
THE ENFORCEABILITY OF CLICK WRAP AGREEMENTS: STRIKING A BALANCE BETWEEN ECONOMICS AND CONSUMER PROTECTION

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ABSTRACT

The E-Commerce is actually facilitating the trade through electronic medium wherein the customers would buy products through online. 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 interchange and electronic fund transfer, the facilitation of which with the help of ‘Internet’ has developed into Information technology enabled commercial transactions called e-commerce’.

The Consumer Protection and the Economic development should go hand-in-hand the legislature shall introduce the law and make sure that there shall be a balance between both the legislations. The State has to take measures in order to boost the economy and also at the same time they shall not neglect the protection of consumers. The consumers’ interest shall not be undermined as here if the same is happening then in such a scenario the impact would fall on economy.

Keywords: Consumer, Commerce, Economic development, Welfare

Introduction:

It is actually an agreement between the service provider and an online user. It is basically a kind of agreement for which the acceptance to adhere to the terms and conditions is given by clicking upon a button.

So, upon such kind of acceptance the user can access the service provided by the service provider. In a click wrap agreement in order to use the website the user has to convey the acceptance by clicking. It is the confirmation that the user has read all the terms and conditions.

The click wrap contract acceptance is given by clicking:

- I accept
- I agree
- I consent

And if a party wanted to dissent then:

- Disagree
- Cancel
- Close the button

A Click wrap agreement is actually an online agreement that the users actually agree to by clicking a button or through checking a box that says "I agree".¹ So, the act of signing or through expressing consent through any other form is replaced with the act of clicking a text box. So, these sorts of agreements actually tend to be more.

Statement of Problem:

The agreement is being entered between the e-commerce entity and consumer through a click wrap agreement and when a click wraps agreement is being made enforceable then in such a

¹ Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

scenario they are bound to make measures in order to enforce the contract which was entered between them and at the same time the e-commerce entity structures and frames its terms and conditions in favor of it as such. So, there is again no restriction upon the entities to actually structure the terms and conditions in this way. They can just frame the terms and conditions in favor of them and then escape from liability in which ever they wanted.

On the other hand the agreement entered is actually not fulfilling the essentials of Indian Contract Act, 1872.

Research questions:

Whether the conduct of the e-commerce entities helps in boosting the economy of a nation or is it a bane to the economy?

Whether the click wrap agreements entered between the parties are enforceable even if in case the essentials established under Indian Contract Act, 1872?

Whether the terms and conditions framed by the E-Commerce entities are structured in such a way to escape from the liability or to boost the economy?

Research objectives:

The primary objective is to analyse the regulations associated with the E-Commerce Entities and to understand the possible problem faced by the consumer due to the conduct of the E-commerce entities in India.

To understand the enforceability of the Click wrap agreements with the context of the Indian Contract Act, 1872 and the Information Technology Act, 2000.

To suggest the possible reforms and then understand the vacuum.

Research Methodology:

The methodology used in this research paper is a traditional method of research that is Doctrinal research. It involves the systematic analysis of regulations in relation to the E-Commerce Entities and also understands the enforceability of the agreements entered between the customers and the e-commerce entities. And also at the same time understand the interest

of the consumers and suggest some adoptive measures in order to ensure that there is consumer protection.. And analysis of certain cases in such sector the researcher actually used secondary sources like journal articles, books and case briefs for the entire process of research.

Literature Review:

- An article titled **“CONSUMER CONFIDENCE: THE KEY TO SUCCESSFUL E-COMMERCE IN THE GLOBAL MARKETPLACE”**² which is actually written by Thomas T. Reith and the same is being published by the SUFFOLK TRANSNATIONAL LAW REVIEW. The author of this article initially explains about the technological transformation which boosted the economy and then continued to explain how ecommerce is actually acting as a catalyst in order to facilitate and change the shape of businesses. The researcher used this article in order to understand the development of Internet and how such development of Intent facilitated commerce and also the researcher through this article understood how the consumer confidence is being built up through this e-commerce platform.
- An article titled **“A GUIDE TO E-COMMERCE: SOME LEGAL ISSUES POSED BY E-COMMERCE FOR AMERICAN BUSINESSES ENGAGED IN DOMESTIC AND INTERNATIONAL TRANSACTIONS”**³ which is actually written by Francesco G. Mazzotta and then the same is being published by the Suffolk Transnational Law Review. The author through his article explains his objective of publishing his paper as to provide interested business people with a basic picture regarding e-commerce. The author mainly focused upon the International and domestic transactions and then continued to relate the same with the consumer protection rules as such. The researcher used this article in order to understand the progress of transactions and the obligations associated with the transactions and understand the consumer importance.
- An article titled **“Browse-Wrap Agreements: Validity of Implied Assent in**

² Thomas T. Reith II., Consumer Confidence: the Key to Successful E-Commerce in the Global Marketplace, 24 Suffolk Transnat'l L. REV. 467 (2001).

