

The Making of Consumer Protection Act 2019 and Fixing Liabilities on Electronic Intermediaries in India: A Critical Appraisal from Consumer Protection Perspective

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Abstract:

One of the objectives of enacting the Consumer Protection Act 2019 is to protect consumers from unfair trade practices in e-commerce and make the consumer law relevant to the present day's trade. E-commerce has brought forth numerous challenges in consumer protection due to the distinct nature of this business. Information and communication technology plays major role in e-commerce business. Involvement of information and communication technology in e-commerce has developed a new set of intermediaries in business, also known as "electronic intermediaries". Electronic intermediaries play a crucial role in e-commerce. The existing legal framework in India largely exempts electronic intermediaries from liability. Yet, looking into the emerging functions of electronic intermediaries in e-commerce and the importance of consumer protection in e-commerce, there is a serious requirement to relook the exiting legal provision providing "safe harbour" to e-commerce intermediaries for effective protection of consumers. This paper is a humble attempt to analyse the Consumer Protection Act 2019 from the perspective of fixing liabilities on e-commerce intermediaries to identify the resulted outcomes and the gaps.

Keywords: E-commerce, Consumer Protection, Electronic Intermediaries

1. Introduction

The advancement of the information and communication technology along with the penetration of internet, smart phones and a young demographic profile have led to the growth of e-commerce at a fastest pace in India.¹In e-commerce business model, many features are considered as unique to the business. One of such unique features of this model of business is that it virtually involves many business players within it. Online marketplace provider, seller of goods or services providers, delivery service provider, online payment service providers and website or application developer may be different people engaged in the single e-commerce retail business. On the other hand, a consumer may face many issues in e-commerce, which may be with respect to the payment, delivery, data breach, contract breach, etc. Exemption from core liabilities by e-commerce intermediaries through their "terms and conditions" and "user policy" poses a serious concern for consumer protection in the virtual world. The various consumer forums have held intermediaries liable

¹ India Brand Equity Foundation expects the Indian E-commerce market to rise US\$ 200 billion in 2026 from US\$ 38.5 billion in 2017 <<https://www.ibef.org/industry/ecommerce.aspx>> accessed 20 July 2021

irrespective of exemption clauses used by intermediaries in their standard terms of contracts. The consumer forums have established the liabilities of intermediaries under the law of agency, principle of vicarious liability, and as a service provider under the Consumer Protection Act. However, these decisions of the consumer forums are not uniform. The information Technology Act, 2000 exempts intermediaries from liabilities subject to certain conditions. Thus, there has been a legal vacuum with respect to the liability of e-commerce intermediaries for consumer protection.

2. Intermediaries in E-commerce and Consumer Protection: Issues and Challenges

The liabilities of a seller towards its consumer may arise out of various reasons which can be divided into contractual and non-contractual liabilities. However, due to the peculiar nature of different models of B2C e-commerce, it is difficult to fix liability among the various business players involved in e-commerce. For example, confusion may arise in cases of delivery of faulty goods or services or non-delivery or late delivery as to who shall be liable. In short, if a company just owns and manages a web store, which enables sellers to sell their products through that web store for a commission and the person owning and managing web store does not indulge in selling goods or services, then whether the person just owns and manages a web store still be liable to a consumer in the event of delivery of faulty goods or services, or non-delivery, or late delivery.² Further, in case of misrepresentations through advertisement, sellers may disclaim their responsibility stating that manufacturers have issued such advertisement. Thus, sellers will refuse to consider any complaint by consumers.³ In addition, there may not be any direct contract between the consumer and the seller or manufacturer or supplier, and that can be a ground for the seller or manufacturer or supplier to claim exemption from the liability.⁴ In many cases, e-traders (for example Amazon.com) explicitly differentiate between two contracts; one concerning the use of the website and another for purchasing goods or services, where account is required to purchase goods or services, but that is not required for the use of website.⁵ Further, in e-commerce, a carrier to deliver goods or services from the e-trader to the consumer is required to be involved. A consumer and an e-trader may mutually decide the role and responsibilities of the carrier. However, the e-trader may exempt his liability through the terms of contract. Alternatively, an e-trader may arrange for a carrier to act as an agent of the consumer. Issues may also arise with respect to passing of risk and the legal consequences if the goods are damaged during the transaction. It has been suggested that a trader often deals with carriers, arranges for insurances and makes insurance claims as part of his business; on the other hand, a consumer would find it hard to arrange for a carrier being a disparate buyer. Hence, the responsibilities attached to the delivery of goods or services should be shouldered by e-traders. Additionally, the e-trader should also bear the risk till the time the goods or services are delivered to the consumer.⁶

² Parul Sinha, 'Electronic Contract and Consumer Protection: Does Legislation Provide Adequate Consumer Protection' (2017) *Bharati Law Review* 17.

