



Jurisdiction in Cyber Space: Where to File a Suit?

*Dr. G A Solanki

* Associate Professor and HOD, Faculty of Law, The M S University of Baroda, Vadodara

ABSTRACT

It is of utmost important to decide the jurisdiction of the court in order to empower the court to deiced the disputes between the parties concerned. The jurisdiction is a nonspecific term that refers to the authoritative power of the court to decide upon the cases. The general principles that decide the jurisdiction power of the court is territory and subject matter. Both are equally important while deciding upon the power of the court to decide dispute. These principles has always stood the test of time in all cases were geographical borders was to be taken into consideration while deciding the power of the court to decide the dispute. But with the growth of the Internet these traditional principles of Jurisdiction has become inadequate and a question has been raised, as to which court shall have appropriate jurisdiction to decide upon the case in case of on-line crimes. Since cyberspace does not respect geographical boundaries the developing law of jurisdiction must address whether a particular event of cyber crimes has to be tried by the laws of the country where internet service provider is located, the country where the user is located or country where the server is located. With these preliminary presumptions an attempt is made to analyze the current hypothesis being used for determination of cyberspace jurisdiction. The rapid growth of e-commerce and the liability of netizen's make the task more difficult. Since there is lack of single principle for ascertaining the jurisdiction over offences committed in cyber space and the adoption of different laws by different countries makes the task of determining jurisdiction more difficult.

The paper aims to analyse various jurisdictional issues aims to suggest appropriate remedies by bringing about public acceptability and faith in the system.

Keywords : Cyber Jurisdiction, Cyberspace, Internet Jurisdiction, Cyber crimes

I. INTRODUCTION

The Internet is the personification of the information society.² Information is now available at the fingertips of many and this has brought about some amazing changes as to way we communicate. We are living in a unique time in the history of human civilization. The Internet has created a monarchy in which individuals, corporations, communities and all other entities including government can exist within and beyond the borders of nation States in an ever-present manner. Increasingly, people in the information society are becoming involved in on-line services, on-line contracts, electronic commerce, and on-line transactions. Some of the reasons behind this on-line trend provide quite an insight into the Internet's popularity. Apart from the fact that Internet is one of the fastest, cheapest and easiest modes of communication today, it has also made the concept of global society more a reality.³

It must be appreciated that almost all the information that is placed on the internet is generally available to anyone who is having an Internet connection. Subscribing for Internet connection now-a-days does not cost much. This allows blanket access to all on-line material. Earlier before Internet, if a person wanted to sell his product, he had limited access to customers and that too by spending exorbitant sum of money for advertisement. Thus geographical boundaries were the major hindrance. Today, a person can sell goods from a desktop computer located anywhere to many different consumers all over the world by means of the Internet.

II. CHALLENGES TO THE LAW

Along with the unique opportunities the Internet offers, it also poses new and significant challenges to traditional legal philosophy.⁴ The growth of transborder activities poses new challenges for law enforcement agencies. Most existing law enforcing systems were designed to address the fraudulent and deceptive commercial practices against consumers when

such practices were mostly of domestic nature. But after the growth of Internet it has been seen that current laws and systems are not capable enough to address cross border issues. A greater difficulty lies with respect to diverse legal systems, different laws worldwide and different law enforcement policies.

III DEFINITION OF JURISDICTION AND WHY JURISDICTION IS AN IMPORTANT ISSUE

The general meaning of the term jurisdiction refers to, 'Power of the State to exercise its authority over property and persons within its geographical limits'. However, in the context of dispute resolution, a clear concept of jurisdiction is needed to answer questions such as 'which is the most appropriate court to hear the dispute? What law will be applied to resolve the dispute? Which authority will enforce the judgment? In such circumstances the term jurisdiction would involve- 'The scope of the courts power to examine and determine the acts, interpret and apply laws, make orders and declare judgments. Geographic area, the type of parties who appear, the type of relief that can be sought, and the point to be decided may limit jurisdiction.'⁵

The whole notion of jurisdiction is vital in the context of dispute resolution because of the deeply rooted relationship between physical proximity and the effects of any legal activity. Jurisdiction enables the States to monitor and control the activities of property and persons within and across its territorial boundaries. The subjects of a sovereign States laws are primarily located within its physical borders and so are greatly affected by the application of its laws. Legal theories about sovereignty, territoriality and an entity's physical presence support the traditional notion of a Courts jurisdiction in its role as adjudicator. These schools of thought recognize the sovereign power of a State and the territorial origin and application of a set of laws. A key assumption in all these theories is that

a State, which is supported by the people of a particular area, makes laws⁶ which will only be valid, applicable and enforceable within its territory.⁷

