

LEGAL RESPONSIBILITY OF INTERMEDIARIES IN E-COMMERCE***Ms. Ashvini Ashok Takalkar***

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Abstract:

In the present digitised world, e-commerce has acquired tremendous significance and assists society in every walk of life. E-commerce companies are increasing in number day by day, and slowly but steadily, e-commerce companies are gaining popularity, and their market share is increasing with the increased use of digital technology in the everyday life of people. Due to the ever-evolving nature of digital technology, e-commerce companies also have to keep themselves abreast and adorning different functions and roles in providing for the needs of modern society. In doing so, e-commerce companies perform the role of intermediaries. 'Intermediary' means someone who acts as a middleman between two parties. Thus intermediaries facilitate transactions among parties online. Some e-commerce platforms/companies act as intermediaries connecting producers with consumers, sharing information and offering products to the public. Despite the crucial role played by the intermediaries, there is no adequate liability fastened upon them. The Information Technology Act, 2000, Section 79 provide for certain liabilities of the intermediary, but the same does not serve the purpose, and the intermediaries can escape from their liabilities due to the shortcoming of the law. The present article discusses the need for fastening adequate liability on the intermediaries. It further emphasises that liabilities on the intermediaries could be fixed considering their functions in a given e-commerce transaction and the type of intermediary. It also refers to the new Consumer Protection Act 2019 and its E-commerce Rules 2020.

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Introduction:

Growth in E-commerce has resulted in an increase in intermediaries on the internet. Intermediaries act as middlemen in third-party online transactions. Intermediaries are evolving and dynamic in nature. They play an essential role in online economic activities. The main functions of the intermediaries are i) to provide infrastructure; ii) to collect, organise and evaluate dispersed information; iii) to facilitate social communication and information exchange; iv) to aggregate supply and demand; v) to facilitate market processes; vi) to provide trust, and vii) to take into account the needs of both buyers/users and sellers/advertisers. It is but natural that while providing these services, there may arise disputes and in such a scenario, what shall be the liability of the online intermediary and in what circumstances the same shall be fastened upon the intermediary is the crucial question. In this background, the present article proposes to examine the adequacy of section 79 of the Information and Technology Act, 2000 regarding liabilities of intermediaries and whether the functions and the role of an intermediary in e-commerce transactions can be a determining factor in deciding its liability.

E-Commerce: 'On 11 August 1994 first ecommerce transaction took place when a man sold a CD of the 'Band Sting'

to his friend through the website Netmarket, an American retail platform. This is the initial example of a consumer purchasing a product online. Today we know this as ecommerce.¹ Over the last 25 years, internet usage has rapidly increased; as a result, it is changing the way people conduct business. Therefore, online shopping has become popular. E-commerce involves commercial dealings conducted electronically on the internet. It is also known as electronic commerce, which deals with the buying and selling of goods or services using the internet and the transfer of money and data to execute these transactions. E-commerce involves activities of the retailer, whole-seller, drop-shipping, crowdfunding, subscriptions, physical products, digital products and services and so on.

Types of e-commerce transactions: E-commerce transactions can be classified into four categories as follows:

- A) **Business to Consumer transactions (B2C):** In this kind of e-commerce transaction, the business entities are providing online products & services to the consumers. Some examples of B2C transactions are Flipkart, Amazon, Snapdeal, and Urban Clap.
- B) **Business to Business transactions (B2B):** In this kind of e-commerce transaction, the business entities provide online products or services to another business entity. Some examples of B2B transactions are Alibaba, 99business and India Mart.
- C) **Consumer to Business transactions (C2B):** Consumers sell their products to the business entity in this e-commerce transaction. Some examples of C2B transactions are Cars24 and OLX Autos.
- D) **Consumer to Consumer transactions (C2C):** E-commerce transactions are those where consumers are selling their products to the consumer directly by using the web portal. Some of the examples of C2C transactions are OLX, Magic bricks and 99acres.

