CENTRE FOR CONSUMER PROTECTION
LAW AND POLICY, NUALS

COMPENDIUM OF PAPERS

One Day National Seminar on

Equipping Consumer Dispute Redressal Agencies for the Present and the Future

26/03/2014

A Peer-Reviewed Publication of

The Centre for Consumer Protection Law and Policy

NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES,

Kochi – 683503, India

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1. Lacunae in the Consumer Protection Act, 1986

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ABSTRACT

The enactment of the Consumer Protection Act, 1986 can be considered as the milestone in the history of socio-economic legislations to protect the interests of the consumers in India. Prior to the enactment of this act, the principle that existed was the principle of Caveat Emptor (let the buyer beware). A revolutionary change was witnessed with the enactment of the Consumer Protection Act, 1986. There was a shift from the principle of Caveat Emptor to Caveat Vendor (let the seller be aware). Indian market is gradually being transformed from a predominantly sellers' market to a buyers' market where the choice exercised by the consumers depends on their awareness level.

The main objective of the Consumer Protection Act is to ensure the better protection and promotion of consumers. It is one of the most benevolent pieces of legislation intended to protect the consumers at large from exploitation. Unlike existing laws which are punitive or preventive in nature, the provisions of this Act are compensatory in nature. The Act is moreover intended to provide simple, speedy and inexpensive redressal to the consumers' grievances and relief of a specific nature with an award of compensation given wherever appropriate to the consumer. But with the increasing challenges in consumerism and weak functioning of the Consumer Courts in the country a number of lacunas have come to light in the recent years. There is an urgent need on the part of the government to enforce laws that could effectively check consumer frauds and provide necessary amendments in the various provision of the Act so as to bring the violators to book to. This paper highlights the lacunas that exist in the provisional interpretation of the Consumer Protection Act, 1986. It attempts to provide an analytical and critical examination of Consumer Protection in India and the provisions of the Act.

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ARTICLE

Consumer Protection has its deep roots in the rich soil of Indian civilization, which dates back to 3200 B.C. In ancient India, human values were cherished and ethical practices were considered of great importance. However, the rulers felt that the welfare of their subjects was the primary area of concern. They showed keen interest in regulating not only the social conditions but also the economic life of the people, establishing many trade restrictions to protect the interests of buyers.[3] All these ancient laws that comprised of consumer protection laws, like the *Vedas, Dharmashastras, Kautilya's Arthashatra,* were replaced by the Muslim Laws during the Medieval period. In the medieval period, consumer protection continued to be of prime concern to the rulers.

During Muslim rule, a number of units of weights were used in India.[4] During the Sultanate period, the prices were determined by local conditions.[5] During the rule of *Alauddin Khalji*,[6] strict restrictions were established in the market place.[7] In those days, there was an unending supply of grains to the city and grain-carriers sold at prices fixed by the Sultan.[8] There was a mechanism for price enforcement in the market. Similarly, shop-keepers were punished for under weighing their goods.[9]Another change was witnessed during the British rule. During the British period, the Indian legal system was totally transformed and modernised and the English Legal System was introduced, at the same time traditions and customs of the Indian legal system were also retained.

Some of the laws which were passed during the British regime concerning consumer interests are: the Indian Contract Act of 1872, the Sale of Goods Act of 1930, the Indian Penal Code of 1860, the Drugs and Cosmetics Act of 1940, the Usurious Loans Act of 1918, and the

[3]A. Rajendra Prasad, "Historical Evolution of Consumer Protection and Law in India: A bird's eye view", *Journal of Texas Consumer Law*, pp. 132-136, p.132 available at http://www.jtexconsumerlaw.com/v11n3/jccl_india.pdf, accessed on 20th March, 2014.
[4]Maulana Hakim Syed Abdul Hai, India-During Muslim Rule 127 (Mohiuddin Ahmad trans., 1977) as cited in A. Rajendra Prasad, "Historical Evolution of Consumer Protection and Law in India: A bird's eye view".
[5]S.R.Bakshi, Advanced History of Medieval India Vol. 1 287 (2003), as cited in A. Rajendra Prasad, "Historical Evolution of Consumer Protection and Law in India: A bird's eye view".
[6]1296 – 1316 as cited in A. Rajendra Prasad, "Historical Evolution of Consumer Protection and Law in India: A bird's eye view".
[7]IrfanHabib, The Price Regulations 'Ala' UddinKhalji – A Defence of 'Za' Barani, in Money and the Market in India 1100-1700 85 (Sanjay Subrahmanyam ed., 1998) as cited in A. Rajendra Prasad, "Historical Evolution of Consumer Protection and Law in India: A bird's eye view".
[8]*Id.* at 88.
[9]*Id.* at 89.

