

## LEGAL POSITION OF ELECTRONIC CONTRACTS IN INDIA

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### *Abstract*

*Electronic contracts are a precious reward given to us by internet. It is one of the divisions of E-business. E-contracts are only different in their mode of occurrence as it takes place via medium of internet. By giving sanctity to this type of contract, business transactions worldwide have been put at an ease.*

*The aim of writing this paper is to highlight the expanded mode for formation of contracts via electronic mode and enlists the challenges, which may occur while making such contracts and suggesting the remedies to deal with the challenges. The paper consists of five sections. First section will give the introduction of the study which consists of nature and definition of electronic contract, essentials of contract, scope, advantages and disadvantages of Electronic contract. Second section of this paper is analytical study of the laws governing E-contracts in India. Third section enumerates the jurisdictional issues which are appended with formation of electronic contracts and Forth section enlists some case laws related to electronic contracts. Last section holds the conclusion from the author's perspective.*

*The methodology adopted for the purpose of writing is doctrinal research by way of collecting data from secondary sources such as Books, articles, journals, and judicial pronouncements.*

**Keywords:** E- contract, E-business, Jurisdictional Issues, Cyber Law, Consent

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## INTRODUCTION

### *Definition, Nature and Scope of Electronic Contract*

A contract refers to an agreement between the two private parties which creates mutual legal obligations for both of them. According to the Indian Contract Act, 1972, the definition according to Section 2(h) states that a contract is an agreement which is enforceable by law. E-contract can be defined as an agreement which has taken place through any electronic medium such as email, internet and fax and is enforceable by law i.e. it must fulfill the prerequisites of a valid contract as per Indian Contract Act, 1872.

Such contracts are not paper based but rather entered in electronic forms. An electronic contract is an agreement “drafted” and “signed” in an electronic form. An electronic agreement can be drafted in the similar manner in which a normal agreement is drafted.

E-contracts are born out of the need for speed, suitability, efficiency and ease of business. In recent times due to pandemic, there has been a shift in modes of doing business, and people are even more inclined towards electronic modes of contract. This popularity and practice calls for more strong and efficient laws to prevent fraud.

### *Essentials of an Electronic Contract*

Other than its mode of formation, an electronic contract is no more different from a contract which is entered into by conventional means and methods. Some of the following essential ingredients are discussed below which an electronic contract must contain:

- Offer to be made

An offer can be made personally through e-mail; fax etc. or the consumer may visit the website to browse the available goods and services showed on the seller’s website. The latter category is essentially an invitation to offer and hence this is not considered to be an offer. In response to the said invitation of offer, the seller has the choice whether to continue with that dealing or not. If yes, then it is required on the part of seller to make an offer to the willing party who first proposed him an invitation to offer. But still, if the buyer does not want to continue that dealing then in spite of giving acceptance on his part, for the time being he is at liberty to revoke his acceptance but subject to a condition that the said acceptance is

revocable at any time but before the completion of communication of acceptance against the proposer.

- *The offer needs to be acknowledged*

The acceptance is generally assumed after the offer is made by the consumer or in relation to the invitation to offer<sup>1</sup>. An offer can be revoked at any time until the acceptance is made. E contract can be accepted by the way of giving acceptance through e-mail or by filling the form online or by clicking on the 'I Agree' tab link.

- *Lawful consideration*

Section 2(d) of Indian Contract Act defines the consideration as an act or abstinence or a promise, done at the desire of the promisor, such act or abstinence or promise is called consideration<sup>2</sup>. Any contract which is to be enforceable by law must have a lawful consideration. A lawful consideration is one in which both parties get something in return and which fulfils the mandate of sec 23<sup>3</sup> and sec 24<sup>4</sup> of Indian Contract Act, 1872.

A valuable consideration in the sense of law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other<sup>5</sup>.

- *Contracting parties must be competent to contract*

Parties to a contract are deemed to be capable of entering into a contract, if they satisfy the requirements of section 11<sup>6</sup> and section 12<sup>7</sup> of Indian Contract Act, the section declares

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<sup>1</sup> Bangia R.K. , Law of Contract I, Allahabad Law Agency, 2018

<sup>2</sup> Cheshire & Fifoot , Law of Contract, Lexis Nexis , tenth edn. 2010

<sup>3</sup> Sec 23- What consideration and objects are lawful, and what not.-The consideration or object of an agreement is lawful, unless-The consideration or object of an agreement is lawful, unless-it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

<sup>4</sup> *Ibid.*

<sup>5</sup> Lush J, Currie v. Misa, (1875) LR 10 Ex 153

<sup>6</sup> Sec 11- Who are competent to contract.—Every person is competent to contract who is of the age of majority

following persons to be incompetent to contract

- i. Minors
- ii. Persons of unsound mind
- iii. Persons disqualified by law to which they are subject<sup>8</sup>.

