protection in e-commerce transactions is of utmost substance. This is so if issue of consumer protection not properly addressed with the adequate mechanism than it may adversely affect the fair competition and the free flow of truthful information in marketplace and may lead to fraud and deception on consumers in respect to their conduct of e-commerce transactions. Hence we have preferred to examine and analyze the interface between consumer protection and e-commerce under the legal perspective.

II. Meaning of Consumer Protection

In the general parlance, consumer protection means the protection of consumers from an assortment of unfair trade practices.¹¹ The Court in *Raghubir Singh v.Thakurain Sukhraj Kuar*¹² explained that the rationale behind such protection is to avoid consumers' exploitation at the end of business community and to hold back various business malpractices.¹³ Usually commercial organizations are well organized, better informed and have a better dominating position in the market.¹⁴ All these factors allow commercial organizations to easily exploit consumers. The worst affected victims of these commercial organizations need to be protected and the consumer is protected through consumer protection.¹⁵ It was Mr. John F. Kennedy, the former President of United States of America, who while introducing the "Bill of Consumer Rights" in US Congress (1962), for the first time has set out the four basic consumer rights, which include 1) Right to Safety, 2) Right to Information, 3) Right to Choice and 4) Right to be Heard.

10 Such as right to privacy, right to get adequate information about the product and services and many more of alike nature.

11 Jan Rafat, *Consumerism And Legal Protection Of Consumers* (Deep and Deep Publications, India, 2007).

12 AIR 1939 Oudh 96 at 99.

13 See Dearmon Valorie, *Risk Management and Legal Issues* (Jones and Bartlett Publisher, LLC) Available on http://www.jblearning.com/samples/0763757144/57144_CH15_470_493.pdf (Last Accessed on July 28, 2012).

14 Ryan, Michael T. "Consumption" in George Ritzer (ed.) *The Blackwell Encyclopaedia of Sociology*, Blackwell Publishing, (2007) 701-705.

15 *Indian Oil Corporation v. Consumer Protection Council*, 1993 SCC (1) 397.

In the recent scenario of consumer movement and caveat venditor¹⁶ under the guidance of Consumers International,¹⁷ four more rights have been added to the list of consumer basic rights which are: i) the satisfaction of basic needs, ii) Right to Redress iii) Right to Consumers' Education iv) Right to a Healthy Environment. Consequently throughout the globe, in the present scenario the basic consumer rights¹⁸ can be summarized as follows:

1. The right to satisfaction of basic needs: To have access to basic, essential goods and services; adequate food, clothing, shelter, health care, education, public utilities, water and sanitation;
2. The right to safety: To be protected against products, production processes and services, which are hazardous to health or life;
3. The right to be informed: To be given the facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labeling;
4. The right to choose: To be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality;
5. The right to be heard: To have consumer interests represented in the making and execution of government policy, and in the development of products and services;
6. The right to redress: To receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services;
7. The right to consumer education: To acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them;

16 "Let the Seller Beware" means the need for disclosure on the seller's part. See *Ashington Piggeries Ltd v. Christopher Hill Ltd*, [1972] A.C. 441.

17 Consumers International (CI) is the world federation of consumer groups that, working together with its members, serves as the only independent and authoritative global voice for consumers with over 220 member organizations in 115 countries.

18 Consumers International, *Consumer Rights*, available at <http://www.consumersinternational.org/who-we-are/consumer-rights> (Last accessed on July 28, 2012).

8. The right to a healthy environment: To live and work in an environment that is non-threatening to the well being of present and future generations.

These rights have been recognized by the United Nation as well in their “UN Guidelines for Consumer Protection.¹⁹” Hence where some vital consumers rights have been recognized at global level than under the concept of “*ubi jus ibi remedium*,²⁰” it is definitely required to provide legal protection to the consumers’ rights in the commercial market against the exploitation of commercial organizations in the form of unfair trade practices.

Under the perspective of regulatory mechanism, consumer protection consists of laws and organizations designed to ensure the rights of consumers as well as fair trade competition and the free flow of truthful information in the marketplace. The laws are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and may provide additional protection for the weak and those unable to take care of themselves. Consumer protection laws are a form of government regulations which aim to protect the rights of consumers. For example, a government may require businesses to disclose detailed information about products—particularly in areas where safety or public health is an issue, such as food. Consumer protection is linked to the idea of “consumer rights” (stated above), and to the formation of consumer organizations, which help consumers make better choices in the marketplace and get help with consumer complaints.²¹ Hence consumer protection implies an adequate device to encounter market challenges of unfair trade practice in the perspective of protection consumer’s rights and interest in market traffic.

III. Need and Significance of Consumer Protection

Consumer Protection means protection of consumers from diverse unfair trade practices, so as to avoid exploitation and check over various business

19 Consumers International, *Guidelines on Consumer Protection*, available at <http://www.consumersinternational.org/who-we-are/un-guidelines-on-consumer-protection> (Last Accessed on July 28, 2012).

20 *Ubi Jus Ibi Remedium* is a Latin legal maxim which means “where there is a right there is a remedy”. The basic principle contemplated in the maxim is that, when a person's right is violated the victim will have an equitable remedy under law. The maxim also states that the person whose right is being infringed has a right to enforce the infringed right through any action before a court. All law courts are also guided with the same principle of *Ubi Jus Ibi Remedium*.