³ Francesco G. Mazzotta, A Guide to E-Commerce: Some Legal Issues Posed by E-Commerce for American Business Engaged in Domestic and International Transactions, 24 Suffolk Transnat'l L. REV. 249 (2001).

Electronic Form Agreements⁴” which was actually written by Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter and Jennifer C. Debrow and the same was published by the Business Lawyer Review. The author of this article explains the scope of browse wrap project as such and then continued to explain the assent which was given by the parties electronically as such. The author discusses the efficiency which he can actually build through click wrap agreements and also stresses upon how reliable it is in order to establish assent. The researcher used this article in order to understand the recent trends in Contract law and then come to a conclusion on which mode of giving and recoding an assent is reasonable as such.

- Another article titled “**Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent**”⁵ which was actually written by Christina L. Kunz, Maureen E Del Duca, Heather Thayer, and Jennifer Debrow and the same is actually published by the Business Lawyer Review. The author of this article claims that the process of actually entering into a click wrap agreements is a strategy to obtain an implied consent but also the parties are still given the opportunity to read through the clauses and covenants. So, the author feels that the opportunity is given but still if the acceptance recorded is considered to be vague then there is a problem. The author cited few landmark cases to substantiate and back the side that whatever is taken is not wrong. The researcher used this article in order to understand the essential which shall constitute and make the assent which is taken through click wrap agreements is legal.
- Another article titled “**Into Contract's Undiscovered Country: A Defense of BrowseWrap Licenses**”⁶ which was actually written by Dan Streater and the same is being published by the San Diego Law Review. The author of this article initially explains about the growth of Internet and then continued to explain how it is actually complementing and facilitating both trade and commerce. And then the author tried to relate the same phenomenon with the Mass market License Agreements as such and

⁴ Christina L. Kunz , John E. Ottaviani, Elaine D. Ziff & Juliet M. Moringiello, Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, 59 Bus. LAW. 279 (2003).

⁵ Christina L. Kunz , Maureen F. Del Duca, Heather Thayer & Jennifer Debrow, Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent, 57 Bus. LAW. 401 (2001).

⁶ Dan Streater, Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses, 39 San DIEGO L. REV. 1363 (2002).

then so in order to facilitate trade and commerce between enterprises and connecting consumers then the agreement should be standardized rather than amending is the stand which was taken by the author. The researcher used this understanding and logical interpretation as such.

- Another article titled **“E-COMMERCE AND CONSUMER PROTECTION: A CRITICAL ANALYSIS OF LEGAL REGULATIONS”**⁷ which was actually written by Rajiv Khare and Gargi Rajvanshi and the same is being published by the National Law School of India. The author of this article initially defines what actually a consumer protection is and what E-commerce is and then tried to establish the same link between both these terminals. The author also continued to express how important is consumer protection. The threats to the consumer protection in E-commerce are also being stressed by the author. The researcher used this article in order to understand the legal framework with regard to the E-commerce and then the consumer protection.
- An article titled **Borderless trade and the Consumer Interest: Protecting the Consumer in the Age of E-Commerce**⁸ has been written by James P. Nehf and the same is published Columbia Journal of Transnational Law. The author of this article mentions the importance of promoting the E-Commerce and also at the same time the author has mentioned the how the government should adopt measures in order to promote the economy. The researcher used this article in order to understand the importance and then formulate the introduction and then understand the involvement of government towards the policy framework.
- An article titled **“Electronic Commerce- Click wrap Agreements: The enforceability of Click Wrap Agreements”**⁹ has been written by Adam Gatt and the same is being published by the University of Melbourne. The author through his article explained the status of agreements entered between parties which are entered electronically and then the author continued the discussion with the enforceability of

⁷ Rajiv Khare and Gargi Rajvanshi, E-COMMERCE AND CONSUMER PROTECTION: A CRITICAL ANALYSIS OF LEGAL REGULATIONS, National Law School of India Bangalore (2021).

⁸ James P. Nehf, Borderless Trade and the Consumer Interest: Protecting the Consumer in the Age of E-Commerce, 38 COLUM. J. Transnat'l L. 457 (1999).

⁹ Adam Gatt, Electronic Commerce- Click wrap Agreements: The enforceability of Click Wrap Agreements, University of Melbourne Computer Law & Security Report Vol. 18 no. 6 2002

such agreements entered between parties. The researcher used this article to understand the status of agreements entered through E-Commerce and also the researcher through this article understood the key consideration which the court shall ascertain in order to decide the admissibility and enforceability of an agreement.