³ Akhileshwar Pathak, 'E-Retailing and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directive' Indian Institute of Management Ahmedabad Working Paper 2015-10-02, 19 <<http://vsllr.iima.ac.in:8080/jspui/bitstream/11718/17055/1/WP2015-10-02.pdf>> accessed 20 December 2017.

⁴ Parul Sinha, 'Electronic Contract and Consumer Protection: Does Legislation Provide Adequate Consumer Protection' (2017) *Bharati Law Review* 17.

⁵ Eliza Mik, 'Contracts Governing the Use of Websites' (2016) *Singapore Journal of Legal Studies* 73.

⁶ Akhileshwar Pathak, 'E-Retailing and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directive' Indian Institute of Management Ahmedabad Working Paper 2015-10-02, 16-

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Further, the rise of e-auction and its borderless nature have also hoisted a major challenge in consumer protection. Online auctioneer (such as eBay) through its policy disclaim its liability by stating that they are not traditional auctioneer and provide only online platform for auction. Though, there are many differences between traditional auction and e-auction, yet, law has to address the issue by holding online auction sites accountable to certain level.⁷

Payments through credit card in e-commerce involve three contracts which operate bilaterally. First, the contract of purchase or hire between the seller and the card holder/consumer; secondly, there is a contract between the card issuing company and the seller, which takes responsibility to honour the card; and thirdly, contract between the card holder/consumer and the card issuing company, by that contract, the card holder/consumer undertakes the responsibility to reimburse the card issuing company. Thus, three separate parties involve in three separate contracts. Each one of them is a party to two contracts; where none of them is a party to the third.⁸ It has been observed that the last two centuries have witnessed “double alienation”: first, the alienation of producers, who ended up the owning the means of production; and second, the alienation of consumers, who do away with the requirement to have trustworthy rapport with sellers.⁹

There are two types of intermediaries widespread in the virtual environment; first, the Internet Service Provider, which facilitates individuals or body corporate to access to the internet; and the second are those who do not give primary access to the internet, however, provide some other online services, either free of cost or with subscription fee. It is significant to mention that due to the growth of the internet service providers, to put on competitive advantage over others, such internet service providers started offering other additional services beyond mere traditional services. Such additional services are generally governed by express contract terms. Nevertheless, in few cases, terms are not express, which results in complex issue for courts to decide. In such a case, courts may imply a contract between intermediaries and consumers; however, this is with the discretion of a court.¹⁰

Thus, with the advancement of information and communication technology and innovations in businesses, new models of e-commerce are coming up where responsibilities of all the players involved may change drastically from one model to another. In such a situation, the following are the major issues which have emerged with respect to the liabilities of intermediaries in e-commerce: lack of clarity of responsibilities of seller, e-commerce marketplace, e-auctioneer, carrier, payment gateways in the event of bad delivery, late delivery, non-delivery of goods or services, data breach, defects in goods or deficiencies in services, payment failure, misrepresentation through advertisement, non-disclosure of relevant information; use of liability exemption clause in consumer contracts, user agreements and policies; complex nature of consumer contracts.

17<<http://vsilir.iima.ac.in:8080/jspui/bitstream/11718/17055/1/WP2015-10-02.pdf>> accessed 20 December 2017.

⁷ RK Singh, *Law Relating to Electronic Contract* (2dn edn, LexisNexis 2016) 217-218.

⁸ Kiron Prabhakar, ‘Payment Mechanism in Cyberspace’ in SK Verma and Raman Mittal (eds), *Legal Dimension of Cyberspace* (ILI 2004).

⁹ Natalia Ryzhova, ‘The Emergence of Cross-Border Electronic Commerce Creativity and Declining Trust’ in Caroline Humphrey (ed) *Trust and Mistrust in the Economies of the China-Russia Borderlands* (Amsterdam University Press 2018) 229.

¹⁰ Chris Reed, *Computer Law* (7th edn, Oxford University Press 2011) 311.