Agriculture Procedure (Grading and Marketing Act) of 1937. All these laws provided legal protection to the Consumers.[10]

Consumer protection was also provided within India's criminal justice system. The Indian Penal Code of 1860 has a number of provisions to deal with crimes against consumers. It deals with offenses related to the use of false weights and measures,[11]the sale of adulterated food or drinks, the sale of noxious food or drink, and the sale of adulterated drugs.[12]

The principle that existed during those days was the principle of *Caveat Emptor* (let the buyer beware). Some of the legislations related to Consumer Protection that was enacted after the British period includes: the Essential Commodities Act of 1955, the Prevention of Food Adulteration Act of 1954 and the Standard of Weights and Measures Act of 1976. In 1985 an important event took place when United Nations passed a resolution indicating certain guidelines under which the state could make laws for better protection of the interests of the consumer. Subsequently in India, the Consumer Protection Act was passed in 1986.[13]

A revolutionary change was witnessed with the enactment of the Consumer Protection Act, 1986. Here we witness a shift from the principle of *Caveat Emptor* to *Caveat Vendor* (let the seller be aware).

It can be considered as a milestone in the history of socio-economic legislations to protect the interests of the consumers in India. The main objective of the Consumer Protection Act is to ensure the better protection of consumers. Unlike existing laws which are punitive or preventive in nature, the provisions of this Act are compensatory in nature. The Act is also intended to provide simple, speedy and inexpensive redressal to the consumers' grievances, and relief of a specific nature with an award of compensation given wherever appropriate to the consumer.[14]But due to some of the defects and deficiencies existing in the functioning of the Consumer Protection Act and with the increasing challenges in the consumerism, it has gone through significant modifications and amendments in the years of 1991, 1993 and 2002, for the fulfilment of the proper essence of the Act. The amendments envisage making certain additions to and alterations of several clauses of the Consumer Protection Act, 1986.

[10]Prasad, note 1, pp.134.
[11]Indian Penal Code, No. 45 of 1860, Chapter.13 ss. 264-67.
[12]*Id*. at Chapter.14 ss. 272-76.
[13]RNP Chaudhary, *Consumer Protection Law: Provisions and Procedure,*Deep and Deep Publishers, 2005, pp.181-187,p. 182.
[14]Aman Chatterjee and Sheetal Sahoo, "Consumer Protection: Problems and Prospects Postmodern Openings*"*, *Postmodern Openings*, 2011, Vol. 7, September, pp: 157-182

No doubt the statement of Objects and Reasons to the amendments explains the reason for introduction of a couple of clauses. It is however silent with regard to various others. It can be seen that the amendments giving reasons for the alterations to the Act is too sketchy to enable anyone to understand the need thereto. Even though the amendments have been made and there are reasons given during different time periods for the need of the particular amendments made, there can still be seen the places of defects and deficiencies in the provisions existing in the Act, where an attempt is made section wise to find out the existing lacunas that can be seen in the provisions of the Act.

In the Act, Section 2(d) specifies who a consumer is, where under Section 2(d) (i) the exception to be a consumer is given, instances when one is not treated as a 'consumer', where a "person who obtains such goods for resale or for any commercial purpose". The term Commercial Purpose is not defined in the Act. The explanation or interpretation to the term depends on the subjective interpretation or with the facts of the case. The term is still a highly controversial subject and the lack of proper interpretation of the term in the Act has led to time to time conflicting notions and judgement regarding the same.

In the case *Western India State Motors* v *Sobhag Mal Mina*[15], question was raised regarding the interpretation of the term Commercial purpose, where the Rajasthan state commission did not give any consideration to this key word; it decided the case on merit and awarded a compensation of Rs 2000 to the complainant. However on appeal by the opposite parties, the National Commission sustained the objections and observed that:

"As per the definition of the expression "consumer" contained in section 2(1)(d)(i) of the Act, the said expression would not include "a person who obtains goods for commercial purpose." There cannot be any doubt that the plying of the taxi for hire is clearly a 'commercial purpose' and the purchase of a vehicle made specifically for being used as a taxi is a purchase made for commercial purpose. Such being the position, the complainant before the state commission was not the consumer and the State commission should have rejected the petition on that ground".[16]

This shows the ambiguity of such terms used within the CPA, 1986, which was mostly decided on the basis of subjective interpretation and the facts of a particular case.