- Another article titled “**Click Wrap Agreements and its Enforceability**”¹⁰ has been written by Anuja Saraswat and the same is being published by IPIF. The author through this article defined the Click Wrap agreements and then continued to explain the enforceability of such agreements entered between the parties. The author then continued to explain the context with regard to the position in India and also global context as such. The researcher used this article in understanding the position of the click wrap agreements and all such other agreements entering electronically by and between the parties in other countries and then understand how such agreements are backed by the legislative framework.

Scope and Limitation of the Study:

- This study aims to focus upon the importance of Consumer Protection and assess the risk associated with the conduct of the e-commerce entities.
- This study mainly looks into various provisions in relation to the Information Technology Act, 2000 and Indian Contract Act, 1872.
- This study aims to remove the ambiguity which it is creating and then propose few measures in order to curb the practice.

HYPOTHESIS:

The e-commerce entities entering agreements with the users through click wrap agreements is actually not enforceable before the court of law with regard to the Indian Contract Act, 1872 and Information Technology Act, 2000.

Chapter 2

¹⁰ Anuja Saraswat, Click Wrap Agreements and Enforceability, IP And Legal Fillings, Vol. 21 no 7 of 2017

Click wrap Agreements:

A Click wrap agreement is actually an online agreement that the users actually agree to by clicking a button or through checking a box that says “I agree”.¹¹ So, the act of signing or through expressing consent through any other form is replaced with the act of clicking a text box.

So, these sorts of agreements actually tend to be more.

It is actually one of the efficient ways for businesses to escape from liability and limit their risk without impacting the customer experience or any conversion. Companies generally initiate click wrap agreements without negotiating the same with the customers they do generally have a standardized version of agreements for which the same sort of agreements would be circulated all over as such.¹²

The phenomenon of actually ticking the box by clicking is predominantly considered as “acceptance” to adhere to the terms and conditions as such. It is a presumption that one can actually draw that the user have actively assented to the terms and conditions and would limit his conduct according to the terms and conditions established as such.¹³

Practically, for a business to business or for a business to customer wherein the business is engaged in the trade of selling goods and services online it becomes a tedious task for the businesses to negotiate the contractual terms and conditions individually with all the users. So, they should actually have things in more common as such.

The status of shrink wrap agreements and browse wrap agreements is actually different from that of click wrap agreements as because those agreements become enforceable and binding by signing in with login details, register or through even browsing the website or database of that concerned company.¹⁴ But the fact that the Click wrap agreements have actually

¹¹ Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

¹² What is Click wrap Agreement, Iron Clad Journal (November 20th, 2023), <https://ironcladapp.com/journal/contractmanagement/what-is-a-clickwrap-agreement/>

¹³ Gatto v. Int'l Vitamin Corp., No. 8:21-cv-00889-JLS-DFM (C.D. Cal. Dec. 08, 2021)

¹⁴ Nicosia v. Amazon.com, Inc., 834 F. 3d 220, 233 (2d Cir. 2016).

maintained high success rate upon comparison with the other trends or above mentioned agreements as such.¹⁵

Only, in the year 2020 the click wrap agreements are actually having 70% of success rate whereas the shrink wrap agreements and browse agreements have 64% and 14% respectively as such. So, the success rate is actually measured through its admissibility and enforceability before the court as such. But the fact that coming to the status of these agreements now they have declined as the court have become more sophisticated that it ought to be in assessing of these agreements and in evidentiary support required to support them as such.¹⁶

The status of Click wrap agreements:

Whether click wrap agreements are legally enforceable?

The Click wrap agreements are actually enforceable before the court. They are designed, presented and tracked in compliance with the possible and best practices as such. So, in United States they are just enforceable as both traditional wet ink signatures and electronic signatures.

The legislation framework with regard to the Click wrap agreements are specified below as such:

The Electronic Signatures Act (ESIGN)

The federal Electronic Signatures in Global and National Commerce Act (ESIGN) was enacted on June 30 and in the year 2000. The law was enacted to facilitate and make sure there is use of electronic signatures and also other electronic records as they are pertained to interstate and foreign business transaction. So, it laid down certain requirements and standards in order to determine the validity and enforceability of the agreements which were entered electronically.

The Uniform Electronic Transactions Act (UETA)

The Uniform Electronic Transactions Act (UETA) was adopted by the National Conference

¹⁵ *Nguyen v. Barnes & Noble, Inc.*, 763 F. 3d 1171, 1176 (9th Cir. 2014)

¹⁶ Click wrap agreements Litigation report, Iron Clad Journal (November 21st, 2023), <https://ironcladapp.com/lp/clickwraplitigation-trends/>

on Uniform State Laws in the year 1999 and following the same the year from which it was adopted, it was adopted by almost 47 states.