21 West Encyclopedia of American Law; “Consumer Protection”; Answers.com. Available on <http://www.answers.com/topic/consumer-protection>. (Retrieved on July 26, 2012).

malpractices that may be detrimental to their rights and interest in the competitive markets. Needless to mention that commercial organizations are well organized, better informed and they have a better dominating position over consumers while conducting the commercial transactions. This advantageous position leads them to exploit the consumers easily. In *Consumer Protection Division v. Luskin's, Inc.*²², Court of Special Appeal of Maryland 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.” With a view of maximizing the profits and revenues of business, many businessmen exploit consumers by supplying inferior quality goods at higher prices. For earning undue profits, they adopt unfair trade practices such as adulteration, hoarding, black-marketing, and so on. This practice not only deprives consumers from getting value for their money, but also puts them under the risk of economic exploitation by the big business houses that use their power for private gains and to the detriment of consumers. Hence where corporations may rob the rights and interest of the citizens either intentionally or because of their oversight in adding revenues to their accomplishment and thus can affect the healthy proceeds of countries’ economy, in such cases ‘Consumer protection’ is vital not only to protect buyers from the seller but also to ensure equitable global standards and protracted growth to Indian economy.

The above discussion implies that in the era of globalization, liberalization and industrialization where the business houses want to earn more and more profit even by deceiving the consumers, the consumers need to be protected from such unfair trade practices.²³ Therefore, in the modern era on one hand the consumers are considered to be the king of the market and on other hand this concept of consumer trust²⁴ is not beyond a shadow of doubt because in reality the consumer are still the most deprived part of the market and are in a disadvantageous position due to non-fortification of their rights. Consequently, consumer protection is necessary for a variety of reasons including:

22 February 26, 1998 352, Sept. Term, 1997.

23 Unfair Trade Practice may include adulteration, sale of spurious products, use of false weights and measures, sale of duplicates, tie-in-sales, offering of gifts having no additional value or coupons, sale of sub-standard goods and misleading advertising.

24 See Delhi Development Authority v. Jaagdish Chandra Luthra, (Appeal No.-335 of 2009, Decided on 05.07.2012)

- i. Ensuring social and ethical responsibility by commercial organizations,
- ii. Increasing awareness,
- iii. Ensuring consumer satisfaction,
- iv. Ensuring Social Justice,
- v. Upholding principle of trusteeship,
- vi. Support Survival and Growth of Business.

Thus “Consumer Protection Mechanism” is crucial not only to fight the battle for providing adequate protection to consumers’ rights in the emergent global market but also to ensure social, ethical and professional responsibility of business organizations under the perspective of healthy business growth and success.

IV. E-Commerce and Consumer Protection: A Tight Spot

Information and communication technology has fundamentally changed the way that the businesses are knobbed by society²⁵ including business houses and consumers in specific. Technology has innovated business transactions as well, with the appearance of e-commerce transactions. In the present scenario, computer use and e-commerce by the use of the Internet, has given new heights to business transactions at a global platform²⁶. The impact of the new technological advancements and the massive convergence of e-commerce transactions, have caught the attention of individual consumers, business enterprises, governments and international organizations not as only facilitating the growth of business endeavor but also posing a variety of challenges and confronts to various segments of social and individual interests like data protection, consumer protection, privacy violations etc.²⁷ Hence the challenges

25 Ramakrishnan Et Al., *E-commerce in India-Growth and Prospects*, 2(3) Asia Pacific Journal of Research in Business Management 101-114 (2011).

26 Eisingerich, Andreas B.; Kretschmer, Tobias, *In E-Commerce, More is More*, 86 Harvard Business Review 20–21 (March, 2008):.Available on <http://hbr.org/2008/03/in-e-commerce-more-is-more/ar/1> (Last Accessed on July 28 2012).

27 Elizabeth Goldsmith and Sue L.T. McGregor (2000); E-commerce: consumer protection issues and implications for research and education; J Consumer Studies & Home Economics; Vol.24, No.2, June 2000, pp.124–127.

posed by e-commerce, called attention to the need of developing a regulatory framework to counter the e-commerce challenges for the adequate protection of consumer rights. It also led to the demand to facilitate the growth of e-commerce with a protective and corresponding system for accomplishing e-commerce transactions on one hand and to fulfill the demands of consumer protection on other hand under the novel phenomenon of e-commerce.²⁸

V. Threats to Consumer Protection in E-Commerce

Undoubtedly the e-commerce has brought recompense and ease to the consumers in the market of purchasing and selling goods and services but at the same time it has posed a threat to consumer with the probability of gross violations of his basic rights and interest at e-commerce portal. The main opportunities and benefits provided by e-commerce to business houses and consumers include a) global access and greater choice b) enhanced competitiveness and quality of service, c) mass customization and personalized products and services, d) elimination of intermediaries and product availability, e) greater efficiency and lower costs, f) new business opportunities and new products and services, etc. However, it has raised a variety of consumers' concerns in relation to the violation of their vital rights recognized at global platform.²⁹ Under the perspective of consumer protection in e-commerce transactions, the primary consumer concerns include:³⁰

- 1) Consumer's exposure to unfair marketing practices:
 - a) Insufficient information disclosure, for example, refund policies, cancellation terms, warranty information
 - b) Contract terms, for example, their enforceability
 - c) Merchandise and delivery practices, for example, failure to perform and lateness

28 Ali.Z. Marossi, Globalization of Law and Electronic Commerce, 'Toward a Consistent International Regulatory Framework' (Delta Fredericton New Brunswick, Canada The Eighth International Conference on Electronic Commerce, August 14-16, 2006).