3. Liability of Intermediaries vis-a-vis Consumer Protection under the Consumer Protection Act, 2019

For the purpose of recognising and imposing responsibilities on online marketplace provider in e-commerce, the Consumer Protection Bill 2015, (for the first time under a consumer protection Bill), defined the term “electronic intermediary”¹¹ The Consumer Protection Act 2019 also incorporates the same within its provisions, however, changing the nomenclature from “electronic intermediary” to “electronic service provider”. The Consumer Protection Act 2019 defines the term “electronic service provider” in the following words:¹²

“electronic service provider means 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 online market place or online auction sites.”

Tamil Nadu NugarvorPadukkappuKuzhu made a suggestion before the Standing Committee on Food, Consumer Affairs and Public Distribution (hereinafter referred to as “SCFCAPD”) that the definition of “electronic intermediary” in the Consumer Protection Bill 2015 must be followed by “even if the disclaimer is advertised”.¹³ Yet, any provision in response to this suggestion does not find a place in the definition of “electronic service provider” as provided in the Consumer Protection Act 2019.

The President, Internet and Mobile Association of India, Delhi, Mumbai and Bangaluru made a suggestion before the SCFCAPD with respect to the definition of “electronic intermediary”. The President suggested, “This definition needs to be in sync with the intermediary definition provided in section 2(w) of the Information Technology Act 2000 especially in view of section 81 (overriding effect) of the IT Act, 2000 as amended”.¹⁴ The President further expressed, “Electronic intermediaries are ‘marketplace platforms’ which are nothing more than an ITeS platforms governed by the provisions of the Information Technology Act, 2000. The electronic intermediary should therefore not be equated to mean a manufacturer, wholesaler, retailer or a seller but should be treated only as facilitators of the transaction between seller and buyer in an electronic environment”.¹⁵

Pertaining to the definition of “electronic intermediary”, the National Law School of India University, Bengaluru suggested before the SCFCAPD that “electronic intermediary” as defined under Section 2(i)(w) of the IT Act should be used in Clause 2(16) of the Consumer Protection Bill 2015.¹⁶ The Department of Consumer Affairs had stated before the SCFCAPD that the definition of “electronic intermediary” should be same as defined in the information Technology Act, 2000. Hence, electronic intermediary may be defined as: “electronic intermediary shall have the same meaning as defined in Section 2(i)(w) of the Information Technology Act, 2000”.¹⁷ The SCFCAPD had concurred with the Department of Consumer Affairs’s proposal to modify the definition of “electronic intermediary”.¹⁸ Despite all the above recommendations, the definition of “electronic

¹¹ The Consumer Protection Bill 2015, cl 2(16).

¹² The Consumer Protection Act 2019, s 2(17).

¹³ Standing Committee on Food, Consumers Affairs and Public Distribution, *The Consumer Protection Bill, 2015*(Ninth Report, 2016) para 2.9.

¹⁴ *ibid* para 2.2.

¹⁵ *ibid* para 2.9.

¹⁶ *ibid* para 2.9.

¹⁷ *ibid* para 2.10.

¹⁸ *ibid* para 2.12.

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intermediary” remains the same in the Consumer Protection Act 2019 as defined in the Consumer Protection Bill 2015.

The Consumer Protection Act 2019 imposes an obligation on “electronic service provider” to provide required information, documents or records which may be required by the Consumer Forums for the purpose of disposal of complaints of consumers.¹⁹ In addition, the term “product seller” under the Consumer Protection Act 2019 is defined widely involving a person engaged in placing a product for any commercial purpose, and thereby the definition includes e-commerce platforms also.²⁰ Therefore, the arguments of the e-commerce platforms that they merely act as “platform” or “aggregator” and not selling goods or providing service to fall under purview of the CP Act 2019 will not be sustainable any longer.²¹ However, the scope of liability under “product liability” action is very limited. The consumer has to establish that the product or service related thereto causes harm to the consumer.

The President, Internet and Mobile Association of India, Delhi, Mumbai and Bangaluru had made the following suggestion before the SCFCAPD with respect to the liability of intermediaries:²²

“The Consumer Protection Act creates a layer of liability for electronic intermediaries or for online service providers completely disregarding the safe harbour protection provided to them under Sec 79 of the IT Act. This is a matter of concern and effort should be to have the Consumer Protection Bill reconciled with the IT Act”.

The SCFCAPD had also observed that due to the provision in clause 3 of the Consumer Protection Bill 2015 which provides that “the provision of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force”, Consumer Forums refuse to take complaints with respect to the services for which special laws are in force. Thus, the SCFCAPD opined that such refusal by the Consumer Forums is against the spirit of the Consumer Protection Act as well as clause 3; therefore, clause 3 needs to be modified and should read as:

¹⁹ The Consumer Protection Act 2019, s 38(4).