The Uniform Electronic Transactions Act predates the Electronics Signature Act but both of these pieces of legislations lay down the requirements for electronic signatures and electronic records to be afforded the same treatment as that of their paper counterparts – UETA at the state level, and ESIGN at the federal level.

So, according to the established legislation and regulatory framework the act of clicking the button and checking the box denotes that an individual have assented to the established terms and conditions as such. And according to the framework it fulfills the requirement of establishing “intent”

So, since the user has actively clicked a button that confirms clearly that they are agreeing to a contract and they are showing the intent to enter to agreement.

Upon this framework the click wrap agreements are actually recognized as an accepted form of electronic signature and when a signature is being recorded then it would take to and lead to the contract. Even upon reference to the above mentioned legislations “definition and interpretation clauses it is being expressly mentioned that the definition of an electronic signature includes “the standard webpage click through process.”

The issues which a court needs to address in order to ascertain and identify whether the click wrap agreements is enforceable before the court and obliged or does it look vague.

- Whether the user has agreed to the terms and conditions in the contract and gave an express consent through any mode.
- Whether the user had an actual or an inquiry into the terms and conditions that are structured.¹⁷
- The design and layout of the screen containing the click wrap agreement.

¹⁷ Berman v. Freedom Fin. Network, LLC, 30 F.4th 849 (9th Cir. 2022)

The first two issues are actually linked directly to the agreement itself and the conduct of the user but the third issue needs to be addressed through the evidence of “screenshot” as because the screenshot displays or records the design and layout of the screen when the user is actually intending to give his express consent as such. Through this screenshot what actually clarifies is that whether the consent which is given by the user by clicking upon the text box or through the text box is it the consent to the terms and conditions which the party frames or to something else which is displaying on the screen.¹⁸

In the case of *Sgouros v. TransUnion Corp*¹⁹, the TransUnion corporation have encompassed their terms and conditions in a scroll directly on the end of a screen, and they expressly mentioned that they required users to check a box labeled “I Accept & Continue” when creating an account. The court envisaged upon the performance and conducts of the corporation and then held that that clicking a button or checking a box is sufficient to signify acceptance of a contract, as long as the layout of the page put the users on notice of the terms. But since the notice surrounding the checkbox did not notify users of the existence of a contract, the court did not enforce TransUnion’s terms.

In the case of *Nguyen v. Barnes and Noble*²⁰, the corporation has actually included a link to the terms on the bottom left corner of every page on their site. And if a user clicked on the link to the terms, they would state that at the very top of the terms that by visiting or doing anything on the Barnes and Noble site, they have accepted the Terms of Use. But the fact that corporation included that the terms and conditions were mentioned at the bottom of each webpage and they did not otherwise call the terms out to the user or require them to take an action to explicitly assent to the terms. The court held that users were actually not put on reasonable notice.

So, these set of judicial precedents of putting the users on notice of the existence of terms and capturing their affirmative assent to the terms. And then these set of cases informed best practices to ensure the terms and enforceability in the court.

¹⁸ *Zachman v. Hudson Valley Fed. Credit Union*, 49 F.4th 95 (2d Cir. 2022)

¹⁹ *Sgouros v. TransUnion Corp.*, No. 14 C 1850, (N.D. Ill. Aug. 18, 2016)

²⁰ *Nguyen v. Barnes & Noble, Inc.*, 763 F. 3d 1171, 1176 (9th Cir. 2014).

Chapter 3

Indian Contract and Consumer protection:

The Indian Contract Act which was enacted in the year 1872 prescribes the essentials of being a contract. So, in order to ascertain whether a particular arrangement or an understanding is considered to be an agreement or not one has to take the reference of provisions established under the Indian Contract Act.

So, the basic essentials of an agreement being recorded as a contract are:

- Consideration ²¹
- Offer and Acceptance ²²
- Free Consent ²³
- Capacity to enter into contract ²⁴
- Lawful object ²⁵

As stated the Indian Contract Act prescribes the essentials of being a valid contract. The same provisions would apply to any contract which was entered within the jurisdictional limits of the country. So, when party to an agreement is actually claiming that a particular conduct is unlawful or against the understanding or against the agreed terms and conditions then in such a scenario prior to that there has to be proper mode of entering into agreement and the same agreement shall go through the essentials of being contract and only then it would be recognized and then the parties are entitled to claim the benefits under such an understanding or an arrangement.