Intermediaries in General: The word intermediary is derived from the Latin word “Intermedius”, which means mediator. This person acts as a link between people to try and bring about an agreement. As per Cambridge Dictionary meaning ‘Intermediary means someone who carries messages between people who are unwilling or unable to meet.’ However, as per UNICIRAL Model Law, “Intermediaries, with respect to a particular data message means a one who on behalf of another receives or stores that data message or provides other services with respect to that data.”

Information Technology Act, 2000, Section ‘2(1)w’ defines intermediary as, “Intermediary with respect to particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, online-auction sites, online- marketplaces and cybercafes.”

Intermediaries manage the data by receiving, storing transmitting data from a third party; e.g., if a person sends a message to another via WhatsApp, the said message is delivered to another person as it is; in such a data transfer, WhatsApp is an intermediary. We will assume that ‘A’ wants to send a message to ‘B’ for better understanding. ‘A’ writes a letter and hands it over to a ‘Ram’ for delivery of the same to ‘B’ along with B’s address; the ‘Ram’ then delivers the letter to ‘B’; in this transaction, the ‘Ram’ is an intermediary. In this example, as ‘Ram’ receives a letter from ‘A’ and on behalf of ‘A’, the ‘Ram’ stores that letter with him until it is delivered to ‘B’ physically.

Thus, bearing in mind the definition of intermediaries as stated in the Information Technology Act, 2000, Section ‘2(1)w’, telecom service providers, network service providers, internet service providers, online auction sites, online-marketplaces and cybercafes would come in the categories of intermediaries.

Intermediaries in Ecommerce: Ecommerce intermediaries are those which, by use of online portals, websites, and online payment sites, allow sellers to sell their products by making available the information about the product,

description of the product in any manner such as photographs and video of the product by which buyer will be able to review and purchased the same via website/portal by making an online payment or cash on delivery or another mode of payments, in this case, said portals, websites, online payment sites are all acting as intermediaries.

Protection from Liabilities (SAFE HARBOUR): The Protection granted to the intermediaries in India is not absolute protection. This protection comes with incessant duties and due diligence of intermediaries. The Information Technology Act, 2000, protects the intermediaries under section 79. Intermediaries are not liable for any third-party information, data, or communication link made available or hosted by them if mere access is provided through the communication system to the third party or if there is temporary storage or hosting of information by the online platform of such intermediary.

Conditions for Protection: To avail of the benefit under the section 79 of the IT Act, 2000 intermediaries have to follow certain conditions as follows:-

Mere Conduit: Protection can be granted to Intermediaries when the functions of Intermediaries are limited to providing access to the communication system only. Intermediaries may restrict their function to providing access to the communication system only. E.g. If Samsung company wants to sell their mobile phone “S10” via the portal of Flipkart; and Samsung uploads the information and description of the mobile phone “S10” along with the price and photographs of that phone on the Flipkart website, Flipkart does not make any change in the same and makes it available to view for all the customer of Flipkart. Then if 1000 customers buy this phone by making payment directly to Samsung and Samsung has shipped directly to customers. In that case, Flipkart has acted only as a mediator/intermediary. If the customer raises any grievance, Flipkart is not liable for any such grievance as Flipkart has restricted and limited its functions to just providing a platform and access to its communication system to Samsung company to sell their product and has not participated in any manner in that said transaction that took place between Samsung and the customers.

Does Not Initiate Transmission by Own: An intermediary is liable for protection if it does not post or begin any transmission on his motion; otherwise intermediary will lose the protection of intermediaries. E.g. Samsung has provided mobile phone descriptions and information on a particular product to Flipkart. Flipkart has merely posted the said product on their website with the description and information provided by Samsung. In this case, Flipkart is not liable for any dispute between Samsung Company and the consumers.

Does Not Select Receivers of Transmission: There is no liability upon the intermediaries if intermediaries do not involve themselves in the promotions of products listed on their website or are not involved in the selection of consumers or the transmission of information to selected receivers or send a notification about the same to the customers. E.g. Flipkart has sent a notification about Samsung Company’s “S10” mobile phone to its customers who searched for mobile phones on the internet. In such a case, Flipkart cannot claim protection from liability because it has acted more than just being a mediator or webspace provider to Samsung Company.