One of the landmark judgments on the capacity of a minor to enter into a contract is *Mohiri Bibee v. Dharmodas Ghose*<sup>9</sup>, It was held in the above mentioned case that the Indian Contract Act, 1872 makes it mandatory that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act.

In English Law, contract by a person of unsound mind is voidable at his option if he satisfies the court that at the time of entering into the contract he was unable to understand the nature of contract and the other party knew it but in India the agreement of a person of unsound mind is absolutely void just like a contract of a minor<sup>10</sup>.

- *Free Consent*

Free consent is a *sine qua non* for a legally enforceable contract. Section 10 of Indian Contract Act, 1872 enlists 'Free Consent' as an essential factor for a valid contract. It has been defined under section 13 that the parties to contract must be doing the concerned act

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according to the law to which he is subject,<sup>1</sup> and who is of sound mind and is not disqualified from contracting by any law to which he is subject. —Every person is competent to contract who is of the age of majority according to the law to which he is subject,<sup>1</sup> and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

<sup>7</sup> Sec 12- What is a sound mind for the purposes of contracting.—A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. —A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

<sup>8</sup> Avtar Singh, *Contract & Specific Relief*, p. 152, Eastern Book Company, 10<sup>th</sup> Edn. 2008

<sup>9</sup> (1903) 30 IA 114 : 30 Cal 539

<sup>10</sup> *Mcchaiman v. Usman Boari* (1907)17 Mad LJ 78

after their meeting of minds only. If they are not agreed on the same thing in the same sense, then this does not meet the criteria given under the principle *Consensus ad idem* mandated by sec 13 of Indian Contract Act. While on one hand, the latter defines the term *Consent*, on the other side section 14 of Indian Contract Act gives us insight on the circumstances when consent can be said to be free-

Consent is said to be free if it is not caused by-

- i. Coercion (sec 15)
- ii. Undue influence (sec 16)
- iii. Fraud (sec 17)
- iv. Misrepresentation (sec 18) or
- v. Mistake (subject to provisions given under sections 20,21 and 22)

If the consent of a party is caused by coercion, undue influence, fraud, misrepresentation or mistake, the contract is always voidable at the option of the same party whose consent was so caused.

- *Intention to create legal relation*

While entering into a contract, there has to be an intention to create a lawful relation. If there is no intention on part of both the parties to create a legal relationship, the contract stands void due the lack of intention to create a lawful relation, not every loose conversation can be termed as a contract. The intention does not only mean intention to enter in a contract but also the intention to face the consequences whichever follows. In the famous case of *Balfour v. Balfour*<sup>11</sup> the court of appeal held; there are agreements between the parties which do not result in a contract within the meaning of contract law. Such arrangements do not result into contract at all, even if there may be some consideration for the agreement, such agreements are not lawful contracts because the parties did not intend to create a legal relationship between them and neither can they said to be ready for facing its consequences.

In those family agreements where parties intend to create a legal relationship between them

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<sup>11</sup> (1919) 2 KB 571

are certainly termed as contracts, such as an agreement between the relatives to share a house has been held to be binding<sup>12</sup>.

In an another leading case on this subject *Jones v. Padavatton*<sup>13</sup> where a mother persuaded her daughter to leave her attractive job and per sue legal education in England, for which she promised to bear all the expenses and also providing her the place of living. Later on after five years when her daughter could not complete her education, and got married, the mother stopped sending allowances and started her eviction proceeding from her property. It was held that the daughter had to leave her attractive carrier and gone to other country for education and the mother could not get out of her promise under these circumstances. The agreement between them is undoubtedly resulting in a contract. Mother's appeal was allowed on the ground that she only agreed to support her daughter and not her husband, since the daughter got married and could not complete her education; she was not entitled for getting any allowances.

## **TYPES OF E-CONTRACT**

*Electronic Contracts are generally of three types-*

- *Shrink-wrap*

These are usually licensed agreements which are applicable in case of Software products buying. As soon as the person purchasing the products opens the software, the terms and conditions to access the software are taken to be automatically accepted and the same are then enforced upon the buyer. These agreements are accepted by the user at the time of installation of the software from a CD-ROM.

In India there is no judicial decision till date on validity of a shrink-wrap agreement.