[15]I(1991) CPJ 44 (NC).
[16]I (1991) CPJ 330 (NC).

The exceptions to the term '*Service*' defined in the Act under section 2(o) is also a debatable issue where large number of Consumer Courts have tried authoritatively to explain the term in a number of cases. Where the exceptions are given as service, it won't include rendering of service free of charge or under a contract of personal service. Hence most of the service rendering organisations or professions are trying to make them fit under the second exception where they will be free from the ambit of Consumer Protection Act, claiming them to be contract of personal services while being contract for personal services.

Most of the professions are taken under the ambit of the Consumer Protection Act by the decrees passed by different consumer courts like the medical, housing construction and many others, while some of them like the legal profession, etc. are still in a debatable term of whether being in a master- servant relationship or being a principle- agent one. While with the decisive verdict in the landmark case of *Indian Medical Association* v. *V. P. Santha and Others*[17], medical profession has been made liable under the purview of the Consumer Protection Act, at the same time cases of legal profession and many other professions are still hanging in the consumer courts with a decision yet to come and justice to be rendered. Where in the case of *Srimathi&Ors*. v. *Union of India &Ors*.[18], the commission decided the legal profession as coming under the purview of the Act, it also stated that the liability of the legal profession is still undecided in the case of *D. K. Gandhi* v. *M. Mathias*[19], where the case is still pending in the Supreme Court.

The proper non-interpretation of the term 'service', and the provisions of the term still being in the conflicting zone gives weightage to the famous saying of - justice should not only be done but should be seen to be done. The making of the Consumer Protection Act and providing different provisions is not enough. Due and reasonable interpretation and timely justice delivery through the judgements are necessary for justice to be seemed as done. This is the one of the important lacunas in the Act. The necessity of proper amendments is required in this section for the correct and due interpretation of the Act.

Another area of concern that can be seen in the Act is in Section 6 where National Commission has adopted six objectives or principles to protect and promote the rights of the consumer parting two very important objectives to adopt, which according to Consumer International's guidelines should also be a part and should be given same importance as it is

[17]*Indian Medical Association* v. *V. P. Santha and Others*, Vol. III (1995) CPJ 1 (SC).
[18]*Srimathi&Ors*. v. *Union of India &Ors*., Vol. III (1996) CPJ 377.
[19]*D. K. Gandhi* v. *M. Mathias*, Vol. III (2007) CPJ 337 (NC).

given to the other six of them. The Act has failed to portray the principle of Right to Basic Needs and Right to Healthy Environment[20], which have been adopted in the eight consumers' rights of Consumer International, which is one of the most essential objectives to be adopted to protect and promote the rights of the consumer interest.

One more observation that is required to be paid attention to in this particular section is that all the first five objectives will be meaningful or successful in the real sense whereas the last or the sixth objective, that is 'the right to consumer education,' will be give due and central importance and will be placed in the first place to understand or to execute the other objectives properly and efficiently. But due to the arrangement of the objectives given in the Act, all the objectives are in a doldrums and is not working properly or efficiently.

The term 'qualified' in Section 10(1)(a) of the Act again has met with many contentions and arguments. The sentence provided "a person who is, or has been, or is qualified to be district judge, who shall be its President", brings with it lots of debate and questions like, who is being qualified, why the criteria is not given in the entire Act to describe the essence of the term Qualified. Qualified to be district judge in what sense? In the academic sense or of qualified in experience or the qualification that is given under the article 233 of Indian Constitution? If the qualification that is adopted is that of the Indian Constitution then we are advocating for a person with an experience of 7 years to be qualified to be a District Judge. However, it is difficult to determine whether a person has been actually in practice for that many years or not, or even if he was in practice how much experience or how eligible he /she is to take over the responsible post of the President of District Consumer Forum. The controversial interpretation of the term and improper attempts made to lay down the criteria for the same makes another block in the progress or true achievement of the objectives of the Act.

Again there can be seen drawbacks in Section 10 (1)(b)(iii) where it is given "Two other members, who shall be persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman", where no criteria is given to explain terms like ability, integrity

[20]The Global Voice For Consumers,available at http://www.consumersinternational.org/who-we-are/consumer-rights/#.UmCOpVA_sec - visited on Thursday, 17 October 2013. (Consumer International have developed these rights based US President John F. Kennedy's vision on consumerism during his address to the US Congress on 15th March, 1962)

and standing, 'adequate knowledge or experience', to what level or, who is supposed to decide what is the exact level of knowledge or experience, where it may vary in subjective interpretation and the criteria of a person of integrity, ability or standing may differ person to person. The selection procedure of the members by the Selection Committee is somewhat of a controversial outcome, since the authority to select a member solely depends on their recommendations on the basis of their interpretation and understanding about these terms. This again led to one of the most important lacuna that is formed in the Consumer protection Act.