Cyberspace, which constitutes a technology-driven imaginary space, defies control by mechanisms evolved in the real world essentially based on geopolitical boundaries. It is a new social order, which cuts across cultures, civilizations, religions, etc. and creates a "new realm of human activity"⁸ forcing mankind to rethink the appropriateness of extending the existing rules to it. Cyberspace clearly disregards the general correspondence, existing in the real world, between physical borders and 'lawspace'—based on considerations of power, effects, legitimacy and notice.⁹

The law, in the "non-virtual world", works essentially on a two-way premise that a certain set of legal rules is applicable to only one set of persons, who are present within the limits of the sovereign prescribing such rules, and to none other; and that a certain set of persons are required to comply with only one set of standards, and with none other. It is this perception, which having been mutually recognized and accepted by most sovereigns gives the requisite strength and legitimacy to each sovereign to enforce its legal rules within its territory. However, the case with the cyber world is different as it admits of no territory or polity based borders sufficient to impose a certain set of rules to a certain territorially defined set of persons. This leads each cyber actor to act according to his own legal order (or perhaps no legal order at all), leading to blatant violations of what may be guaranteed rights under other legal regimes. Litigation involving the internet has thus increased as the internet has developed and expanded.¹⁰

IV POSITION IN UNITED STATES

A court does not have power over every person in the world. Before a court may decide a case, the court must determine whether it has "personal jurisdiction" over the parties. A plaintiff may not sue a defendant in a jurisdiction foreign to the defendant, unless that defendant has established some relationship with that forum that would lead him to reasonably anticipate being sued there. In the U.S., the Due Process clause of the Constitution's Fourteenth Amendment sets the outermost limits of personal jurisdiction.¹¹

There broadly two bases for a US court to exercise jurisdiction. They are: Firstly, Territoriality and secondly Jurisdiction over out of state defendant. Needlessly, physical presence of the defendant has always been a basis for personal jurisdiction. This is permitted over people who are within the territorial borders. Here, physical presence shall play the determining role, even when an out-of-state individual enters the forum state for a brief time. In case of out-of-state defendant who is not physical present, a US court requires to satisfy two broad principles,¹² firstly, there must be authority with the court to try the case (i.e court must have jurisdiction) and secondly, due process clause of the Constitution must be satisfied.

If a party has substantial systematic and continuous contacts with the forum, a court may exercise jurisdiction over a party for any dispute, even one arising out of conduct unrelated to the forum. This is known as general jurisdiction. For example, a corporation or person can always be sued in its state of residence or citizenship or its principal place of business, regardless of whether or not the claim arose there. If a party is not present in the state or does not have systematic and continuous contacts with the state, courts may exercise jurisdiction over a party for causes of action arising out of his contacts with the state, or arising out of activities taking place outside the state expressly intended to cause an effect within the state. This "effects" test is described from the American Law Institute's Restatement (Second) of Conflict of Laws 37 (1971), which provides: "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."¹³

To do this, the court must look to the state's "long-arm" statute¹⁴, which sets the parameters for the state's exercise of its constitutional power to govern conduct by non-citizens (including both Americans and foreigners). Long-arm statutes vary widely from state to state. In order to be subject to personal jurisdiction in a state that is not his domicile, not only must a person fit under the ambit of the state's "long-arm" statute, but also the state's jurisdiction must be valid under the Due Process Clause of the Fourteenth Amendment. The Supreme Court set the standard for constitutional exercise of jurisdiction in *International Shoe Co. v. Washington*¹⁵. Pursuant to the Due Process Clause¹⁶, a nonresident defendant may not be sued in a forum unless it has first established sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." In addition, the nonresident's "conduct and connection with the forum [must be] such that he should reasonably anticipate being hailed into court there."

This test relies on courts to decide, according to "traditional notions of fair play and substantial justice," what contacts are sufficient.¹⁷ Courts will generally hold that contacts are sufficient to satisfy due process only if the nonresident "purposefully availed" itself of the benefits of being present in, or doing business in, the forum. According to the plurality of the Supreme Court in *Asahi Metal Industry v. Superior Court*¹⁸, a connection sufficient for minimum contacts may arise through an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State, but advertising or marketing in the forum state may fulfill the deliberate availability requirement. There must be clear evidence that the defendant sought to serve the particular market. If the minimum contacts test is met, a court may only exercise jurisdiction if it is "reasonable" to do so. In determining reasonableness, a court must weigh and consider the burden on the defendant to litigate in the forum, the forum state's interests in the matter, the interest of the plaintiff in obtaining relief, efficiency in resolving the conflict in the forum, and the interests of several states in furthering certain fundamental social policies.