29 A Report on Approaches to Consumer Protection within the APEC Region, Report of the Electronic Consumer and Steering Group, October 2002. See http://www.nacpec.org/docs/Approaches_to_consumer_protection.pdf (Last Accessed on July 28, 2012)

30 A Final Report on "Canadian Consumer Battery Baseline Study," Environment Canada, RIS International Ltd., (2007). Available at <http://www.ec.gc.ca/Publications/C2F55D78-072A-4ED3-ACAA-B4B4FE5B991%5CCanadianConsumerBatteryBaselineStudyFinalReport.pdf> (Last accessed on October 18, 2012).

- d) Payment, for example, recovering fraudulent charges if credit card information falls into criminal hands
 - e) Transaction confirmation and cancellation policies, for example, consumer's lack of knowledge on cancellation rights for online transactions, including for mistakenly made purchases
 - f) Fraud and deception, for example, lack means to authenticate merchandise purchased online.
- 2) Unsafe product.
 - 3) Confidentiality of any information which consumers provide.
 - 4) Identity of seller.
 - 5) Effective grievance system and legal remedies, if anything goes wrong.
 - 6) Protection from the ill effects of high competitive markets which may include selling of same product at different prices.
 - 7) Goods delivered should correspond to the description, quality and quantity for which consumer has effected paid for.
 - 8) Delivery of goods at the correct place and the correct time.
 - 9) Insecure payment methods.
 - 10) Loss of personal privacy (Violation of data privacy).
 - 11) Risk and misuse of personal information.
 - 12) Other concerns include computer fraud, hacking, virus, interception and alteration of financial data, and misuse of personal information. The above discussion shows that e-commerce is intimidating the risk of the violation of consumers' basic rights in the conduct of e-commerce transactions.³¹ As we have discussed earlier that to accommodate the need of providing, promoting and protecting consumers right in the competitive markets, there is a need of legal regulatory mechanism, so is the case with the upholding consumers' right in the era of e-commerce as well.

31 The Electronic Commerce and Consumer Protection Group ("E-Commerce Group"), See <http://www.ecommercegroup.org/guidelines.htm> (Last Accessed on July 28, 2012)

VI. Need of Legal Defense to Consumer Protection in E-Commerce Transactions: A Perfunctory Analysis

In the above discussion where we have discussed that no doubt on one end e-commerce is serving enormous benefits to the consumer in the conduct of their business transactions but on the other end, e-commerce is detrimental to the consumer protection as well. This unfavorable reaction of e-commerce to consumer protection may affect the consumer's interest and willingness to conduct e-commerce transactions and thus may be injurious to the growth of e-commerce. Therefore a distinct and adequate set of rules and regulations are required to counter the challenges of consumer protection in e-commerce transactions which will not only argue against the hitch of consumer protection in e-commerce but will also enhance consumer's confidence in e-commerce transactions. The adequate and efficient regulatory mechanisms and legal concepts to attend to the need of consumer protection in e-commerce will give protection to globally recognized consumer protection mandates in electronically equipped commercial transaction.³²

Various researchers have emphasized on the need of balancing the pros and cons of every system to the larger benefits of the society, as Furnstone³³ has exemplify that "the aim of contract law should be protection of the contractual relationship and the balancing of the involved interests which is attainable through the articulation of legal standards." Applying the same balancing theory³⁴ in solving the fissure of consumer protection in e-commerce transactions, it is argued that the role of consumer protection law should be "to regulate market practices and social practices for controlling distressing consequences of probable violation of consumer protection with a view of ensuring adequate consumer protection along with the growth of e-commerce market".³⁵ The laws and other regulatory mechanisms should not only ensure the welfare of consumers, but should also support the free will of consumers in conducting

32 *Supra* note 28.

33 Michael Furnstone, *Law of Contract* 240 (Butterworths, Lexis Nexis, UK, 2003).

34 David M. Trubek & Alvaro Santos, *The New Legal And Economic Development, A Critical Appraisal* 5 (Cambridge University Press, 2006).

35 Ian Ramsay, *Consumer Law And Policy: Text And Materials On Regulating Consumer Markets* (Hart Publishing, 2007).

e-commerce without any intimidation or loss of basic consumer's rights in the e-commerce transactions.³⁶ Sahoo and Chatterjee³⁷, (2009) were of the view that where in online business transactions (e-commerce) unfair and deceptive seller's market strategy and practice may not only infringe basic consumer protection standards but also is likely to diminish the growth of e-commerce market. In the light of this, it may further be argued that the legal arrangement of the electronic marketplace under the perspective of consumer protection and growth of e-commerce will support the reconsideration of consumer protection rules and mandates to be applicable in cyberspace at the more efficient, convincing and rewarding approach to consumer protection in e-commerce.³⁸

VII. Consumer Protection in E-Commerce Transactions: The International Perspective

Internationally, most of the nations including USA³⁹, EU⁴⁰ and Canada⁴¹ have strong consumer protection regulation in the sphere of e-commerce transactions specifically under some unique identified principles.⁴² In the regulation of consumer protection in e-commerce transactions, most of the states (like Thailand,⁴³ Sri Lanka,⁴⁴ Korea,⁴⁵ Mongolia,⁴⁶ Philippines,⁴⁷ Mauritius,⁴⁸ China,⁴⁹ Taiwan,⁵⁰ Malaysia⁵¹)

36 Johnson D And Post D, *Law and Borders, The Rise of Laws in Cyberspace*, 48 *Stanford Law Review* 1367-402 (1996).

37 Sahoo And Chatterjee, *Consumer Protection, Problems & Prospects* 22 (KIIT University, KIIT Law School, August 14, 2009).

