# The curious case of personal jurisdiction for cyber-based transnational transactions in India: Does one size fit all?

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The advent of the internet has led to mass-communication like no other. Everything one wants is at the tip of our fingers now, thanks to mobile phones, laptops, iPads and the likes. Mass consumerism has seen an exponential increase in the last ten years. If one needs to buy quirky stationery, we have the likes of Amazon and Chumbak online; if one wants to watch the latest episode of Brooklyn Nine-Nine, Netflix does the needful; if we wish to read multiple newspapers, while also saving papers, multiple Apps such as InShorts exist. Platforms such as these stream large quantities of data across the globe, thus bringing the world closer, but also leading to certain jurisdictional issues in case of litigations. Such activity requires a cross-cutting need and definition of personal jurisdiction.

Personal jurisdiction relates to the jurisdiction of a Court to adjudge a dispute between parties. The general rule is that to exercise such jurisdiction, physical presence is mandatory. As such, jurisdiction *in personam* is not to be exercised over a person who is not subject to the jurisdiction of courts. This has become a commonly accepted principle domestically and globally. However, the advent of technology and the pervasiveness of the world wide web has led to massive debates in this regard. How is personal jurisdiction then to be adjudicated for matters of cyber torts, or that of defamation that takes place online? In the context of the internet, personal jurisdiction oft refers to and deals with websites or services on the internet that deal with advertisements or promotions of business or brands online in their home State but debate their liability to be litigated within another foreign State. However, courts in the United States, Europe and, India are now determining how to assess and enforce such jurisdiction.[1]

# Understanding Personal Jurisdiction: the United States and Europe

## A. The United States

In the United States ["the US"], the criteria of "certain minimum contact" with the jurisdiction where the cyber transaction has occurred must be met to assess personal jurisdiction. This aligns with the Long Arm Statute of the United States of America. Traditionally, in *International Shoe* v. *Washington,* the Supreme Court held that a defendant may be held liable for such cross-border issues if they have at least a *minimum level of contact* with the State that seeks to hold them liable and there must be a reasonable expectation of being sued in that State.[2] In this regard, courts in the US have held that mere advertisements on a website are not enough to hold a defendant liable for a cross-border tort and to exercise personal jurisdiction there.[3]

Before this, however, was the iconic case, *Calder* v. *Jones*,[4] where the Court, in 1984, held that where an action is targeted at a particular forum, even if there is minimum contact, the *"effects" test* may be applied. In this case, an article was written and edited in Florida, the article concerned a resident in California and relied on sources in California, and thus, the Court held that the intentional tortious act was "expressly aimed at California". This test essentially, thus, lays down that where an act is done intentionally, has an effect within the forum state and is directed or targeted at the forum state, then jurisdiction will be satisfied.[5] Thus, the effects test is useful when the exact nature of the defendant's internet activities need to be assessed *vis-à-vis,* injury caused to a resident elsewhere, in a different State.[6]

The legal position in the US has been seemingly settled, off late, in this regard in *Zippo Manufacturing Co. v. Zippo Dot Com Inc*,[7] which rendered the famous *Zippo Test*. Per the Zippo Test, a finding of jurisdiction would be contingent upon the nature of the website and sought to employ a sliding scale test. It further laid down two important points:

1. The interactive nature of the site, which would aid in quantifying the extent of the damage so caused;
2. The harmful effect within the jurisdiction of the concerned state.

Per *Zippo*, websites are of three kinds- websites that conduct business over the internet; websites where users exchange information with the host computers; and websites that do little more than present information.[8] However, this has been criticized for not providing enough information on the assessment of the extent of interactivity of the website to justify purposeful availment.[9]

Multiple cases, however, well into the 2000s, yet apply the *Calder* case. For instance, in *Blakey v. Continental Airlines*,[10] the minimum contacts test was applied along with the effects test to assess "proper jurisdiction". This was further cemented by *Young v. New Havem Advocate*,[11] where two Connecticut newspapers defamed the warden of Virginian prison. Here, the court assessed the issues based on the *Calder* test once again and opined that proof must be derived that the defendant's internet activity is expressly targeted at or directed to the forum State. Similarly, in *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme*,[12] the *Calder* test was applied once again to establish personal jurisdiction between two French organizations and Yahoo (an American company). Thus, it seems more appropriate to say that Courts in the US, first apply the Zippo Test, but then apply the effects test as laid down in Calder to have a wholly encompassing test.