²⁰ Section 2(37) of the CP Act 2019 defines the term “product seller”. The definition reads as “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;”

²¹GaurangKanth and Divjot Singh, ‘The Consumer Protection Act, 2019: An Overview’ (Mondaq, 18 December2019)<<http://www.mondaq.com/india/x/876600/DoddFrank+Wall+Street+Reform+Consumer+Protection+Act/The+Consumer+Protection+Act+2019+An+Overview>> accessed 5 January 2020.

²² Standing Committee on Food, Consumers Affairs and Public Distribution, *The Consumer Protection Bill, 2015*(Ninth Report, 2016) para 2.2.

“The provision of this Act shall apply notwithstanding existence of any special law unless such special law specifically bars application of the Consumer Protection Act.”²³

Further, highlighting the importance of regulating e-commerce, the SCFCAPD had made the following recommendation:²⁴

“The Committee note that E-Commerce, Direct selling and Multi-level marketing are on the rise and consumer complaints are also on the rise. At present there is a vacuum in the area of regulation in these sectors. Since Department of Consumer Affairs is concerned with ‘internal trade’, the Committee desire that the Department may be vested with the powers to make regulations on these subjects also. The Committee further feels that the Central Consumer Protection Authority may be vested with the necessary powers to make regulations for its functioning in an effective manner.”

The Legal Metrology (Packaged Commodities) Amendment Rules, 2017, though provides for the liability of the e-commerce entity to display on its platform the requisite information as specified in section 6 of the Rules, yet, this Rules exempts the e-commerce marketplace providers from such disclosure obligation.²⁵

The e-Commerce Policy of the Government of India proposed the following provisions to regulate e-commerce market place providers: (a) compulsory registration of e-commerce sites or apps as registered business entity;²⁶ (b) barring of non-compliant e-commerce sites or apps to operate in India;²⁷ (c) restraining payments through Indian banks and payment gateways to unregistered and unauthorised e-commerce sites or apps;²⁸ (d) mandatory full disclosure by e-commerce entities the purpose or use of data collection in simplified and easily understandable form;²⁹ (e) compulsory disclosure of sellers’ details including full name, address, contact details (comprising emails and phone number);³⁰ (f) compulsory undertaking from sellers by e-commerce platforms and publishing it on its sites or apps;³¹ (g) e-commerce platforms to enter into agreements with sellers so as to obtain guarantee of genuineness, authenticity, good condition of products and that the brand owner’s guarantees and warranties to be honoured accordingly, and the provision for remedy for the violation of the same;³² (h) refunding the amount paid by the consumer upon a consumer’s complaint to the e-commerce marketplace about selling of counterfeited product through its platform, and for that, blacklisting such seller, creating financial disincentive for such seller and taking down the information related to such products;³³ (i) develop mechanism to ensure non-discriminatory and transparency in publishing reviews and ratings, and preventing fraudulent ratings or reviews by sellers or their affiliates;³⁴ (j) mandatory display of email address and phone number of consumer grievance officer on e-commerce sites or apps with a system of acknowledgement of complaints and

²³ *ibid* para 3.8.

²⁴ *ibid* para 3.48.

²⁵ The Legal Metrology (Packaged Commodities) Amendment Rules 2017, r 6(iii)(10).

²⁶ Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, *Draft National e-Commerce Policy: India’s Data for India’s Development* (2019) para 3.4.

²⁷ *ibid* para 3.3.

²⁸ *ibid* para 3.7.

²⁹ *ibid* para 3.8.

³⁰ *ibid* para 3.9.

³¹ *ibid* para 3.10.

³² *ibid* para 3.15.

³³ *ibid* paras 3.16-3.17.

³⁴ *ibid* paras 3.21-3.22.