- *Click Wrap or Web-Wrap*

These agreements are web based and it requires the consent of the buyer or the visitor of the page or software by clicking 'I Agree' or 'I Accept', by clicking on such buttons the acceptance of the user is recorded and his agreement upon all terms and conditions of

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<sup>12</sup> *Parker v. Clark*, (1960) 1 WLR 328

<sup>13</sup> (1969) 2 All ER 616

contract is considered. Those users who after reading the terms and conditions do not agree with it are not allowed entering the software or website.

- *Browse-Wrap*

This type of agreement generally intends to be binding upon two or more parties by the use of website. In case of a browse wrap agreement, a regular user of a particular website is deemed to accept the terms of use and other policies of the website for continuous use.

## **ADVANTAGES AND DISADVANTAGES OF CONTRACT THROUGH ELECTRONIC MEDIUM**

After doing an analysis of advantages and disadvantages of formation of electronic contracts, we find that on one hand the mode of entering into electronic contracts is simple, easy accessible and time saving while on the other hand, the public at large faces various complexities when it comes to seek any remedy for breach of their rights. Let us first discuss the pros or advantages of electronic contracts.

### ***Advantages***

- *Ease of access in contracting online*

Getting your documents attested online is fast which saves the time of both the parties. The contract can be accessed at any time and at any place and just needs a functional internet connection.

- *Ensures Fast Business*

Online contracting is a fast method to get the documents signed instantly. On the other hand, physical contract needs to be sent through a post or courier or through any person, which is time-consuming. It helps to keep one's business in a very effective and quicker operating mode irrespective of the fact that the contracting parties reside in different localities.

- *Improves Document Accuracy*

It is certainly be troublesome to verify documents physically. But the situation becomes more pathetic when at some later stage, it comes to the knowledge that one of the parties has missed out filling crucial information or failed to sign on an important page which creates too

much chaos in formation of a contract. But such a scenario can be easily overcome by shifting towards an advanced approach from a conventional one. By using digital signatures or by marking mandatory fields digitally, e transactions get to be prompted within a short span of time. It also makes an error to be rectified much conveniently and efficiently. It saves time and reduces the hassle of having to bug the signer to resend the application and re-verify it patiently<sup>14</sup>.

- *Save your time and money*

Electronic Contracts save time and money of contracting parties because of the fast speed and access of internet in every nook and corner of the world. The documents via internet can be shared within seconds and does not require any other expense of telecommunication or transportation.

### ***Disadvantages***

- *Security Issues in E-contract*

The moment you enter the global world of internet or the cyberspace, your personal and sensitive data becomes available in public domain. It can be leaked at any time and the privacy of user is constantly in danger. Hence, e-contracts must be entered into carefully and cautiously.

- *Restricted Storage*

Some of the electronic firms, which we generally use to sign for, have limited storage which makes it difficult for them to store all the documents on their servers. It leads to the dependency on other sources which today has become a concern for many stakeholders who are bothered about the confidentiality of their sensitive information. In such cases, one needs to ensure that the vendor can allow access to the digitally signed documents server according to Defense standards.

- *Dependency on Proprietary Software*

Electronic signature relies on proprietary software, which can be a concern for businesses that do not want to depend on other vendors for contracting. To overcome this, one must

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<sup>14</sup> Shreen Abdin, (2019, Oct 1) .Electronic Contract Pros & Cons, Available at: <https://www.lawyered.in/legal-disrupt/articles/electronic-contracts-pros-and-cons/>



choose a vendor that complies with digital signature standards set by the National Institute of Standards and Technology.

## **LAWS RELATED TO E-CONTRACT**

- *Indian Contract Act*

Various Provisions of Indian Contract Act are applicable on E-contracts as E-Contracts are only different in the mode but otherwise they need to satisfy all the prerequisites of a valid contract.

- *Legal Recognition of E-Contracts*

The objective behind enacting Information Technology Act was to protect and encourage E-commerce. It is based on Model Law on Electronic Commerce which was adopted by United Nations Commission on International Trade Law. Section 2 covers the various definition such as Computer network, Computer System, Cyber security, Data, Digital signature etc.

Chapter 2 of Information Technology Act provides recognition to Electronic signature and digital signature.

- *Section 10 A of Information Technology Act, 2000*

Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of electronic records, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose<sup>15</sup>.

The language used by the legislature makes it clear that electronic contracts are to be treated as any other general hard-copy contract and it cannot be questioned on the ground of being signed virtually.

- *Section (11) of Information Technology Act, 2000*

An electronic record shall be attributed to the originator-

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<sup>15</sup> Section 10 A, Information Technology Act, 2000

- a) If it was sent by the originator himself;
- b) By a person who had the authority to act on behalf of the originator in respect of that electronic record; or
- c) By an information system programmed by or on behalf of the originator to operate automatically<sup>16</sup>.