# B. European Standing

In the European Union ["EU"], the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ["Brussels Convention"][13] regulates acts concerning torts, delict and quasi-delict under Art. 5(3) and thereby, a defendant may be sued in the court of the place where the harm has occurred.[14] The leading law on the matter of defamation can be found in *Shevill & Ors.* v. *Presse Alliance S.A.*,***[15]*** where a libellous article was published in one place but distributed across multiple jurisdictions. Here, the ECJ devised what came to be known as the mosaic approach and held that the place where the harm has occurred includes:

1. the place where publisher resides, or where the defamatory statement came into existence, or the place of publication;

2. the place of distribution or where the material was read and received.

This approach was also applied in *Handelskwekerij G J Bier B. V.* v. *Mines de Potasse d'Alsace SA*, where the Court held that the "place where the harmful event occurred" must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.[16] However, this approach has led to criticism that it enables forum shopping for the plaintiff.[17] This approach suggests that the plaintiff may choose the more convenient forum under Art. 5(3) as one forum may have a more liberal approach to prove defamation than another.

Article 5(3) was subject to further interpretation in 2011 when the ECJ held that a person may bring an action for liability when their rights have been infringed on the internet before:

1. the courts of the Member State in which the publisher of that content is established; or
2. before the courts of the Member State *in which the centre of his interests is based;* or
3. the courts of each Member State in the territory of which content placed online is or has been accessible.[18]

This position has since been challenged in the *Svensk Handel* case, wherein Article 7 of the Brussels Recast Regulation (similar to Article 5(3)) was assessed.[19] Here, while the Court didn't expressly reject the Mosaic Approach, it did, however, lay down that "the centre of interest" must be located and interpreted broadly to include residence, where the most harm occurs. However, the Court laid down an important safeguard by stating that any order for the takedown of insulting content cannot be initiated in every Member State where the website is accessible. Since the earlier days till now, there seems to be a newfound cogency in the application of personal jurisdiction for defamatory matters in the EU.

# Banyan Tree Holdings and the

# Indian Position

In the case of *Banyan Tree Holdings* v. *A. Murali Krishna Reddy*,[20] the plaintiff is part of the hospitality business and has since 1994, used the word mark, "Banyan Tree" which has now acquired a secondary meaning. It also maintains websites that use the mark and are accessible in India. However, in 2007, the defendants began work on Banyan Tree Retreat and hosted a website which directed to a "Banyan Tree" project. The Plaintiffs contended that the use of this mark is dishonest and aimed at encashing on the reputation and goodwill of the Plaintiff. They also claim that it would lead to confusion and deception if such usage was so allowed.

In this case, the Court found that the website of the defendant is accessible in Delhi and is thus, not a passive website, as derived from American laws. Further, the defendant also sent a brochure to Delhi regarding their property's sale. In this case, parties relied on the holdings and observations of *International Shoe Co.*, the *Zippo Test* of "sliding scale", *Cybersell Inc.* and the effects test in *Calder*, among multiple other American cases on the same issue. It then discussed cases from Australia and Canada before assessing the Indian Position on the same.

In India, there seems to have been some form of debate on such issues. In a similar factual matrix as *Banyan Tree*, the Delhi High Court in *Casio India Ltd.* v. *Ashita Tele Systems Pvt Ltd*.***[21]*** held that even a mere likelihood of deception on the internet would entertain an actual action for passing off and no actual deception needed to be proven. Thus, the mere accessibility of the website from Delhi could invoke the Court's jurisdiction. However, in another case,[22] the Court held that the mere accessibility of a website from one jurisdiction may not be enough or sufficient for a court to exercise its jurisdiction.