38 *Supra* note 35.

39 US Uniform Electronic Transaction Act (UETA), 2000

40 EU's Electronic Commerce Directive, 2002. See <http://www.legislation.gov.uk/ukxi/2002/2013/contents/made> (Last Accessed on July 29th 2012)

41 Canadian "The Uniform Electronic Commerce Act, 1999."

42 Eight Internationally recognized Consumer Protection Principles.

43 See Consumer Protection Act, 1979 of Thailand that was amended in 1998.

44 See Consumer Protection Act, 1979 of Sri Lanka.

45 Consumer Protection Act, 1980 of Korea that was amended in 1996.

46 Consumer Protection Law, 1991 of Mongolia.

47 Consumer Act, 1991 of Philippines.

48 Consumer Protection Law, 1991 of Mauritius.

49 Law on the Protection of Consumer Rights and Interests, 1993 of China.

50 Consumer Protection Act, 1994 of Taiwan.

51 Consumer Protection Act, 1999 of Malaysia.

are following the approach that 'Consumers' should not be afforded any less protection in 'electronic commerce' than in other forms of commerce. Consumer protection provisions should be designed to achieve the same results whatever be the medium of commerce. At global platform, countries are acting in accordance with "Eight internationally recognized consumer protection principles⁵²" for ensuring consumer protection at e-commerce portal. These principles⁵³ include:

Principle 1: Information Provision: Consumers should be provided with clear and sufficient information to make an informed choice about whether and how to make a purchase.

Principle 2: Contract Formation: 'Vendors' should take reasonable steps to ensure that the consumer's agreement to contract is fully informed and intentional.

Principle 3: Privacy: Vendors and 'intermediaries' should respect the privacy principles set out in the Personal Information Protection and Electronic Documents International's Model Code for the Protection of Personal Information (These principles are: 1) Accountability, 2) Identifying Purposes Consent, 3) Limiting Collection, 4) Limiting Use, 5) Disclosure and Retention, 6) Accuracy, 7) Safeguards, 8) Openness, 9) Individual Access, 10) Challenging Compliance)

Principle 4: Security of Payment and Personal Information: Vendors and intermediaries should take reasonable steps to ensure that 'transactions' in which they are involved are secure. Consumers should act prudently when undertaking transactions.

Principle 5: Redress: Consumers should have access to fair, timely, effective and affordable means for resolving problems with any transaction.

Principle 6: Liability: Consumers should be protected from unreasonable liability for payments in transactions.

52 OECD Guidelines for Consumer Protection in Context of E-Commerce. Available at <http://www.accc.gov.au/content/item.php?itemId=255556&nodeId=ee905a658e5458e77a3c4182605e98d2&fn=Asia.pdf> (Last Accessed on July 28, 2012).

53 Working group on Electronic Commerce and Consumers, *Principles of Consumer Protection, for Electronic Commerce*, Available at http://www.cba.ca/contents/files/misc/vol_20090000_consumerprotectionelectroniccommerce_en.pdf (Last Accessed on July 28, 2012).

Principle 7: Unsolicited Commercial E-mail: Vendors should not transmit commercial e-mail without the consent of consumers, or unless a vendor has an existing relationship with a consumer.

Principle 8: Consumer Awareness: Government, business and consumer groups should promote consumer awareness about the safe use of electronic commerce.

These principles basically aim to provide, promote and protect Information Privacy⁵⁴, fully informed 'Contract Formation' to the consumers with reasonable terms of his interest⁵⁵, privacy protection,^{56 57} Payment Security and security of personal information⁵⁸, Redressal Mechanism⁵⁹, Liability Clauses⁶⁰, Denial of unsolicited E-mails to the consumer without his consent⁶¹ and Consumer Awareness⁶² to consumers in the epoch of the protection of their basic rights in e-commerce transactions.

VIII. Consumer Protection and E-commerce: Indian Legal Perspective

In the legal arena though consumer protection and e-commerce are attended through different pieces of Indian legislations, but in the region of market,

- 54 Principle 1: Information Provision: Consumers should be provided with clear and sufficient information to make an informed choice about whether and how to make a purchase.
- 55 Principle 2: Contract Formation: "Vendors" should take reasonable steps to ensure that the consumer's agreement to contract is fully informed and intentional
- 56 Principle 3: Privacy: Vendors and "intermediaries" should respect the privacy principles set out in the *Personal Information Protection and Electronic Documents International's Model Code for the Protection of Personal Information*
- 57 These principles are: 1) accountability 2) purposes consent 3) limiting collection 4) limiting use 5) disclosure and retention 6) accuracy 7) safeguards 8) openness 9) individual access and 10) challenging compliance.
- 58 Principle 4: Security of Payment and Personal Information: Vendors and intermediaries should take reasonable steps to ensure that "transactions" in which they are involved are secure. Consumers should act prudently when undertaking transactions
- 59 Principle 5: Redress: Consumers should have access to fair, timely, effective and affordable means for resolving problems with any transaction.
- 60 Principle 6: Liability: Consumers should be protected from unreasonable liability for payments in transactions.
- 61 Principle 7: Unsolicited Commercial E-mail: Vendors should not transmit commercial E-mail without the consent of consumers, or unless a vendor has an existing relationship with a consumer.
- 62 Principle 8: Consumer Awareness: Government, business and consumer groups should promote consumer awareness about the safe use of electronic commerce.