- *Section (12) of Information Technology Act, 2000*

Section 12 talks about the modes of providing the acknowledgement of receipt to the contracting party if a particular medium is not stipulated in the contract.

- *Section (13) of the information technology Act, 2000*

Section 13 discusses the time and place of dispatch and receipt of electronic record.

### *Identity Theft and Impersonation*

The It Act provides that the identity of a person shall be deemed to have stolen when any unique identification of a person (such as digital signature or password) is fraudulently or dishonestly used. The act prescribes for imprisonment up to 3 yrs and fine up to INR 1 Lakh.

### *Digital Signature*

When a contract is entered into through an electronic mode, it is necessary for the enforcement of such contract to establish the genuineness of the transaction to prove that the proposal emanated from the originator and acceptance was signified by the acceptor from the appropriate persons. The signature of the parties is taken into consideration. It is a personalized thumb print and it is the encryption of an electronic document using a private key .It performs three different functions in order to ensure the security of the system and genuineness of the transaction:-

S.No.	Particulars (A)	Particulars (B)
1.	<b>Data integrity</b>	A digital signature helps in getting information in

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<sup>16</sup> Sec 11 of Information Technology Act, 2000

		case of any tampering with data, file or any message.
2.	<b>Data authentication</b>	A digital signature helps in verifying the initials of the person signing the message.
3.	<b>No chance of disown</b>	- No message signed and sent could be disowned by the receiver <sup>17</sup> .

- *Indian Evidence Act, 1872*

The evidentiary value of electronic contracts has been given recognition and can be understood in the light of various sections of Indian Evidence Act, 1872. Sec 65B of the Indian Evidence Act deals with the admissibility of electronic records. As per Sec 65B of the said Act, any information contained in an electronic record produced by the computer in printed, stored or copied form shall be deemed to be a document and it can be admissible as an evidence in any proceeding without further proof of the original subject to following conditions which must be satisfied, such as:

- The computer from where it was produced was in regular use by a person having lawful control over the system at the time of producing it,
- During the ordinary course of activities the information was fed into the system on a regular basis,
- The output computer was in a proper operating condition and has not affected the accuracy of the data entered.

## JURISDICTIONAL ISSUES IN ELECTRONIC CONTRACTS AND EMERGING CHALLENGES

Jurisdictional issues in electronic contracts are bound to arise since the positive limits of classic statute do not fit in the eternity of the internet. Since these agreements exist in borderless environment, issues generally arise as to where to initiate legal action and what laws will be followed when the individual with whom contract is made resides outside a

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<sup>17</sup> [2006] EWHC 813 (Ch) (07 April 2006)

jurisdictional area. The boundlessness of the internet and the instantaneous transactions provides a tough opportunity for the courts to ascertain their jurisdiction upon the disputes concerning E-contracts.<sup>18</sup>

The Delhi High Court tried to determine the dispute over jurisdiction on the virtual space in *Banyan Tree Case*<sup>19</sup> in the year 2009. The plaintiff contended that the court had the jurisdiction to hear the present case because the defendants even after residing outside the jurisdiction offered services within the jurisdiction of the court. The Court held that, since there is no long-arm statute in India for purpose of passing off action against the defendants, the plaintiff needs to satisfy the court that the defendants purposefully availed itself to the jurisdiction of the court.

The British Columbia Court of Appeal decision in *Brain Tech Inc v. Kostiuk*<sup>20</sup> provides the probable circumstances when a judgment can be enforced in another jurisdiction. Kostiuk was alleged to have used the internet to publish defamatory information about Brian Tech. Brian Tech obtained a default judgment in Texas on which he commenced action in British Court of Columbia. The court took the jurisdiction despite the tenuous link between the two courts<sup>21</sup>.

### *Cross Border Issues*

Section 75 of Information Technology Act was amended in 2008 to remedy this problem and enact laws that are operative outside India. It provides punishment for commission of any offence through a computer system, by a person outside India irrespective of his nationality, if the act committed involves a computer system or network located in India. In absence of any specific legal framework for cyberspace in India, reliance is generally placed upon foreign judgments of those states which have developed the concept of cyber jurisdiction.

## **EMERGING CHALLENGES RELATED TO ELECTRONIC CONTRACTS**

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<sup>18</sup> Rishabh Aggarwal, (2019, Dec 15), *Jurisdictional Issues in E-Contracts*, Available at: <https://www.legalbites.in/jurisdictional-issues-in-e-contracts/>

<sup>19</sup> *Banyan Tree Pvt. Ltd. v. A. Murali Krishna Reddy*, CS (OS) 891/2008

<sup>20</sup> (1999), 171 DLR (4<sup>th</sup>) 46 (CA)

<sup>21</sup> Mishra Sachin, *Determining Jurisdiction over E-commerce disputes in India*, Available at: <https://www.manupatra.com/articles/>

*Contract with minor*

It is not possible to determine the age of the person while entering into a contract through internet, neither does a contract require the age verification by legal documents. Generally the person himself declares that he is a major. The other party who entered in the *bonafide* legal relation has to suffer its consequences in case of non-enforceability of contracts against those who are exempted from every liability.