In *Banyan Tree*, on an analysis of these positions, Justice Muralidhar found that essential principles developed in other jurisdictions may be seamlessly adopted into our own.[23] The Court chose to disagree with *Casio* and held that a passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction.[24] Further, it observed that the degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be examined while adjudging the "effects" test.[25]

Additionally, there is a need to assess whether the Plaintiff can show a prima case that the specific targeting in the forum State by the Defendant resulted in an injury or harm to the Plaintiff within the forum state.[26] The Court thus chose to apply the "effects" test with the "sliding scale" taste, this reconciling the application of the *Calder* test with the *Zippo* Test in India.

On the matter of jurisdiction, the Court held that to establish a prima facie case under Section 20(c) of the Code of Civil Procedure, 1908 ["the CPC"], the Plaintiff will have to establish that irrespective of the passive or interactive nature of the website, it was targeted specifically at viewers in the forum State, which in this case would have been Delhi.[27] They will then have to establish that there has been specific harm or injury caused to it by the Defendant's actions.

# Conclusion: Certainty in India's Position?

In India's case, it has become abundantly clear that cross-border defamation will be adjudged as per Section 19 of the CPC, as per the residence of the defendant or where the wrong has been done. Additionally, India also follows the double actionability rule to adjudge applicable law in such matters. However, if the tort is committed outside India, then Section 19 yields to Section 20 of the CPC, and the territorial jurisdiction is adjudged as such.[28] The factors relating to the cause of action and its assessment have been discussed in multiple cases. For instance, online sale of property in a different jurisdiction did not constitute sufficient cause of action for courts in Kerala.[29] However, while the test in *Banyan Tree* may be quite descriptive, Muralidhar J. opines that it does not lay down a "one size fits all" test,[30] in the sense that while it is foolproof for an online commercial transaction and intellectual property issues, it does not cover the area of torts such as defamation.

In a differing opinion, in *World Wrestling Entertainment, Inc. v. M/s Reshma Collection & Ors*,[31] the Appellant was a Delaware based company providing the online sale of digital merchandise to customers world over and also in Delhi and held the trademark for the same. Here, the Court held that due to the spontaneous nature of the transactions (offer and acceptance and payment of consideration) over the internet, the cause of action is deemed to have occurred

at the place the customer carried out his part of the transaction.[32]

The jurisprudence in such torts is still developing in India and largely follows the double actionability rule. The double actionability rule is the foundation or cross-border torts, particularly, defamation.[33] This rule lays down two points:

1. The act must be "actionable" as a tort in England; and
2. The act must be "non-justifiable" by the law of the place where it was committed. (this was eventually overruled by *Boys v. Chaplin*)[34]

This rule was further discussed and upheld in *Govindan Nair* v. *Achuta* Menon,[35] when the then Raja of Cochin (which was at the time an independent Indian State), sent a communication to the plaintiff excommunicating him from his caste in British India. The High Court applied the rule but dismissed the case as there was no trace of malice. In more recent times, the order in *Baba Ramdev and Anr.* v. *Facebook Inc.*,[36] is highly interesting. The allegation here was that a book based on the plaintiff was being circulated on a global basis by social media platforms, such as Facebook. The basic issue here was whether a global takedown order could even be passed by the Court. The Court essentially held that:

1. If the content was uploaded in India, or from IP addresses in India, the content had to be taken down, blocked/ restricted on a global basis;[37]
2. However, if uploaded from outside India, the Court cannot exercise its jurisdiction.[38]

Such exercise of jurisdiction has also been discussed in *YouTube v. Geeta Shroff*, wherein the Court held that any exercise of jurisdiction must be done assuming that the internet transaction is one akin to a real-life transaction, thereby ensuring that the Court cannot assume extra-territorial jurisdiction on the matter.[39]

Julia Hornle points out that the laws in the US are quite liquid on the point of personal jurisdiction and can be used to adapt to multiple scenarios.[40] However, tests in India have seemingly been fact-specific and not one test that can cover the entirety of actions that take place on the internet. Thus, courts may exercise jurisdiction either very broadly or very narrowly. However, this does not mean that India does not follow any minimum standard. The laws laid down in the US and other common law jurisdictions have gone a long way in establishing India's position on personal jurisdiction in matters of cyber-transactions. Thus, it

is easy to conclude by saying India has given the concept of personal jurisdiction a wide berth and a multi-dimensional interpretation and one can hope to have a "one size fits all" criteria in the foreseeable future, as Courts get better acclaimed with the use of and the advancement of technology in all fields – legal, commercial

[1] TiTi Nguyen, *A Survey of Personal Jurisdiction based on Internet Activity: A Return to Tradition*, 19 Berkeley Tech. L.J. 519 (2004).