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prominently display of timeline for disposal of complaints subject to maximum of one week;³⁵ (k) requirement to display on sites or apps the list of prohibited products prescribed by Director General of Foreign Trade (DGFT) or other competent authorities and have and display seller's undertaking about not to engage in a transaction of such prohibited products;³⁶ and (l) mandatory removal of listing, blacklisting seller and notifying relevant authorities within 24 hours on being found or receiving complaint about prohibited goods are sold through the platform.³⁷ In addition, it has also been provided that the platform's liability will be determined as per the provision of law, if it has been used for selling prohibited products.³⁸ The e-Commerce Policy recognises the importance of developing the existing laws taking into consideration changing business models and changing ways of doing business, which includes Internet of Things (IoT), latest technologies, placing of online orders, modes of delivery, treatment of data, network effects, online marketplace, free ancillary services like logistics, etc.³⁹

Further, the Draft Model Guidelines on e-Commerce has proposed to impose certain specific accountabilities on e-commerce entities for the protection of consumers in e-commerce. These accountabilities provide for the legal requirements to carry on business in India and do's and don'ts list for e-commerce entities. The responsibilities falling under the legal requirement to carry on business in India are: (a) mandatory registration as legal entity in India; (b) submission of a self-declaration to the Department of Consumer Affairs with respect to the compliance of the Model Guidelines on e-Commerce; (c) requirement to comply with the provisions of the Information Technology (Intermediaries Guidelines) Rules, 2011; (d) needs to comply with the guidelines of the Reserve Bank of India, in case the e-commerce entity facilities online payments; and (e) prerequisite to display details of seller, which includes seller's business identity, principal geographic address, legal name, name of the website, contact details, email address, explanation with respect to their business identity, their products and the mode of contacting with them by consumers.⁴⁰

The obligations under the do's list of e-commerce entities are:⁴¹ (a) the requirement to publish terms of contract between sellers and e-commerce entities with respect to guarantee/warranty, delivery, form of payments, exchange, return, grievance redressal mechanism, etc; (b) obligation to ensure that the actual usage, characteristics and access of the goods or services are consistent with the advertisement of such goods or services; (c) ensure that the health care and safety information of the goods or services are also displayed with the advertisement; (d) mandatory disclosure of information about the various available methods of payments, security in such methods, manner of use of such methods, canceling regular payment under those methods, costs applicable to such methods of payments and charge back options; (e) ensure safeguard of personally identifiable information of consumers, and collection, storage and use of data are in compliance with the provisions of the Information Technology (Amendment) Act, 2008; (f) compulsory acceptance of return of goods in case of late delivery or delivery of spurious, wrong or defective products or products which are not in

³⁵ *ibid* paras 3.23-3.25.

³⁶ *ibid* paras 3.27-3.27.

³⁷ *ibid* para 3.28.

³⁸ *ibid* para 3.29.

³⁹ *ibid* para 25.

⁴⁰ Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, Government of India, *Model Framework for Guidelines on e-Commerce for Consumer Protection* (2019) 2-3.

⁴¹ *ibid* 3-5.

accordance with the features or characteristic as advertised; (g) compulsory refund are to be made within 14 days of acceptance of refund request; (h) ensure to prohibit selling of counterfeit products, for that purpose, upon being informed by consumer or informed by itself or other sources about counterfeit products being sold through its platform, e-commerce entities need to inform the seller, and upon seller's inability in providing genuineness of products, e-commerce entities are required to take down listing of products and inform the consumers of the same; (i) need to publish name, contact details of grievance officer and the manner of notifying complaints by consumers, and such grievance officer must redress complaints within one months; (j) options must be given to consumers to register complaints through phone, email or website, and the tracking number of the complaint must also be provided to the consumer; (k) requirement to provide transparent and effective consumer protection equivalent to the protection offered in other types of commerce; and (l) need to develop a system to link with National Consumer Helpline (NCH) in the grievance redressal process. Further, the don'ts list include the following prohibitions:⁴² (a) not to influence the price of the goods either directly or indirectly and to maintain a level playing field; (b) refraining from influencing transactional decisions of consumer through any unfair or deceptive method or practice; (c) not to represent falsely as consumers and post reviews of goods or services, and (d) not to exaggerate or misrepresent the quality or the features of the goods or services. In addition, it has been provided that making any declaration vouching for the genuineness of the goods by e-commerce entities make them liable under secondary or contributory liability.⁴³

The Consumer Protection (E-Commerce) Rules 2020 substantially incorporates the above provisions of the Draft Model Guidelines on E-Commerce. The Rules defines e-commerce entity⁴⁴ and differentiates between inventory e-commerce entity⁴⁵ and marketplace e-commerce entity⁴⁶. The Rules prescribes the following general duties on e-commerce entities:⁴⁷

However, after analysing and assessing the provisions of the Consumer Protection Act 2019 and the Rules made thereunder from the perspective of intermediaries' liabilities in e-commerce, it is revealed that though the term "electronic service provider" has been defined in the Consumer Protection Act 2019, but, this Act fails to realise the responsibilities and liabilities which electronic intermediaries should shoulder upon for the effective consumer protection in e-commerce. The following concerns of consumers in e-commerce with respect to intermediaries' liabilities remain untouched by the Consumer Protection Act 2019 and the Rules made thereunder: (a) uncertainty as to who should bear the responsibilities in the cases of bad delivery, late delivery, non-delivery, damage in delivery, payment errors, data breach, goods damaged or lost in transit, false and deceptive advertisements or representation; (b) lack of clarity as to the legality and validity of the use

⁴² *ibid* 3.