So, the conclusion which the researcher would like to draw from the above discussed analysis that even though the agreements or so called “contracts” shall be valid only if the fulfill the

²¹ Section 8, Indian Contract Act, 1872

²² Section 7, Indian Contract Act, 1872

²³ Section 14, Indian Contract Act, 1872

²⁴ Section 11, Indian Contract Act, 1872

²⁵ Section 24, Indian Contract Act, 1872

essentials of being a contract as such. Even the Click wrap agreements for that matter shall be enforceable before the court only in case if they are fulfilling the essentials of Indian Contract Act, 1872. Else the prospects and conduct of the parties would use this as an excuse and defeat the purpose of an enacting the Indian Contract Act.

The objective of enacting the Indian Contract Act is to utter the confusion which exists with regard to the contracts and to reduce the burden on the Indian Judges to understand the genuinity and confidentiality of an arrangement or understanding which exists between the parties. So, the drafters felt that the codification is lacking to cover the extraordinary situations which exist between the parties. So, rather taking the reference of English law every other time they felt if there is a legislation and adherence to certain rules the process of adjudicating would not be a heinous task.²⁶ But the new mode of entering into contracts and establishing the rights and obligations is acting as an escape route to the Indian Contract Act. So, this is ultimately taking to an extent where it is defeating the purpose of enacting the Indian Contract Act.

Conflict between Indian Contract Act and Click Wrap Agreements:

The Indian Contract Act, 1872 in its definition of the word “contract” is actually states that an agreement which is enforceable by law.²⁷ So, it does not prescribe the nature or mode of a contract as such. The act is not being amended right from then as such as it is does not include nor exclude the Click wrap agreements or the electronic agreements.

The judicial precedents which were passed by Judiciary in India also have an opinion with regard to the enforceability of the Click wrap agreements. So, they have stated the same through judgments.

In the case of Ddit (LT) Mumbai v. Gujarat Pipavav Port ltd²⁸, the Income tax tribunal held that unconscionable or unreasonable bargain between the parties would lead to contract adhesion especially when it is entered in masses like Shrink wrap and Click wraps agreements as such. So, this position makes them unenforceable even though they have all the components

²⁶ Jain, M. P, *THE LAW OF CONTRACT BEFORE ITS CODIFICATION*. *Journal of the Indian Law Institute*, SPECIAL ISSUE : 1972 pp. 178-204 (1972).

²⁷ Section 2(h), *Indian Contract Act, 1872*.

²⁸ Ddit(lt) Mumbai v. Gujarat Pipavav Port ltd ITA No.7823/Mum/2010

of a valid contract.

In the case of *Trimex International FZE v. Vedanta Aluminum Limited*²⁹, the Supreme Court have held that if the terms of a Contract had been discussed over the email, such emails constituted to be a valid contract and hence were enforceable. Here the Supreme Court recognised the validity of electronic contracts even if they were not electronically signed and registered.

In the case of *LIC India vs. Consumer Education and Research Centre*³⁰ the Supreme Court of India commented on the scope of its intrusion in a contract where the parties to the contract had unequal bargaining power. The Court held that when a contract is of such a nature that it can be stated to be an Adhesion Contract and further when the parties to the contracts do not have equal bargaining power then in the light of Article 14 of the Constitution of India (guaranteeing equal protection of law to its citizens) the Supreme Court shall strike an unfair or unreasonable contract.

In the case of *Specht v. Netscape Communications Corporation*³¹, the court held that Click wrap Contracts are enforceable only when they are clearly and conspicuously posted on the website.

In the case of *Bragg v Linden Research, Inc*³², Click wrap agreement was a form of Adhesion contract where the terms of the contract were drafted in such a manner that it was extremely onesided and would shock the conscience. The United States District Court of Eastern Pennsylvania upheld the contention of the Plaintiff here and refuted the validity of the contract.

But the genesis which can be drawn from the judicial precedents discussed is that the courts do not actually have a problem with regard to the enforceability of a click wrap agreements but however such an acceptance is not absolute it is always exposed to reasonable restrictions. The courts are actually delving into these agreements in detail and understand the terms and conditions as such. The bargaining power and the theory of reasonable choice to the party

²⁹ *Trimex International FZE vs Vedanta Aluminum Limited* 2010 (1) SCALE 574

³⁰ *LIC India V. Consumer Education and Research Centre*, 1995 AIR 1811

³¹ *Specht v. Netscape Communications Corporation* 306 F.3d 17 (2d Cir. 2002)

³² *Bragg v Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007)

were considered in order understand the progress and status of the Click wrap agreements.

The growth of the internet users actually increased to a larger level and that implied more formation of contracts through Internet or through any other electronically generated databases. So, these increase in e-contracts actually led to a lot of legal challenges wherein the minors entering into such an agreements without understanding the possible consequences of entering into such an agreements would lead to legal implications. Though the contracts are an essential aspect of any such commercial transaction, there are certain legal restrictions in order to decide the capacity of a party into enter into an agreement.