Does Not Select or Modify The Information: When the intermediary does not pick and choose the products or service or modify the product information or put any tag or advertise and promote the product or service, it also does not provide any additional services like fast delivery, online payment or COD, pay later scheme on its portal or website in such situations also intermediaries cannot be held liable. E.g. If Flipkart had put the company tag “Flipkart Assured” before Samsung “S10” mobile phone on its website, Flipkart would have modified the information provided by

Samsung and added value to that product. This action of Flipkart makes it liable towards the consumers of Samsung Co who purchase the said product through Flipkart in case of any dispute between them.

Due Diligence: ‘An intermediary should take due diligence while discharging its duties which means they should take reasonable steps to avoid committing a tort or an offence as per Information Technology (Intermediaries Guidelines) Rules, 2011, which are enumerated herein below: -

- a) Publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary’s computer resource by any person.
- b) Such rules and regulations or user agreement of the intermediary shall inform the user not to host, display published modify upload, transmit or share any information i.e. a) belongs to another person and to which the user does not have any right to; b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another’s privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever; c) harm minors in any way; d) infringes any patent, trademark, copyright or other proprietary rights; (e) violates any law for the time being in force; e) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature; f) impersonate another person; contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource; i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation belongs to another person, and user does not have any right thereto
- c) The intermediary shall himself not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission or modify the information in transmission as specified in above paragraph.
- d) The intermediary should take action within 36 hours of its knowledge to disable any such information as mentioned in above paragraph no. ‘4.1.1.5. b.’
- e) Intermediaries shall inform its users that in case of any non-compliance with the rules and regulations, user agreement, and privacy policy, the intermediary has the right to immediately terminate the access or usage rights.
- f) Intermediaries are under obligation to strictly follow the provisions of the IT Act and any other law prevalent.
- g) Intermediaries shall provide assistance and information to government agencies as and when required under any lawful order.
- h) Intermediary shall follow the reasonable security practices and procedures as prescribed by law.
- i) Intermediary shall report and share cyber security incidences with India Computer Emergency Response Team.
- j) Intermediaries shall not modify or change the technical configuration of computer resources in order to circumvent any law in force.
- k) Intermediary shall provide the name of grievance officer and his contact details on its website by which user or any victim can notify their complaints and grievance officer shall redress the complaint within one month of its receipt.’

Observe Guidelines of Central Government: Intermediary shall observe the guideline issued by the Central Government from time to time.

Restrictions on Intermediaries: Intermediary may not get protection in the following circumstance:-

Involvement into Unlawful Acts: Protection to the intermediaries shall not apply if intermediaries have ‘conspired or abetted or aided or induced, whether by threat or promises or otherwise in the commission of the unlawful activity.’ This means that an intermediary involved in any crime will not get protection under section 79 as an intermediary. For example, in the case of Sanjay Kumar Kedia . Narcotics Control Bureau And Anr. the appellant was arrested for selling ban drugs online via his website in the USA. He came up with a defence that he is only an intermediary and protected under section 79 of the IT Act. However, the Supreme Court held that the appellant was not an innocent intermediary; he was involved in the selling of banned drugs under the NDPS Act 19.....and hence rejected his plea for protection.

Remove The Discriminating Material by Order of Court or Notified by Government: The intermediary has to expeditiously remove discriminating material from the website upon the order of the court or when notified by the appropriate Government or its agencies, as held in the case of Shreya Singhal vs Union of India.

Types of Intermediaries and their Liabilities: Intermediaries can be categorised into three types according to their functions: (i) Single functional Intermediary, (ii) Multifunctional Intermediary and (iii) Hybrid Intermediary.

Single Functional Intermediary: Single functional intermediaries provide only web spaces to the seller and connect them to the buyer. Such intermediary never participates in any transaction with the buyer or seller except for providing them with web space and only manages data received, stored and transmitted on behalf of seller and buyers.