In sum, under U.S. law if it is reasonable to do so, a court in one state will exercise jurisdiction over a party in another state or country whose conduct has substantial effects in the state and whose conduct constitutes sufficient contacts with the state to satisfy due process. Because this jurisdictional test is ambiguous, courts in every state of the U.S. may be able to exercise jurisdiction over parties anywhere in the world, based solely on Internet contacts with the state.¹⁹

V JURISDICTION FROM INDIAN PERSPECTIVE

Effective legal machinery can be identified on how properly rules and regulations are drafted by legislators and more importantly how precisely principles of jurisdiction are laid down. A court must have jurisdiction, venue, and appropriate service of process in order to hear a case and render an effective judgment.

In India Jurisdiction of civil courts is divided into three categories: 1). Pecuniary, 2). Subject matter, and 3). Territorial

The term pecuniary jurisdiction means jurisdiction that is based upon monetary limits. Here the jurisdiction of civil court to deal with suits is dependent on the total value of the suit. It is the value of the suit it would be decided as to which court would be competent to deal with the case. For example, if the claim is below Rs. 1, 00,000, then the appropriate court would be Civil Judge (Junior Division). But if it is more than Rs. 1, 00,000, then the appropriate court shall be the Civil Judge (Senior Division).

There can be instances when jurisdiction for certain subject has been exclusively vested in a particular court. In such case it is termed as subject matter jurisdiction. For e.g. a petition for winding up of a company can be filed only in the concerned High Court.

Territorial jurisdiction is subject to pecuniary and subject matter jurisdiction.

To take some examples: According to the Code of Civil Procedure 1908 (CPC), a suit for any immovable property such as land, building etc can be filed in the court within whose jurisdiction the property is situated (Sec. 16 CPC). As per the proviso to Section 16 of the C.P.C a suit for compensation for wrong to immovable property, held by the defendant, where the relief sought can be obtained entirely through his personal obedience, can be filed in the court having jurisdiction over the place where the property is situated or where the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Where the immovable property is situated within the jurisdiction of different courts, the suit may be instituted in either of the said courts (vide S.17 CPC).

Therefore, disputes between the parties relating to immovable property, arising through the Internet or otherwise, do not present any difficulty as to the jurisdiction of the civil court to entertain and resolve the suit which as discussed above depends upon the location of the immovable property, subject to one exception as stated above.

According to S.19 of CPC, which deals with, compensation for wrong done to a person or to a movables, then in such case if the wrong was done within the jurisdiction of one court and the defendant resides, or carries on business or personally works for gain, within the jurisdiction of another court, a suit can be filed at the option of the plaintiff, in either of the courts having jurisdiction over the said places. Since plaintiff is the aggrieved party who files the suit, the law gives him the option to choose the place of suing from the stipulated alternatives wherever provided in law. On the other hand, since the defendant would have to defend himself, jurisdiction based on residence and works are to his convenience.

International and Municipal Jurisdiction The fact that international organizations, courts and tribunals have been created raises the difficult question of how to co-ordinate their activities with those of national courts. If the two sets of bodies do not have concurrent jurisdiction but, as in the case of the International Criminal Court (ICC), the relationship is expressly based on the principle of complementarity, i.e. the international court is subsidiary or complementary to national courts, the difficulty is avoided. But if the jurisdiction claimed is concurrent, or as in the case of International Criminal Tribunal for the former Yugoslavia (ICTY), the international tribunal is to prevail over national courts, the problems are more difficult to resolve politically.²⁰

The idea of universal jurisdiction is fundamental to the operation of global organizations such as the United Nations and the International Court of Justice (ICJ), which jointly assert the benefit of maintaining legal entities with jurisdiction over a wide range of matters of significance to states (the ICJ should not be confused with the ICC and this version of "universal jurisdiction" is not the same as that enacted in the War Crimes Law (Belgium) which is an assertion of extraterritorial jurisdiction that will fail to gain implementation in any other state under the standard provisions of public policy). Under Article 34 Statute of the ICJ only states may be parties in cases before the Court and, under Article 36, the jurisdiction comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. But, to invoke the jurisdiction in any given case, all the parties have to accept the prospective judgment as binding. This reduces the risk of wasting the Court's time. Despite the safeguards built into the constitutions of most of these organizations, courts and tribunals, the concept of universal jurisdiction is controversial among those states which prefer unilateral to multilateral solutions through the use of executive or military authority, sometimes described as realpolitik-based diplomacy.²¹

Provisions under Information Technology Act 2000

The Act talks about the widest jurisdiction power. It aims to bring within the jurisdiction of Indian court any act which is an offence under the Act. Section 1(2) of the Act states that: "It shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention there under committed outside India by any person." Also S. 75 of the Act is widely defined and it extends jurisdiction to any offence or contravention committed outside India by any person. Further, under this provision nationality of a person is not a relevant consideration. But in cases of cross border issues, the Act is silent.