*Quality of the goods delivered*

While placing an order or making a contract for goods the quality of goods cannot be verified by the purchaser later on they have to suffer losses in terms of money and time. Cyber fraud is easier to commit as the identity of actual offender can easily be hidden.

**CASE STUDY****Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.**

The Hon'ble Supreme Court of India has passed an important verdict concerning the scope of determination of the existence of an arbitration agreement from correspondence between the parties under the Arbitration and Conciliation Act, 1996. The apex court was of the opinion that the existence of an arbitration agreement can be inferred from a document signed by the parties or an exchange of emails, letters, telegrams or other means of communication which provides a record of the agreement<sup>22</sup>.

**Arizona Retail System Inc. v. Software Link**

A question arose as to the building nature of the shrink wrap contracts in relations to the original copies of the software. Arizona Retail System Inc. purchased software from software link .There was a shrink wrap attached along with the real copy at the time of delivery. However , several other copies were sent later on to Arizona Retail System Inc. and shrink wrap was not attached to them . The U.S. district court for the district of Arizona held that shrink wrap applies only to the original copies<sup>23</sup>.

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<sup>22</sup> 2010 (1) SCALE 574

<sup>23</sup> *Hotmail Corporation v. Van \$ Money Pie Inc.* 47 U.S.P.Q.2d (BNA)1020,1998 US Dist, 1998 WL388389 (N.D.Cal.Apr.16,1998)

**LIC India v. Consumer Education & Research Center**

The case relates to a policy issued by Life Insurance Corporation of India consisting of certain terms in the name of Public Purposes.

The Court noted that ‘In dotted line contracts there would be no occasion for a weaker party to bargain so as to assume themselves to have an equal bargaining power. He has either to accept fully or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever.’<sup>24</sup>

**Pro CD Inc. v. Zeidenburg**

It was held that the defendant is bound by the terms of the license as he clicked on the box containing “I agree” thereby indicating his assent to be bound<sup>25</sup>.

**CONCLUSION**

With the recent advancement within the areas of engineering, computer technology and software, technology has resulted in advancing the quality of living for individuals in a commendable manner. The communication between individuals isn't restricted because of the constraints of geographical area and time. Information can be transmitted and received widely and more rapidly than ever. The electronic commerce offers the pliability to business setting in terms of place, time, space, distance, and payment. With the expansion of e-commerce, there's a speedy advancement within the use of e-contracts. E-contracts provides measures compatible to facilitate the re-engineering of business processes occurring at several companies involving a composite technologies, processes, and business methods that aids the speedy exchange of knowledge.

The e-contracts have their own merits and demerits. On one hand they cut back costs, saves time, fasten client response and improve service quality by reducing paper work, thus increasing automation. Simultaneously on the other hand, the law governing e-contract lacks certain provisions like -there is no provision to determine the intention of the parties to enter into a legal relationship. With this, E-commerce is expected to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an on-line

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<sup>24</sup> 1995 SCC (5) 482

<sup>25</sup> *Pro CD. Inc. v. Zeidenberg* 86F .3d 1447 (7<sup>th</sup> Cir.1996)

global market place with millions of customers and thousands of products and services.

The cyberspace keeps the world interconnected, but the threats related to it cannot be denied. These jurisdiction related issues remain unsolved because owing to lack of technological advancements tracing the accurate jurisdiction of the parties becomes difficult as it involves three types of jurisdiction, one is of the originator, second is of the addressee and third is of the region where the host server is located.

Since the IT Act only provides for admissibility of electronic records and sets out the punishment but it is just an enabling statute. There is a need for special legislation regarding online transaction as there is no specific legislation which specifically governs online transactions and determine the jurisdiction. In the matters relating to website the precedent till now allow the plaintiff to sue the defendant anywhere in India where his website can be accessed, without considering the defendant's convenience.

There is lack of digital literacy among masses so they become more prone to cyber-crime and rate of conviction is very low. For resolving the issue education and digital literacy has a huge role to play. There is a need to comply with cyber ethics for every individual while using cyberspace. At the same time spreading awareness about the threats related to cyberspace, the ways to prevent it and available effective remedies upon breach are necessary.