Such intermediaries function just like a ‘Mall’ that provides space to shopkeepers in the mall for selling, displaying and transacting with the customers who visit the shops in the mall. The mall does not have any responsibility or liability for the transactions between the shopkeepers and the customers, although the shops are situated on the mall’s premises. The same principle applies in the case of single functional intermediaries. The website owner /intermediary has only allotted web space to sellers and manages data received, stored, and transmitted between seller and buyer. This intermediary plays no active role in the buyer and seller transactions. Hence, single functional intermediaries in e-commerce are not liable to either party for any harm or damage caused in the transaction.

Multifunctional Intermediary: These intermediaries participate in e-commerce transactions by providing a bundle of services and offers to sellers and buyers. Multifunctional intermediaries adopt a value creation role; they increase the value of products by providing offers, creating trust, promotions, logistics, easy payment options, research about products, data and information, and providing information about market trends. As a result, multifunctional intermediaries online are lowering the cost burden of sellers compared to traditional intermediaries. In addition, multifunctional intermediaries are involved in and manage or provide several allied services like logistics, cash on delivery, EMI, easy online payments, sales tracking, product guarantee and warranty, assurance about product quality, product review, customise notifications, promotions, offers and discounts. Multifunctional intermediaries also offer paid membership to buyers and sellers. Thus, multifunctional intermediaries function like superstores; you just have to pick up your products, place them in the cart, and checkout. If there is any defect or grievance regarding the products, you can hold the superstore liable, and it is bound to redress your grievance.

Now, let us understand how multifunctional intermediaries lose their protection and make themselves liable by using the illustration of ‘Ram’. This illustration assumes that ‘Ram’ is an e-commerce intermediary.

Illus. 1:- ‘Ram’ thinks he will help people find good things in his area. An ‘XYZ’ electronic shop owner told ‘Ram’ that they sell good quality laptops in their store. ‘Ram’ stored this information in his mind received from the shopkeeper. One person asked ‘Ram’ where will I get the best laptop. ‘Ram’ had information regarding the same, and

he passed it on to that person that said ‘XYZ’ shop has good laptops; he also passed on ‘XYZ’ shop’s address and phone number. That person ordered a laptop, and the shop delivered it to him.

In this illustration, ‘Ram’ received information from the seller, which he stored with him, and when a similar query arose before him, he responded to that query and transmitted the information to another person. ‘Ram’ has only received, stored and transmitted the information. If any dispute arises between the shopkeeper and the other person, ‘Ram’ shall not be liable. Thus, ‘Ram’ (an intermediary) acts only as a mediator, transmitting the information. Therefore, there is no liability on the intermediary.

Illus.2: We continue the illustration in Illus. 1. further, if the same person asks ‘Ram’, “can you bring the laptop for me?” and ‘Ram’ says yes. Then that person also passed on money to the ‘Ram’ and requested him to purchase a laptop. So ‘Ram’ went to the shopkeeper, brought a laptop, and delivered it. The said person paid him the transportation charges also.

In this Illus.2, ‘Ram’ has just followed the instructions. Firstly, ‘Ram’ received information from that person to bring a Laptop for him from ‘XYZ’ shop accepted the money from that person. Then, ‘Ram’ stored the said information and money and passed it on to the ‘XYZ’ shop, and the shop owner provided the laptop according to the information and money received from ‘Ram’. Then the shopkeeper handed over the product to ‘Ram’ for delivery. Therefore in this illustration, ‘Ram’ (an intermediary) is protected from any liability incurred from the present transaction as he has functioned as a mere conduit of the transaction, i.e. provided access to communication only.

Illus.3: We further continue the illustration in Illus. 1, now after receiving information from ‘XYZ’ shop, ‘Ram’ started to advertise about the said laptops. In this case, ‘Ram’ has made himself liable for the transaction and any breach or grievance arising thereof. Thus, there is a breach of the condition under section 79(1)(b) of the IT Act, as ‘Ram’ has initiated the transmission of information on his own.