business and trade, e-commerce and consumer protection are considered as two sides of same coin. In Indian legal standpoint, on one hand we have 'Consumer Protection Act, 1986', ensuring the protection of basic consumer rights and providing the mechanism to enforce consumer rights and claim remedy under the specific and dedicated forum system and on other hand we have Information Technology Act, 2000^{63 64} and some provisions in other legislations like The Constitution of India, 1950⁶⁵ under Article 38, Indian Contract Act 1872⁶⁶, Indian Penal Code, 1860⁶⁷, Indian Copyright Act, 1957⁶⁸, Sales of Goods Act,

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- 63 In 2008, the Information Technology Act was amended to include an extremely salutary relief to people when a breach of privacy is occasioned by the leakage of data from computerized databases maintained by corporate. Thus, the newly inserted Section 43A states that if a "body corporate" is possessing, dealing, or handling any "sensitive personal data or information" in a computer resource which it owns, controls, or operates, and is negligent in implementing and maintaining "reasonable security practices and procedures" and thereby causes wrongful loss or wrongful gain to any person, this body corporate will become liable to pay damages as compensation to the affected person.
- 64 See Section 72A of Information Technology (Amendment) Act, 2008 which declares that if "any person including an intermediary" secures access to any personal information about another person while providing services under the terms of lawful contract, and if he, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain, discloses such information without the consent of the person concerned, or in breach of a lawful contract, he is liable to be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both
- 65 Articles 38, 39, 42, 43, 46 and 47 of Constitution of India, 1950 provides that the state shall strive to secure a social order for the promotion of welfare of the people; it shall direct its policies in such a way that operation of economic system does not result in the concentration of wealth and means of production to the common detriment, it shall make provision for securing just and humane conditions of work and for maternity relief; it should endeavor to build an economic organization or to make suitable legislation to ensure a decent standard of life to all the workers who constitute the bulk of the consumers; it should promote educational and economic interests of schedule castes, scheduled tribes and other weaker sections and it shall also raise the level of nutrition and standard of living and to improve public health.
- 66 Indian Contract Act 1872, ACT No. 9, 1872 deals with the general principles of contract formation (Section 10), rights and liabilities in contract formation and consequences of breach of contract. (Section 73 and 74).
- 67 IPC, 1860 is an indirect process in which consumers may not be getting any compensation but may instead indirect and remote benefit. Section 272 & 273 of IPC deal with the offences affecting public health by making the respective offences of the adulteration of food and drink intended for sale, and the sale of noxious food and drink, both punishable with up to six months imprisonment, or fine up to one thousand rupees, or both. Section 274 to 276 accordingly, makes the offences of adulteration of drugs intended for sale, the sale of adulterated drugs, and the sale of drug as a different drug or preparation punishable with similar sentences.
- 68 See Right to Reproduction, Issues of Licenses and enforcement, Right to rental. New Delhi Television Limited v. ICC Development (International) Delhi High Court, October 11, 2012

1963⁶⁹, Indian Telegraph Act, 1885⁷⁰ among others to encounter the challenges faced by the consumers in the conduct of e-commerce transactions.

A. Consumer Protection Act, 1986: The Basic Law and E-Commerce

Although Consumer Protection Act, 1986 is enacted by the Indian Parliament with a purpose to “provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers’ disputes and for matters connected therewith⁷¹” yet it is not free from criticism from the point of view of providing adequate consumer protection to individual in commercial transactions. To promote and protect consumers’ right in the Indian scenario at par with international level, the Consumer Protection Act, 1986⁷² (hereinafter referred as CP Act, 1986) provided for the promotion and protection of few specific rights⁷³ including 1) Right to Safety⁷⁴ 2) Right to Information⁷⁵ 3) Right to Choose⁷⁶ 4) Right to be Heard⁷⁷ 5) Right to Seek Redressal⁷⁸ and 6) Right to Consumer Education.⁷⁹ The Act came into

69 See Sec 12, 13, 14, 15, 16, 59 (Conditions and Warranty) and another provisions calling the seller for legal penalty for defects and deficiency of goods and services provided to the seller. *City and Industrial Development Corporation of Maharashtra Ltd. v. Nagpur Steel and Alloys, (P) Ltd.* AIR 1992 Bombay 55

70 Sec 7B (1) of Indian Telegraph Act, 1885. See *Mahanagar Telephone Nigam Ltd. v Om Prakash Chawala*, 2003 (66) DRJ 141.

71 Available at http://india.gov.in/sectors/consumer_affairs/index.php?id=9 (Last Accessed on July 28, 2012)

72 An Act to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith

73 Sec 6 of India Consumer Protection Act, 1986. Available at http://www.ncdrc.nic.in/1_1.html (Last Accessed on July 28, 2012).

74 To be protected against the sale of goods and services which are spurious/hazardous for the life.

75 To know the quality, quantity, weight and the price of goods/services being paid for, so that one is not cheated by unfair trade practices.