[2] International Shoe v Washington, 326 U.S. 310 (1945)

[3] Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997)

[4] Calder v. Jones, 465 U.S. 783 (1984)

[5] *Id.*

[6] Dudnikov v. Chalk & Vermilion, 514 F.3d 1063 (10th Cir. 2008).

[7] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119

[8] *Id;* Christopher Wolf, *Standards for Internet Jurisdiction*, FindLaw (May 03, 2016), https://corporate.findlaw.com/litigation-disputes/standards-for-internet-jurisdiction.html

[9] *No Bad Puns: A different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821, 1833 (2003).

[10] Blakey v. Continental Airlines, 751 A.2d 538 (NJ 2000)

[11] Young v. New Havem Advocate, 315 F 3d 256 (4th Cir, 2003)

[12]Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme, 433 F.3d 1199 (9th Cir. 2006)

[13]Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Regulation 44/2001 (Dec. 22, 2000)

[14] Article 5(3) allows for two jurisdictions – the place of domicile of the defendant OR the place where the harm has occurred; Handelskwekerij G. J. Bier

B.V. v Mines de Potasse d'Alsace S.A. (preliminary ruling requested by the Gerechtshof of The Hague) (Case 21/76) [1976] ECR 1735, [1978] QB 708, [1977] 1 CMLR 284.

[15] Shevill & Ors. v. Presse Alliance S.A., Case C-68/93 [1995] 2 W.L.R. 499

[16] Handelskwekerij G J Bier B. V. v. Mines de Potasse d'Alsace SA, Case 21/76 [1976] E.C.R. 1735

[17] Christopher Forsyth, *Defamation under the Brussels Convention: A Forum Shopper's Charter?*, 54(3) Cam. L.J. 515 (1995)

[18] eDate Advertising GmbH and Others v X and Société MGN Limited, Cases C-509/09 and C-161/10

[19] Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB, Case C-194/16, ECJ

[20]Banyan Tree Holdings v. A. Murali Krishna Reddy, CS (OS) No.894/2008 (Nov. 23, 2009) [hereinafter Banyan Tree]

[21] Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited 2003 (27) PTC 265 (Del)

[22] (India TV) Independent News Service Pvt. Limited v. India Broadcast Live Llc And Ors., 2007 (35) PTC 177 (Del.).

[23]Banyan Tree, *supra* note 20 at ¶38

[24] *Id* at ¶38

[25] *Id* at ¶42

[26]*Id*

[27] *Id* at ¶45

[28] Sarine Technologies v. Diyora and Bhanderi Corpn., 2020 SCCOnline Guj 140.

[29] Presteege Property Developers v. Prestige Estates Projects Pvt. Ltd., 2008 (37) PTC 413 (SC)

[30] Justice Muralidhar, *Jurisdictional Issues in Cyberspace,* 6 Ind. J. L & Tech. 1 (2010).

[31] World Wrestling Entertainment, Inc. v. M/s Reshma Collection & Ors, AO (OS) 506/2013 and CM Nos. 17627/2013 & 18606/2013, decided on October 15, 2014.

[32] *Id.*

[33] Philips v Eyre, 6 L.R. Q.B. 1, 28 (1870, Queen's Bench).

[34] Boys v. Chaplin, 2 Q.B. 1 (1968, Queen's Bench).

[35] Govindan Nair v. Achuta Menon, (1915) I.L.R. 39 Mad 433.

[36] Baba Ramdev and Anr. v. Facebook Inc, CS (OS) 27/2019

[37]*Id* at ¶96(i)

[38] *Id* at ¶96(ii)

[39] YouTube v. Geeta Shroff, FAO 93/2018

[40] Julia Hörnle, *The Conundrum of Internet Jurisdiction and How US Law has Influences the Jurisdiction Analysis in India*, 14 Ind. J. L. Tech. 183 (2018).