Illus.4: Further, after receiving the information from the ‘XYZ’ shop, now ‘Ram’ decides to tell about the said shop to people who have bungalows and transmit his information to bungalow owners. ‘Ram’ made himself liable for the transaction and any breach or grievance arising out of the said transaction. There is a breach of the third condition under section 79(1)(c), as ‘Ram’ has selected the receivers to whom the information is transmitted.

Illus.5: Further, after receiving XYZ shop’s information, ‘Ram’ added a punch line to the same, stating that, ‘town’s best Laptop sold by ‘XYZ’ shop.’ Then, ‘Ram’ has made himself liable for any liability arising from the said transactions between the parties. As there is a breach of the fourth condition under section 79(1)(d), as ‘Ram’ has modified the information received by him in the Illus.1, i.e., “the shop XYZ has good quality Laptop in their store”, thereby making himself liable for any transaction and grievance arising out of the same.

Illus.6: Another example of a breach of the fourth condition imposed by the Information Technology Act 2000 is if after receiving the information from ‘XYZ’ shop, ‘Ram’ states to the customers that offer 25% discount on laptop sold by ‘XYZ’ shop. Then in these circumstances again, ‘Ram’ has made himself liable for any liability arising from the said transactions by breaching the fourth condition under section 79(1)(d) because here ‘Ram’ has modified the information.

Illus.7: Continuing the Illus.1 further, if ‘Ram’ declares that he will offer premium services to those who avail of his paid membership and give them offers and discounts upon the products purchased from him. In this scenario, ‘Ram’ has rendered himself liable for every liability arising from such transactions between the parties.

Hybrid Intermediary: These intermediaries are a combination of single functional and multifunctional intermediaries. Hybrid functional intermediaries provide both options to the sellers, firstly, providing webspace and secondly, value-added services, as the case may be. The sellers can choose from the options of services provided to them by these intermediaries. This type of intermediary can find a way out of skipping their liability. Such intermediaries are doing business and providing various multifunctional services. However, they may escape from their liability in a given case by pretending to be a single functional intermediary.

Ecommerce Consumer Protection Rules 2020:

The new Consumer Protection Act 2019 provides for additional liabilities that are imposed on the marketplace E-Commerce entities apart from those mentioned in sub-section (2) and (3) of section 79 and the provisions of Information Technology (Intermediate guidelines) Rules, 2011.

An intermediary has been termed as a ‘Marketplace E-Commerce Entity’ in the new Consumer Protection Act 2019 and Consumer Protection E-Commerce Rules 2020. The liabilities imposed on intermediaries under the consumer protection e-commerce rules can be enumerated as under:-

- 1) Marketplace E-Commerce entity has to undertake from its sellers that the description images and the contents of the goods and services on their platform are accurate and correspond with the appearance nature quality purpose and other general features of such goods or services.
- 2) Market place entity is required to provide the below-mentioned information in a clear and accessible manner and also display the same prominently on its platform at an appropriate place for its users:-
 - a) Details of the seller's goods and services that are offered including the name of the seller's business whether it is registered or otherwise and its geographical address, customer care number and any other feedback about the seller and any other information necessary for the consumers to take an informed decision at the purchase stage. Market place entity is also required on demand in writing by the consumer who has purchased the goods from seller, to provide details of the seller's email address geographical address of its headquarters and all branches name and details of the seller's websites and any other information necessary for communication with the seller by the consumer for effective dispute resolution.
 - b) It is also mandatory for the marketplace e-commerce entities to provide a ticket number for each complaint lodged by the consumer so that the status of the same can be cracked by the consumer.
 - c) Further it is also mandatory for the marketplace e-commerce entity to provide information relating to the return refund exchange warranty and guarantee delivery and shipment modes of payment and grievance redressal mechanism and any other similar information which is required by the consumer to make an informed decision.
 - d) It is also mandatory for the marketplace e-commerce entity to provide consumers with information about the available payment methods security of those methods fee or charges table by the consumer's procedure for cancellation of payments under those methods chargeback option and the contact information of the relevant payment service provider.
 - e) Explain the main parameters of goods and sellers on its platform in an easy description drafted in a plane and intelligence language.
 - f) E-commerce market entity shall also include in its terms and conditions in the relationship with the sellers on its platform and mention any differentiated treatment given to any goods or services of the same category.