⁴³ *ibid* 4.

⁴⁴ Rule 3(1)(b) defines e-commerce entity as "e-commerce entity means 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."

⁴⁵ Rule 3(1)(f) defines inventory e-commerce entity as "inventory e-commerce entity means an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers and shall include single brand retailers and multi-channel single brand retailers."

⁴⁶ Rule 3(1)(g) defines marketplace e-commerce entity as "marketplace e-commerce entity means an e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers."

⁴⁷ The Consumer Protection (E-Commerce) Rules 2020, Rule 4.

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of liability exemption clause by electronic intermediaries; (c) ambiguity as to the legal status of the electronic intermediaries in relation to the consumer, seller, carriers and payment gateways; and (d) contractual uncertainty governing the relationship between different business players engage in e-commerce transactions.

The Information Technology Act 2000 exempts intermediaries from liability subject to the due diligence as laid down in the Information Technology (Intermediary Guideline and Digital Media Ethics Code) Rules 2021. The objective of providing the “safe harbor” to intermediaries was due to economic and technical impracticalities for intermediaries to regulate or monitor the huge contents they host and transmit every day.⁴⁸ Looking into the types of e-commerce, its characteristics, different functions of e-commerce traders, and the vulnerability of consumers in e-commerce, it may be argued that the e-traders should not be qualified to be exempted from all the liabilities.

Thus, considering the peculiarities of e-commerce and vulnerability of consumers, the responsibilities of the intermediaries in e-commerce should be shared responsibility. It has been said that though it may not be fair to impose strict liability, however, as like “ignorance of the law is no excuse, ‘I did not know’ should also not be always a ground of defense”.⁴⁹ It has been suggested that the responsibility of intermediaries must be based on the capacity of the intermediaries to shoulder the responsibility while discharging its service on the internet, and the role it plays in monitoring the content on the website or the e-commerce platform.⁵⁰ Nevertheless, the legality or validity of the liability exemption clauses use by intermediaries in its self-designed rules and regulation or user agreement required to be tested through legislative intervention.

The safe harbour provision under Section 79 of the Information Technology Act 2020 has been borrowed from the EU directive. EU directive does not preclude provision of protection through filtering of content by intermediaries. The Indian legal provision fails to realise such possibilities of content filtering through technological advancement. Thus, though an intermediary is technologically capable for taking preventive measures through filtering; yet, Indian law seems to exempt them to take any preventive action. Nevertheless, under the provisions of the IT Act, intermediary may lose the safe harbour position if it selects or modifies the information. In such a situation, taking preventive step through filtering the contents may result in losing the safe harbour position, as it may be interpreted as adding or modifying the content. Thus, in spite of having illegal content on their website and having technologically competent to prevent it through filtering, the intermediary may still wait to get notified by somebody to prevent it.⁵¹

Hence, it seems to be visible that the development of technology leaves laws ten footsteps behind it.⁵² Similarly, all the activities developing through technology leaving far away the existing laws from it.

⁴⁸ Apar Gupta, *Commentary on Information Technology Act* (2nd edn, LexisNexis 2011) 294.

⁴⁹ Paul Brennan, *Encyclopaedia of Information Technology Law: Law for IT Professionals* (2nd edn, Universal Law Publishing Company) 20.

⁵⁰ Karnika Seth, *Computers, Internet and New Technology Law* (2nd edn, LexisNexis 2016) 519.

⁵¹ Sarla Gupta and Beniprasad Agrawal, *Cyber Laws: Law Relating to Information Technology, Hacking, Intellectual Property Rights, Trade Marks, E-Commerce, Computers, Computer Software, Internet and Cyber Crimes etc* (2nd edn Premier Publishing Co. 2016) 801-802.

⁵² Pavan Duggal, *Law Relating to iPads, Tablets, Smartphones & Smart Devices* (1st edn, Universal Law Publishing Company 2013) 187.