As per section 11 of the Indian Contract Act³³, the minors are actually not competent to contract.

The word “minor” is being defined under the Indian Majority Act. The section 3 of the Indian Majority Act ³⁴defines that the age of majority is when an individual completes the age of 18 years as such.

So, the section 11 of the Indian Contract Act makes the minor incompetent to enter into the contracts. But however the act does not talk about the nature of an agreement which was formed by a minor is void or voidable.

The perplexity due to the absence of any statutory provision relating to the nature of such an agreement was set at rest by the Privy Council's judgment in the case of *Mohiri Bibee v. Dharmodas Ghose* ³⁵wherein it was held that the agreements by a minor are void, and that Section 64 and 65 of the Contract Act do not apply to such agreements because minors are not competent to contract.

According to Section 10 of the Contract Act, click-wraps are legally binding in India if they meet all the requirements for a valid contract. According to Section 10A of the Information Technology Act of 2000, an e-contract cannot be declared void just because it was generated

³³ Section 11, Indian Contract Act, 1872

³⁴ Section 3, Indian Majority Act, 1875

³⁵ *Mohiri Bibee v. Dharmodas Ghose* (1903) LR 30 IA 114

using an electronic source.³⁶

There can be lot of instances to discuss with regard to the development and enforceability of the agreements which is entered between the party and a minor so the court addresses the same with a positive note by dealing into the objective and reasons as such.

In the case of *Leslie v. Sheill*,³⁷ it is more about restitution and is more about giving back earnings that the minor obtained unfairly than it is about upholding the terms of the agreement. It would be equivalent to enforcing the agreement, which is against the terms of the Contract Act, if the minor is asked to repay the money and it has already been spent and is no longer traceable.

The Lahore High Court took a more liberal stance in *Khan Gul v. Lakha Singh*³⁸, deviating from *Leslie's* ruling that the restoration of an unjust benefit should not be dependent on a party's mere appearance in court as a plaintiff or defendant.

The Court also observed that asking a minor to restore an ill-gotten gain in form of money is not enforcing the agreement but restoration of the pre-contract position.

However, almost after a decade, In the case of *Ajudhia Prasad v. Chandan Lal*,³⁹ Allahabad HC took a view contrasting to *Khan Gul* in consonance with *Leslie*. The Court held that a minor could be asked to restore the property only if it is traceable.

The criticism:

The criticism which revolved against one of the essentials of it being a contract is “consideration” but the fact that the word “consideration” does not always shall be in terms of compensation rather it is something in exchange of value. So, though the terms and conditions for that matter is not directly having or showing the impact on the value in monetary terms but still it has the background of actually facilitating the trade or commerce

³⁶ Saransh Jauhari, India: Though Click-Wraps Are Legal, Can Minors Enter Click-Wraps, THE MONDAQ (November 24th) <https://www.mondaq.com/india/it-and-internet/1305896/though-click-wraps-are-legal-can-minors-enter-click-wraps>.

³⁷ *Leslie v. Sheill* (1914) 3 K.B.607

³⁸ *Khan Gul v. Lakha Singh* MANU/LA/0462/1928

³⁹ *Ajudhia Prasad v. Chandan Lal* AIR 1937 All 610

electronically indirectly as such.

Generally, these sorts of click wrap agreements require the mutual consideration, which means that both the parties must exchange something of value. So, in most cases, the user gains access to the service or product, while the service provider obtains the user's consent to the terms.

So, the fact that the click wrap agreements does not take up one of the essential of it being “consideration” have to be interpreted with deep understanding and also understand the implications of the progressive actions which ought to happen in future as such.⁴⁰

Impact on consumer protection:

In order to prevent exploitation and prevent different business malpractices that could jeopardise the rights and interests of consumers in highly competitive marketplaces, consumer protection refers to safeguarding customers from a variety of unfair commercial practices. It goes without saying that while conducting business, commercial organizations are more knowledgeable, wellorganized, and in a better position to dominate consumers.

The massive convergence of e-commerce transactions and the impact of new technological advancements have drawn the attention of governments, international organizations, and individual consumers. While these developments have facilitated the growth of business endeavors, they have also presented a variety of challenges and confronted various segments of social and individual interests, such as data protection, consumer protection, privacy violations etc.