- g) Marketplace e-commerce entity shall also maintain a record of relevant information allowing the identification of sellers who have been removed or access to such seller's goods or services have been disabled under the Copyright Act 1957, the Trademarks Act 1999 and the Information Technology Act 2000. Market-place e-commerce entities can voluntarily remove the goods and services of such sellers and it is not a mandatory requirement of law.
- h) The marketplace e-commerce entity shall also provide all the information provided to it by the seller under sub-rule 5 of rule 6 which is as follows:-
- i) seller should not offer goods or services in the marketplace e-commerce entity by adopting unfair trade practices.
 - ii) seller should not represent himself as a consumer to post reviews about goods or services or miss represent the quality of any goods or services.
 - iii) no seller offering goods or services in the marketplace e-commerce entity shall refuse to take back the goods or withdraw or discontinuous services or refuse to refund consideration is paid where such goods or services are defective deficient or spurious or not of characteristic or features as advertised or as agreed to or if such goods are delivered late as for the agreed schedule. However, if the late delivery is due to force major the seller shall not be liable as above.
 - iv) Further it is also mandatory for a seller offering his goods or services through a marketplace e-commerce entity to:-
- a) Enter into a written contract with the e-commerce entity to sell or offer his goods or services.
 - b) To provide for a grievance officer for the consumer grievance redressal which acknowledges received of any consumer complaint within 48 hours and is required to redress the same within 1 month from the date of receipt of such complaint.
 - c) To ensure that the advertisements of goods and services are consistent with their characteristics.
 - d) The seller has to provide the e-commerce entity with its legal name, principal geographic address as well as of all its branches, the name and details of its website, email address, customer care, contact details of fax, landline, mobile numbers its GST and PAN details.
 - e) The seller offering his goods and services through a marketplace e-commerce entity is required to provide the following information to the e-commerce entity to be displayed on its platform:-
- i) disclose contractual information as required by law.
 - ii) collective price of the goods and services should be displayed along with the breakup of all compulsory and voluntary charges i.e delivery charge, postage, handling charge, conveyance charges and taxes.
 - iii) provide all mandatory notices and statutory warnings required to be given with respect to the goods and services offered for sale and the expiry date of the same.
 - iv) disclose relevant details including the country of origin of the goods and services offered for sale through the marketplace e-commerce entities.
 - v) provide for the name designation and contact number of the grievance officer in case of a dispute.
 - vi) provide details of the importer along with the guaranteed and genuineness of the imported product.
 - vii) provide for terms of exchange, returns and refunds in a clear and accessible manner.

viii) to provide details relating to delivery and shipment of such goods and services and any guarantee and warranty available on such goods.

Conclusion: Thus, the liability of intermediaries in e-commerce depends on the role and functions undertaken by the intermediaries in e-commerce transactions. As long as the intermediary has not participated in any other activities/functions and has limited itself to only providing webspace, managing, storing, and transmitting the third party's data to the buyers and seller, it will not attract any liability under the law. However, if an intermediary exceeds its limits as mentioned above, it will make itself liable for any liability arising out of such e-commerce transaction, including criminal, civil, contractual, consumer and tortious liabilities. Therefore, the distinguishing factor as to whether an intermediary is liable or not would depend on the nature of functions performed by an intermediary in e-commerce transactions, and the nature of functions performed by the intermediary would defer from transaction to transaction. The Information Technology Act 2000 attempted to fix and determine the liabilities of the consumers however since it was not sufficient to cover the liabilities of intermediaries in an online e-commerce transaction, a need was felt to further lay down the liabilities and duties of the intermediaries. Thus the new Consumer Protection Act 2019 and its E-commerce Rules 2020 were enacted to further fix and determine the liability of intermediaries as aforementioned. Thus one needs to have a clear understanding of the role and various functions undertaken by the intermediaries in e-commerce transactions.

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