76 To be assured, wherever possible, access to a variety of goods and services at competitive prices

77 To be heard and to be assured that the interest would receive due consideration at appropriate fora.

78 To seek legal redressal against unfair or restrictive trade practices or exploitation.

79 To have access to consumer education

force with one of its major objective⁸⁰ that is, to provide for better protection of the interests of consumers and for that purpose to make provisions for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and upheld consumers' rights as against the probable exploitation in the competitive markets. Where on one hand, the advent of information technology era has opened the door of effortless and swift commercial transactions on electronic portal; on other hand it has posed various challenges⁸¹ to the protection of various consumers' rights like misleading description of goods and services in a distanced contract, privacy and security of consumers' information, copyright and trademark issues, issues of standard form of contract, jurisdictional issue in disputes arising out of e-commerce transactions and so on. Hence it becomes imperative here to examine the adequacy of Indian CP Act, 1986 to encounter the challenges of consumer protection in the conduct of e-commerce transactions. On the issue of providing adequate protection to the consumers' rights in e-commerce transactions the Consumer Protection Act, 1986 in general may be critically analyzed on the following grounds:

1. Firstly 'Indian Consumer Protection Law' fails to address a) the right to satisfaction of basic needs and b) right to healthy environment which are being recognized at International level adequately and effectively.
2. Secondly, it is discovered that the object of Indian Consumer Protection Act is to promote and protect the consumers' rights and not to provide the basic consumers rights to consumers as are being argued at International standards.⁸² This implies that other contemporary laws may provide basic consumer rights to the consumers but consumer protection will only serve the mechanism to promote and protect the consumers' right at its jurisdiction.
3. Thirdly, that the Act does not create rights and liabilities but it provides for the procedural mechanism through which the consumer rights can be enforced. The Act does not provide for do's and don'ts of the business organizations while securing the basic consumer rights of the individual

80 Consumer Protection Act, 1986 and Rules, 1987, available at <http://chdfood.gov.in/Word%20Documents/18C.P.Act.pdf> (last accessed on October 24, 2012)

81 M. Ali Nasir; Legal Issues Involved In E-Commerce (Magzine Ubiquity, ACM Digital Library, New York, NY, USA, 2004).

82 See Consumer Protection Act, 1986, Consumer Affairs, Food and Public Distribution Sector, Government of India. Available at http://india.gov.in/sectors/consumer_affairs/index.php?id=9 (Last Accessed on July 28 2012)

but it does endow with the provisions of a) Consumer Protection Councils, (Center, State and District) b) Consumer Dispute Redressal Agencies (National, State and District), c) Jurisdictional issues (Subjective, Territorial, Pecuniary & Appellate) and other allied procedural issues.⁸³ Hence it implies that consumers' right is to be created, provided and recognized under the specific and focused legislation, and the C.P. Act, 1986 will only provide the mechanism to enforce that well created and recognized right in case of its violation at the end of business organizations.

4. Fourthly, that though the law provides for consumer court system for the enhanced promotion and protection of consumers' right, the enforcement mechanism provided by Consumer Protection Act, 1986 suffers from the following drawbacks⁸⁴ that: a) Seldom do companies pay heed to the consumer court and their reports, orders and summons are very commonly ignored. As a result, most consumer cases drag on unnecessarily without any outcome.⁸⁵ b) Often the companies do not adhere to the verdict, and as a result once the verdict is pronounced the proceedings to execute the verdict take even more time than that of disposing the complaint. c) Consumer courts are not known to be devoid of corruption, like other courts in the country.⁸⁶
5. Last but not the least, the Consumer Protection Act, 1986 does not include provisions specific to the consumer protection challenges transpired in e-commerce transactions. Rather, it provides consumer protection provisions in its wide-ranging and all-purpose application.

B. Information Technology Act, 2000 and Consumer Protection: A Terse Analysis:

In the previous discussions, we have perceived that in an e-commerce transaction, there are certain issues that raise consumers' concern with regard to consumer protection in the conduct of commercial transactions

83 See, Consumer Protection Act, 1986, available at http://www.ncdc.nic.in/1_1.html (Last accessed on July 28, 2012).

84 A brief note on "Consumer Protection Law in India", published online on "consumerdaddy.com". Available at <http://www.consumerdaddy.com/a-14-consumer-protection-law-in-india.htm> (Last accessed on July 28, 2012).

85 See Ramesh Chandra v. Commercial Tax Officer [1993] 3 CPR 182 (Ori.).

86 The Supreme Court stayed a Odisha government notification removing A K Samantray, a former judge of Orissa high court, from the post of president, State Consumer Disputes Redressal Commission on the grounds of allegations of corruption or misconduct. See http://articles.timesofindia.indiatimes.com/2012-05-25/india/31851909_1_consumer-forum-removal-odisha.

through electronic mechanism. These consumer protection issues in e-commerce and the position of their respective legal provisions may be summarized as follows:

- 1) The Information Technology Act, 2000 (hereinafter referred as IT Act, 2000) has been enacted with an objective of facilitating the conduct of e-commerce transactions and to address and encounter all the challenges that may hamper the conduct of e-commerce transactions but the provisions of IT Act, 2000 are not primarily providing to address the issues of consumer protection in e-commerce transactions, yet it has got a few provisions which reflects the consumer centric approach to protect consumers' right in e-commerce.
- 2) Needless to mention that Consumers' exposure to unfair marketing practices, which usually includes unfair practices like: a) Insufficient information disclosure, for example, refund policies, cancellation terms, warranty information, b) Contract terms, for example, their enforceability, c) Merchandise and delivery practices, for example, failure to perform and lateness, d) unauthorized and unjustified Payment, for example, recovering fraudulent charges if credit card information falls into criminal hands, e) Transaction confirmation and cancellation policies, for example, consumer's lack of knowledge on cancellation rights for online transactions, including for mistakenly made purchases, f) Fraud and deception, for example, lack of means to authenticate merchandise purchased online are not specifically addressed under the Information Technology Act, 2000 (Amended till 2008) but some provisions may indirectly address and encounter these issues like section 6A⁸⁷ of the Act binds the service providers to efficiently deliver the services and section 8⁸⁸ of the Act provides for the publication of laws and provisions related to the regulation of IT transactions in the official gazette so as to bring it to the public notice. However, nowhere in the Act, are business organizations put under the legal obligation of intimating transaction confirmation and cancellation policies. Moreover, Section 10A⁸⁹ of the Act only confirms the validity of contracts being entered through electronic medium, but does not provide for the contents of contractual terms that need to be included and followed for ensuring consumer protection in e-commerce transactions. In addition, Chapter V

87 Sec 6A: Delivery of Services by Service Provider (Inserted vide ITAA-2008).

88 Sec 8: Publication of rules, regulation, etc, in Electronic Gazette.

89 Sec 10A: Validity of contracts formed through electronic means (Inserted by ITAA 2008).

- (section 14 to 16⁹⁰) of IT (Amendment) Act, 2008 talks about the secured transactions by elaborating that electronic transactions will be considered as secured transactions or payment mechanism, but it does not talk about the remedy in case a person suffered the consequences of unsecured transactions and payment mechanism.
- 3) Unsafe product: IT Act 2000 does not provide any provision for imposing any obligation on e-commerce companies to ensure safety of the product sold by them in e-commerce market.
 - 4) Confidentiality of any information which consumers provide in e-commerce transactions: Through Section 72⁹¹ and 72 A⁹² of IT Act, 2000 deals with the penalty in case of breach of confidentiality and privacy but this has limited application because for the application of this section wrongful loss or wrongful gain should be proved. In *Fateh Chand v. Balkishan Das*⁹³ the Supreme Court decided that the quantum of damages for breach of contract in cases where neither the parties nor the statute have not quantified the loss, the breach of contract may result in injustice to the actual victim of the breach of contract. In IT Act, 2000 as well, section 72-A has not decided the limit of penalty to be imposed to the nonpayer.
 - 5) Identity of seller: Though IT Act, 2000 does not impose any obligation on the seller to disclose his identity to the consumer, he can be booked under section 66D⁹⁴ for the punishment of imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees, if the seller cheats on the buyer by wrongly personating to other person and organization.
 - 6) Effective grievance system and legal remedies, if anything goes wrong: Though IT Act has provided for Cyber Appellate Tribunal (Section 48) for addressing the matters of the contravention of the provisions of IT Act 2000, matters of consumer protection are specifically to be enforced under the

90 Sec 14: Secure Electronic Records, Section 15: Secure Electronic Signature, Section 16: Security Procedures and Practices.

91 Sec 72: Breach of confidentiality and privacy.

92 Sec 72 A: Punishment for Disclosure of information in breach of lawful contract (Inserted vide ITAA-2008).

93 AIR 1963 SC 140.

94 Sec 66D: Punishment for cheating by personating by using computer resource (Inserted Vide ITAA 2008).

consumer redressal forum created under Consumer Protection Act. So it creates confusion as to where one should plea the matter of the violation of consumer protection in e-commerce transactions.

- 7) Protection from the ill effects of high competitive markets which may include selling of same product at different prices: IT Act, 2000 contains no regulation: for restricting e-commerce companies from selling the same product at different prices. Thus e-commerce companies need not follow uniform prices for the same product they are selling to the consumer. This may grossly violate consumer protection in e-commerce.
- 8) Goods delivered should correspond to the description, quality and quantity for which consumer has paid for: IT Act, 2000 does not contain any provision calling for the corresponding description, quality and quantity of goods and services purchased in e-commerce transactions, and it can be ensured only through the contractual terms of e-commerce companies, if any how they provide this remedy. Hence if remedy is provided, it can be claimed under breach of contract and not under IT Act, 2000.
- 9) Delivery of goods at the correct place and the correct time: This provision is also absent in IT Act, 2000 and can be governed only under contractual remedies which are often in the type of "standard form of contract", which may be detrimental to consumer protection.
- 10) Insecure payment methods: IT Act, 2000 does not talk about the damages by way of compensation, where damages being suffered by the insecure payment methods.
- 11) Risk of misuse of personal information and Loss of personal privacy (Violation of data privacy): There are no specific provisions in IT Act, 2000 which provide solutions to encounter the issues of loss of personal privacy of the information revealed by the consumers in e-commerce transactions, though IT Act, 2000 read with Data Protection Rules, 2011 provides some guidelines to be followed by body corporate in maintaining and upholding the privacy of sensitive personal information of consumers but it does not provide for any penalty in case of non compliance with these guidelines.
- 12) Other concerns include computer fraud, hacking, virus, interception and alteration of financial data, and misuse of personal information: In this

respect section 43⁹⁵ of the act provides that where any person without the due permission downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium may be held liable for the compensation by way of damages to the affected person. In this provision, no specific minimum and maximum limit of compensation is being provided and the amount of compensation will depend upon judicial interpretation. Section 43-A⁹⁶ which provides for the responsibility of body corporate to provide compensation to the personal affected by the loss of personal and sensitive data is also limited to the proof of wrongful loss and wrongful gain to the affected person. 'Hacking' as per se is not described and dealt in IT Act, 2000 but section 66⁹⁷ is incorporated to deal with the offences of like nature where a penalty of "three years" or fine up to five lakh rupees or both can be imposed if any person dishonestly, or fraudulently, does any act referred to in section 43. However, this remedy can be availed only where it is proved that damage is being done either dishonestly or fraudulently, and if damage is caused by the automatic aided system, there will be no remedy. Section 66C⁹⁸ of IT Act deals with the offence of "Identity Theft."