Because of this, the difficulties presented by e-commerce have drawn attention to the necessity of creating a legislative framework to address these difficulties and ensure that consumer rights are adequately protected. Additionally, it created a need to support the expansion of e-commerce while providing a correspondingly safe system to carry out transactions and satisfy consumer protection requirements in light of the new phenomena of

⁴⁰ Robert Lee Dickens, Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases, 11 *Intellectual Property L. Rev.* 379 (2007).

e-commerce.⁴¹

The Consumer protection is very much important when any business is operating through electronic means or through any other mode. Basically and only if the consumer is satisfied with the product or with the service which is being facilitated by the consumer only then the commerce works out well and then comes the satisfaction to the consumer. But the fact only the consumer is satisfied only then it is a good sign to the business which is being provided by the service provider as such. So, this has to be the primary concern for any business operator. And if we link the three dots i.e. the business, economic development and then the consumer protection then each one of it is actually having its own significance but all these three dots go hand-in-hand. Only if there is business which is being offered to consumer then there is a chance of generating huge revenue accordingly the business will expand into various other geographical markets and then create job opportunities and ultimately it would increase and contribute towards the economy of the country.

And the same would be retained only in case if the consumers are being satisfied with the service offered by the service provider. With regard to the Click wrap agreements which were entered by almost all the e-commerce entities with the consumers shall also make sure that they are benefitting the consumers at large through their conduct.

The terms and conditions which were actually framed by the e-commerce entities are generally placed in a such a way that no one even tends to read such kind of terms and conditions when they are actually using such an e-commerce platform. So, the consumers generally ignore the terms and conditions clause which actually exists in the e-commerce platform. So, the entities and the companies generally take this as an advantage and then frame the terms and conditions clause in such a way that whatsoever is the matter of concern they are not responsible for the conduct.

The terms and conditions clauses and covenants which they generally frame does not have to adhere to any regulation so they can be as ambiguous as they can actually get. So, this turn is making them to take advantage over consumers. The enforceability of the click wrap

⁴¹ 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).

agreements is not a problem for the researcher but using that as an excuse and abusing the same by entering into a non-negotiated terms and conditions is a problem. If the researcher have to explain the actual problem which exists then turning out the situation for instance if there is an agreement between two parties not entered electronically then before concluding the same there is a stage and a platform set up for making numerous number of negotiations and then the end result would be either going forward with agreed terms and conditions else they would back off. But imagining the same situation by turning it around if it is an electronically entered agreement then the privilege of negotiating between the parties does not exist so ultimately the parties wanted to standardize the terms and conditions and here the service provider or the e-commerce entity is on an upper hand so there is high chance that they would impose conditions which are arbitrary and also at the same time put the customer solely liable for whatever consequences take place later.⁴²

A case study of Zomato and a consumer:

The terms and conditions of an e-commerce entity is actually designed in a such a way that is beneficial for the company itself whatsoever is the reason and concern and the same e-commerce entity is claiming itself that it is not responsible for any of the damage through an agreement which is entered by the party through click wrap agreements. So, unconditionally when there is a serious concern which needs to be addressed then it just simply escaped by stating that it is no where responsible as it is already mentioned in the terms and conditions as such.⁴³

So, the consumer went back and looked into the terms and conditions and they actually look very much arbitrary as they claim that they are responsible for any conduct of the delivery partner or the restaurant agency. So, here the consumer is only using the restaurant through the platform which is being given by the entity and the delivery is also being selected by the company.

The problem comes here is that they never mentioned in their terms and conditions that there exists a master servant relationship but the fact that there is always such a relationship

⁴² Ankita Chakravarthi, Court orders Zomato to pay Rs 8,362 as compensation to user for failing to deliver food orders worth Rs 362 , INDIA TODAY, November 16th 2022.

⁴³ Petlee Peter, Dinner not delivered: Zomato hold liable for paying compensation worth 3,000 to the consumer, Times of India, January 7th 2023.

and the same can be drawn through inference by evaluating the degree of control which one possesses in a relationship and that is in fact making one go beyond the other as such.⁴⁴

The researcher would like to take the reliance of case of *Hardesh Goyal V. Spectrum Business* in order to draw a conclusion with regard to the Information Technology and Indian Contract Act.

In the case of *Hardesh Goyal v. Spectrum Business*⁴⁵, the court is of an opinion that an offer or proposal starts the legal process that results in the contract. On the other hand, an invitation to offer may come before an offer or proposal in various circumstances. The Indian Contract Act, 1872 covers the topics of proposal/offer communication, acceptance, and revocation in sections 3 through 9. An acceptance is necessary for a proposal to become a promise. It is true that the Indian Contract Act of 1872 does not impose any restrictions on communication methods. The law maintains open lines of communication because it tacitly acknowledges that as technology advances, communication networks will also evolve. The information technology revolution has made it possible for parties to transact business through new means of communication. One such method is by clicking on a specific area of a website to indicate an offer or, if applicable, an acceptance. This has grown in importance as a means of conducting business over the Internet. "Click-wrap contracts" are a common term for these agreements. Clicking is a legally acceptable kind of communication because our contract law allows for flexibility in the manner in which an offer, acceptance, and revocation may be communicated.