VI. CONCLUSION

The lack of any appropriate legislation has been felt time and again. Cases of cyber frauds are regularly reported from different parts of the country, the most significant chunk being the various Ponzi Schemes which operate stepwise. In the first step people find mails in their inbox which informs them that they have won some lottery or prize, etc from some unknown sender who claims himself/herself to be some authority representing some organization but the condition to obtain the prize money is that the receiver of the mail is asked to pay certain amounts as part of the procedural requirements which is to be deposited through bank transfers.²² In the next step they are showed some fake award certificates and seals of some government bodies to make the whole transaction look real. Also the promise of confidentiality about the whole process, till it is complete, is taken from the receiver. Once a person falls to the trap and deposits the money asked for neither the person nor his organization can be found or traced. Such cases have mostly been reported from the smaller cities where people tend to get more attracted by such lucrative schemes. The law however is silent on such cases as the fraudsters cannot be traced, not even one of culprits involved, of the numerous incidents reported so far has been caught. Executive takes the plea of lack of technologically advanced resources and even if they succeed initially then there is no concrete law which can ensure that the guilty would be caught irrespective of territorial borders.²³

The law dealing with cyber fraud is, however, not adequate to meet the precarious intentions of these fraudsters and requires a rejuvenation in the light and context of the latest developments all over the world. The laws of India have to take care of the problems originating at the international level because the Internet, through which these activities are carried out, recognises no boundaries. A country may employ enforcement measures against a person located outside its territory on the grounds of reasonable circumstances to press charges, opportunity to be heard, courts having jurisdiction and principle of natural justice. So far no treaty or global organizations have been able to formulate uniform policy acceptable to the global forum. 1

The task of the inventors is to develop new technologies. On the other side, there are criminals who use those technologies for commission of more advance crimes. Legislatures, Executive and Judiciary are trying to control such crimes. It is a circle, and in between, it is the society who suffers. Society suffers sometimes with terror- as a new invention springs up, then with distrust- when the invention is used for anti-social activities and then with the hope as the law will catch holds the wrongdoers. As the wheels of justice become operational, such unsociable activities though cannot be eradicated fully are forced to reduce. To think that cybercrimes could be fully curbed- is fighting against reality, against the inevitable, that it cannot be removed/curbed fully. Legislators have taken a great step forward by enacting the IT Act 2000. Now it's a time for its proper implementation. ²

REFERENCES

1. Dr. G A Solanki, Associate Professor, Faculty of Law, The M S University of Baroda | 2. Fitzgerald B, Dow Jones & Co. Inc. v. Gutnick: Negotiating 'American Legal Hegemony' in the Transnational World of Cyberspace' (2003) 27 Melbourne University Law Review 590 | 3. See Keane J, Global Civil Society? (2003) Cambridge University Press, Cambridge | 4. See, Oberding JM and Norderhaugh T, A Separate Jurisdiction for Cyberspace? Available at jcmc.indiana.edu/vol2/issue1/juris.html, accessed on 25/9/12 | 5. Nygh PE. Butt P 9 (eds) Australian Legal Dictionary, Sydney, 1997 at 650 | 6. 'Vested right theory' postulates that all law is territorial in scope. This means that the law of a country, including the authority of its courts, does not extend beyond its territory but applies to all persons and property, situated within that territory. | 7. The concept of the exclusivity of State authority derives from the Positive School of law which belongs to the domain of John Austin. | 8. David R. Johnson and David G. Post, 'Law & Borders—The Rise of Law in Cyberspace' (1996) 48 Stanford Law Review 1367. | 9. Ibid | 10. Sachdeva A, International Jurisdiction in Cyber Space, available at <http://www.vaishlaw.com/article/Cyberspace%20Jurisdiction-Amit%20Sachdeva.pdf>, accessed on 28/9/12 | 11. Besty R, Principles of Jurisdiction, available at <http://cyber.law.harvard.edu/property99/domain/Betsy.html>, accessed on 24/9/12 | 12. Pennoyer v Neff 95 U.S. 714 (1877) | 13. Ibid | 14. See, Long Arm Statue, at http://en.wikipedia.org/wiki/Long_arm_jurisdiction, accessed on 29/9/12 | 15. 326 U.S. 310 (1945) | 16. See, Due Process Clause, available at http://en.wikipedia.org/wiki/Due_Process_Clause, accessed on 27/9/12 | 17. Ibid | 18. 480 U.S. 102 (1987) | 19. Ibid | 20. See, Jurisdiction of Civil Court under Civil Procedure, by Shradha Oja, available at <http://legalservicesindia.com/article/article/jurisdiction-of-civil-court-under-civil-procedure-code-508-1.html>, accessed on 2/10/12 | 21. Ibid | 22. See, Ascertainng Cyber Jurisdiction in Cyber Space: Jurisprudential Understanding and A Comparative Analysis, available at <http://airwebworld.com/articles/index.php?article=1022&print=Y>, accessed on 29/9/12 | 23. Ibid | 24. Ibid | 19 |