Thus from the above discussion we can assume that though there are some provisions that in a round about way address the issues of consumer protection in e-commerce transactions under Consumer Protection Act and Information Technology Act, 2000 (Amended up to 2008), but the specific consumer protection issues in e-commerce are not exclusively and distinctively attended and addressed to either in Consumer Protection Act, 1986 or in Information Technology Act, 2008 or in other statutory provisions.

IX. Conclusion and Suggestions

The critical analysis of Indian legal position paints an unambiguous picture as we find that on one hand section 4 of Consumer Protection Act, 1986 (Consumer Protection Councils) section 66A of IT (Amendment) Act, 2008

95 Sec 43: Penalty and Compensation for damage to computer, computer system, etc. (Amended vide ITAA-2008).

96 Sec 43A: Compensation for failure to protect data.

97 Sec 66: Computer Related Offences (Substituted vide Information Technology Act, 2008)

98 Sec 66C Punishment for identity theft (Inserted Vide ITA 2008).

(Hacking), Section 72A of (Privacy and Confidentiality of Information) address & tackle the issues of consumer protection in e-commerce transactions, but on other hand these provisions are slightly scattered and nonfigurative.



The legal provisions on consumer protection in e-commerce transactions are neither focused nor do they specifically target efficient consumer protection in

e-commerce transactions. For these reasons, Indian consumers do not enjoy adequate legal protection to their consumer rights while dealing in e-commerce transactions. If these issues are not adequately addressed, it may affect consumer's interest in e-commerce transactions and may negatively affect the growth of e-commerce transactions.

A. A Way Forward: Suggestions

In view of above findings, the following suggestions are made which may ensure adequate and efficient legal mechanism to consumer protection in e-commerce at both national and international norms:

- 1) In view of the internationally recognized consumer protection principles, there is a need to introduce innovative consumer protection regulations and rules which will provide adequate protection to the consumers in e-commerce transactions as well as on the promote e-commerce transactions in our country.
- 2) That mere articulation of consumer rights in the statutes is not sufficient; there is an urgent need to engage in spreading awareness amongst consumers and their rigorous implementation at every forum so as to make them meaningful.
- 3) In e-commerce transactions, it is suggested that a right to the period of reflection ("warming up") before agreeing to a contract (consumers would have to be informed '*a priori*' of the contractual terms and conditions proposed by the supplier, who would have to maintain these terms for a period); must be recognized which will allow consumers to compare various offers and examine the contract adequately before giving their consent;

- 4) A right of withdrawal, that is, the right during a "cooling-off" period to withdraw from the contract without penalty and without giving any reason which may exist only if the contract was signed before the consumer had received its full terms and conditions, or the consumer was put under unfair pressure during the reflection period may be recognized.⁹⁹
- 5) In e-commerce transactions, the supplier too should have a "suppliers' right to be compensated" if the consumer decided to withdraw once performance of the service had already begun.
- 6) There should be a prohibition on so-called "inertia selling" i.e. a prohibition on providing distance services which have not been requested in e-commerce transactions.
- 7) In e-commerce transactions there should be limitations on, and conditions for, the use by the supplier of certain means of distance communications such as limitations on so-called "cold calling", where a consumer is contacted without his prior consent.
- 8) The complaints and redressal procedures and mechanism" for the settlement of disputes between a consumer and a supplier in e-commerce transactions may be suitably amended/modified so as to make it more consumer friendly.

Last but not the least, a fair, strong, competitive, growing and developed market can be achieved by providing utmost security to consumers against the unfair trade practices and by providing consumers' strength and spirit to the growth of e-commerce market. It is rightly said that Adequate Legal Devices to consumer protection will develop a new generation of consumer rights and consumer supported developed market for businesses.¹⁰⁰ Hence the adoption of the above mentioned consumer protection principles in legal regulatory mechanism for the fortification of consumer rights in e-commerce transactions will not only ensure the protection of basic consumer rights in e-commerce transactions but will also heighten

99 See, Ashar Allan, Consumer Protection in E-Commerce Report on Oecd Guidelines for Consumer Protection in the Context of Electronic Commerce (2000) Published in Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection. Available at <http://www.accc.gov.au/content/item.php?itemId=255556&nodeId=ee905a658e5458e77a3c4182605e98d2&fn=Asia.pdf> (Last Accessed on July 28, 2012).

100 Read more at <http://www.brainyquote.com/quotes/keywords/consumer.html#YLAg1MQ65FsyEliO.99>.

the growth of e-commerce market. To be specific, it is proposed that for consumer protection in e-commerce transactions a specific and adequate set of well defined and well addressed legal framework should be enacted to facilitate consumer protection in e-commerce transactions with a degree of trust and confidence in e-commerce. This will support the society, including consumers, to relate and correlate with the adequate consumer protection law which will be appreciated and understood with the perspective of consumer protection and growth of e-commerce.