A 'click-wrap contract' operates on a straightforward process. The terms and conditions for selling goods or providing services are posted on a party's website. The customer who wishes to purchase the goods or use the services must indicate his acceptance of the terms and conditions by either clicking an icon that says "I accept" or "I agree" or something similar, or by typing "I accept" or "I agree" or other specified words in an onscreen box and then clicking a button that says "send" or something similar. The aforementioned actions create a click-wrap contract.

⁴⁴ *Adarsh TR*, Consumer forum asks Zomato to pay Rs 10,000 fine over cancelled pizza order, INDIA TODAY, August 22nd,

⁴⁵ *Hardesh Goyal v. Spectrum Business Support Ltd. and Ors.* MANU/SF/0136/2005

Chapter 4

Conclusion:

The researcher after looking into various prospects and fields of click wrap agreements would like to conclude that though there is no particular legislation or substantial legal provisions dealing with the enforceability and fundamentals of an e-contract, click wrap agreements have enough legal and judicial support. While the Information Technology Act, 2000 grants them legal legitimacy and recognition, the requirements established by the Indian Contract Act of 1872 serve as guiding provisions in the examination of their validity and legality. In this present age of globalization, modernization, and a thriving e-commerce industry, courts have begun to adapt and apply existing contract standards to electronic contracts.

The position in the United States, while we have seen that even historically click wrap agreements have been considerably favored, in India the enforcement is largely on a case-to-case basis. The prevalent hazard of 'rushing through' negligently or failing to read the terms and conditions closely has been ruled out as a contention by most courts. While the 'assent' element is taken into account and given significant weight age in both countries, enforcement is solely subject to standard contract law criteria pertaining to justice, fairness, and being conscionable.

The Courts carefully examine the terms or disputed provisions of a contract to uncover any dishonest, unfair, or manipulative behavior on the part of the defendant where there is an obvious imbalance in negotiation power, which is arguably inherent in click wrap agreements. Where the requisites under the Contract Act, such as offer, acceptance, capacity to contract, free assent, legal consideration, and so on, are not present, Indian courts have ruled that such contracts are unenforceable.

As a result, if one were to summarize the legal position of click wrap agreements in India, it would be twofold: first, courts take a generally progressive stance in consideration of technological advancement and promoting economic development through legalizing quick, convenient electronic contracts; second, these liberal interpretations are still subject to legal principles applicable to contract law and commercial transactions in general.

The consumer protection with regard to the e-commerce has actually gained the considerable

amount of attention both from the side of academics and policy makers. As stated earlier both the e-commerce platforms and method undertaken by the e-commerce entities to enter click wrap agreements have failed to address the e-commerce needs. If online platform is not charging the users, the Consumer Protection act may not apply. The legal system has constantly tried to catch up with the enactment of the various rules under the IT Act to deal with a host of issues emerging from the use of internet. But still it is far away from the goal.

Suggestions:

The researcher would like to propose the following suggestions as in there is no applicable and appropriate law with regard to the recognition of the electronic contracts and click wrap agreements. So, it is very much important and essential to actually have a legislative backup as it has in the United States. The Indian Contract Act, 1872 also does not prescribe the mode of acceptance and there is an ambiguity in defining the term “contract” so it is very much essential to define the law with regard to the acceptance of a contract. And also it is very much needed to amend the definition of contract so that we can actually culminate the agreements which were entered electronically.

Also, the e-commerce entities and companies do actually draft their terms and conditions in such a way that they are always escaping the liability. Since the e-commerce entities hold the higher position in negotiation generally they frame the terms and conditions in such a way that is more favorable to the e-commerce entities. The Indian courts actually did not directly make the econtracts unenforceable but still they went into the roots and understood on what basis the terms and conditions were actually framed and then accordingly made sure that in what way and indication is it actually having impacting the consumer interest.

And also 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 if and if there is any unfair trade practice as such.

The researcher would also like to propose a “material and defective test” in order to understand and ascertain the degree of variance which the terms and conditions would actually create and for an instance if the Ministry of consumer affairs lay down the standards for which if it is considered as a “Model Standard terms and conditions”. So, through this test the

researcher would actually understand the degree of variance and then accordingly come to a conclusion that whether it is arbitrary and vague. And this would ultimately bring in efficiency in framing of terms and conditions they generally frame the terms and conditions in a standardized way as such wherein it is applicable to all the users in a same way and they would have same terms and conditions as such. So, through this set of terms and conditions the researcher would like to conclude that it would bring in lot of consumer satisfaction.

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