4. Conclusions and Suggestions

In e-commerce, different models have been developed in the course of time. The functions and the responsibilities of different people involved in e-commerce may differ with the different models of e-commerce. Further, within the “business to consumer model”, the responsibilities of the different people involved in marketplace model, hybrid model, aggregator model, auction model, portal model and dynamic pricing model are difficult to establish with the single set of principles or legal provisions. In these types of e-commerce models, various categories of intermediaries are involved in the business process. Hence, responsibilities may differ with respect to the different rights of consumer, such as, responsibility to provide adequate information to consumer; adequate protection in the formation of a contract; responsibility to ensure that the business, advertisement and marketing practices are not unfair; responsibility to deliver goods or services; responsibility to provide post delivery services; responsibility to protect data, information and security; and the responsibility of redressal of grievances of consumers. It may be pertinent to mention that different traders may perform each of the above diverse functions. Hence, imposing legal obligation only on the seller of the goods or services may cause serious hardship to consumers. Such hardship may be in the form of: shifting of responsibilities by different traders involved in the e-commerce business process; absence of direct contract between the consumer and the seller, or the advertiser, or the payment gateways, or the delivery person; exemption of any responsibility by the e-trader through the user policy. Thus, in such a case, the consumer may find it difficult to enforce his or her rights.

The Information Technology Act 2000 exempts intermediaries from any liability, subject to the requirement of fulfilment of certain conditions by such intermediaries. The online market place providers, the providers of online payment sites, the online auction sites providers, and the web-hosting service providers, who are involved in e-commerce business processes are specifically categorised as “intermediary” under the Information Technology Act 2000. Though taking into consideration the nature of function the intermediaries perform, the intermediaries may not be liable for the wrong of any third party, yet, exempting them from the responsibilities of the functions, which they themselves perform, would cause a serious hardship to consumers. Such responsibilities may be: the responsibility of online market places to secure data or information and ensure providing adequate information to e-consumers; the responsibility of online payment sites to ensure secure online payment of e-consumer, etc. Secondly, consumers trust and rely more on online market places, such as, Amazon, Flipkart, etc as brands rather than a seller, who sells product in online marketplace. Hence, in such a situation, exempting the intermediaries in e-commerce is unjust and unfair from the perspective of consumer protection.

The Consumer Protection Act 2019 and the Rules made thereunder fails to address the larger issues with respect to the requirement of imposing obligations on the intermediaries in e-commerce for the effective protection of e-consumers. Secondly, due to the provision of section 81 of the IT Act, any provision imposing liability on intermediaries would not be enforceable.

In addition to the definition of “electronic service provider” as defined in section 2(17) of the Consumer Protection Act 2019, a new definition of “e-commerce intermediary” should be added in section 2 of the Consumer Protection Act 2019. The term “e-commerce intermediary” should be defined as:

“E-commerce intermediary” includes—

- (1) online marketplace;
- (2) online auction sites;

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- (3) online payment gateways;
- (4) delivery person;
- (5) any other person as may be identified by the Central Government by making rules;”

Taking into consideration the nature of the function performed by the intermediaries in e-commerce, two types of liabilities may be imposed on the intermediaries; one, vicarious liability, and the second, joint and several liability. However, joint and several liability would be more appropriate considering the involvement of the intermediaries in e-commerce business process. Further, all of them should not be liable jointly and severally for one type of wrong. Intermediaries’ liabilities should be depended on the type of wrong and their involvement with the activity through which such wrong has been committed. For example, for the wrong delivery, the trader, online marketplace and delivery person should be jointly and severally liable and not the payment gateway. However, in case of security breach in e-payment, the online marketplace and payment gateway should be jointly and severally liable. Similarly, in case of false and misleading advertisement and unfair trade practice, the online marketplace and the traders should be jointly and severally liable. Thus, joint and several liability of the intermediaries should be depended upon the relation between the wrong and the functions of the intermediaries in e-commerce processes. Further, use of liability exemption clause by intermediaries in the user agreement, or policy, or the terms of contract should be prohibited by declaring such practices as unfair trade practice. Law should also declare such clauses null and void. Accordingly, a new section titled “Intermediary’s Liability in E-commerce” be added in Chapter VI (Product Liability). The following text for this new section on “Intermediary’s Liability in E-commerce”:

“Intermediary’s Liability in E-commerce

(1)The following shall be the liabilities of e-commerce intermediaries,—

- (a) online marketplace or auction site, deliver person, seller or service provider, as the case may be, shall be liable jointly and severally in case of bad delivery, late-delivery, non-delivery of goods or services, as the case may;
- (b) online marketplace or auction site, payment gateways, seller or service provider, as the case may be, shall be jointly and severally liable for breach of security in online payment system;
- (c) online marketplace or auction site, seller or service provider, as the case may be, shall be jointly and severally liable for false or misleading advertisement; unfair trade and marketing practices; misleading information; withholding relevant information; use of unfair or unconscionable terms, conditions and policy; breach of privacy, data or information of consumers; non-recognition or non-facilitation to exercise consumer right to cancellation of contract, reject and return of goods or services, claim for repair or replacement of goods or services, refund and damages as per the provisions of this Act;

(2) Intermediaries shall be liable under the provisions of this section irrespective of anything contrary contained in the terms of contract, or user agreement, or policy of the intermediary.”

Since section 81 of the IT Act provides for overriding effect of the IT Act over any other legislation, and section 79 of the IT Act exempts intermediaries from liability, hence, mere enacting provision to impose liabilities on intermediaries will have no effect. Therefore, there should be a specific provision in the Consumer Protection Act 2019 to give overriding effect to the provisions of the Consumer Protection Act over the Information Technology Act and an amendment should be made in section 81 of the Information Technology Act, 2000. Section 100 of the Consumer Protection Act 2019 (Act not in derogation of any other law) should be amended, which should read as:⁵³

“100. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force.”

Section 81 of the Information Technology Act 2000 should be amended to give effect to the proposed section 100 of the Consumer Protection Act 2019. The researcher proposes that section 81 of the IT Act be amended and reworded as follows:

“81. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force:

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under *the Consumer Protection Act, 2019 (35 of 2019)* or the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970)”

Further, section 79 of the IT Act (Exemption from liability of intermediary in certain cases) should also be amended and reworded as follows:

“79. Exemption from liability of intermediary in certain cases.—(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of *the Consumer Protection Act, 2019*, and sub-section (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.”

In e-commerce, to protect privacy, data or information of consumers and to impose effective obligations on e-commerce intermediaries, amending the terms “consumer” under section 2(7) and “service” under section 2(42) of the Consumer Protection Act 2019 are indispensable. The definition of the term “consumer” should be amended to give a wider meaning to the term “consumer”. The following definition of “consumer” which should substitute the present definition:⁵⁴

“consumer means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.”

Similarly, the definition of “service” under section 2(42) the Consumer Protection Act 2019 should be amended and substituted by the following definition:

“service means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical, or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, *e-commerce and also includes digital content*, but does not include the rendering of any service under a contract of personal service.”

⁵³ This suggestion is proposed by taking a reference from the suggestion made by the Standing Committee on Food, Consumers Affairs and Public Distribution, *The Consumer Protection Bill, 2015* (Ninth Report, 2016).

⁵⁴ The suggestion with respect to this definition is made taking a reference from the definition of the term “consumer” under the CR Act, 2015 (UK)

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The words “but does not include the rendering of any service free of charge” should be omitted from the above definition of service under section 2(42) the Consumer Protection Act 2019, as marketplace e-commerce platform providers often take an argument that they provide free service, hence, their activities do not come within the purview of “service” as defined under the Consumer Protection Act.

Further, the term “digital content” should be defined under section 2 of the Consumer Protection Act 2019 similarly to the definition of the expression as provided in section 2(9) of the Consumer Rights Act, 2015 (UK). The definition of the term “digital content” should read as:

“digital content means data which are produced and supplied in digital form.”

Any breach of the obligations imposed on e-traders, as suggested above, should be treated as “unfair trade practice” under the Consumer Protection Act 2019. Further, such breach should be a ground for a consumer to terminate the contract and seek damages for breach of statutory duty. A new provision should be incorporated in the definition of “unfair trade practice” under section 2(47) of the CP Act 2019 which should read as:

“(xix) failure to comply with the provision of this Act and the rules and guidelines made under this Act;”

Further, a working group consisting of experts having technical knowledge and experience in internet technology, legal knowledge (particularly contract law) and knowledge in e-commerce and consumer protection should be established to regularly review the existing law taking into consideration the changing technology and business practices in e-commerce for the effective consumer protection in e-commerce. In addition, the Central Consumer Protection Authority should work as a representative body to the Cyber Regulatory Advisory Committee, an advisory body to the Central Government. The Central Consumer Protection Authority should also join hands with the accreditation agencies for the accreditation of e-traders like “Trust UK” in the UK. Further, International Community should come together to frame a common legal framework for consumer protection like EU Directives for European Countries.