Again another loophole that can be seen in the Act is based on the non-interpretation or due to no proper providence of the definition of the provision what is given in the Act. In Section 13(1)(c), there is no specific definition provided for the term 'such extended period', where the District Forum have the power to give its own discretion to extend the time for submission of the report for the defected goods by the laboratory if it finds any difficulty at the time of the submission of the report.

The problem in this section is that although this provision was made for the smooth working of the Section and for a fair justice delivery process, the Act still indirectly provides a scope for the District Forum to delay the trial to an unspecified period. Where the President and the other members of the District Forum have their own discretion or notions of what they mean or understand by 'such extended period', which may vary from person to person. This may again lead to the delay in the justice delivery system which may affect the core objective or purpose of the formation of the Act, that is for the speedy redressal of the consumer grievances.

The recent introduction of the Consumer Protection (Amendment) Bill, 2011 has proposed certain amendments which perhaps will make the Consumer Protection Act, 1986 less ambiguous and bring clarity in the sections. Like insertion of a number of clauses within Section 2 clause (r) "unfair trade practices". In Section 19 of the principal Act, in the second proviso, the words "or rupees thirty-five thousand, whichever is less" has been proposed to be omitted. Again section 20, in (b) in sub-clause (i), for the words "thirty-five years", the words "fifty five years" have been substituted, in (c) in sub-clause (iii), firstly for the words "ten years", the words "thirty years" has been substituted; secondly after the words "public affairs", the words ",consumer affairs" has be inserted. A number of amendments have been

proposed by this Bill number 127 of 2011 which aims at widening the scope of the Consumer Protection Act, 1986 and make it more intelligible.

It can be concluded that the Consumer Protection Act, 1986 presents lacunas. Therefore it can be rightly commented that this Act is not entirely free from shortcomings. In view of these problems some recommendations provided are[21]:

(i) Strengthening of the existing redressal mechanism to make it more efficient for delivering speedier justice.
(ii) Supplement the existing redressal system with an active ADR Mechanism.
(iii) Building a strong consumer information and advisory system.
(iv) Integrate State Consumer Helplines and Consumer Advice Centre to facilitate mediation.
(v) Review of Consumer Protection Act 1986 and take adequate measures to plug loopholes with a view to reducing delays and enhance its reach to new areas of consumer issues.
(vi) National Consumer Protection Agency.
(vii) Information Technology tools for better delivery of service.

Moreover, any future enactment should accommodate women, the youth and even the rural population in order to have better protection for the nation's future consumers. Procedural simplicity and speedy and inexpensive redressal of consumer grievances as contained in the Consumer Protection Act are really unique and have few parallels in the world. Implementation of the Act reveals that interests of consumers are better protected than ever before.[22]

However, it is also important to raise consumer awareness through consumer education, actions by the government and consumer activists, and mostly through the associations which are needed the most to make consumer protection movement a success in thecountry.

[21]Joginder Grewal & Pratap Singh, "Consumer Protection in India: Some Issues and Trends", *International Journal of Latest Trends in Engineering and Technology (IJLTET)*, Vol. 2, Issue 1, January 2013.
[22]*Ibid*.

After covering most of the underlying problems within the Consumer Protection Act, 1986 a critical study of the above mentioned recommendations can be commented as satisfactory but besides these, innovative ideas can be taken into consideration so that the CPA, 1986 not just 'provides for better protection of the interests of consumers' but instead the best.

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2. EMERGING CONTOURS OF 'CONSUMER': A CRITICAL LOOK

Dr.Sushila*

I. INTRODUCTION

The Consumer Protection Act, 1986 (CPA)was enacted to provide for better protection of the interests of consumers and for the purpose of making provision for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes. It seeks *inter alia* to promote and protect the rights of consumers such as- (a) the right to be protected against marketing of goods which are hazardous to life and property; (b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices; (c) the right to be assured, wherever possible, access to an authority of goods at competitive prices; (d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums; (e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and(f) right to consumer education[1].

The term "consumer" has been defined in section 2(d) of CPA meaning as any person who (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for

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[1]Statement of Objects and Reasons to the Consumer Protection Act, 1986.

consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes[2]. Further, the explanation to the provision provides that "for the purposes of this clause, 'commercial purpose' does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment"[3].

The definition has undergone several changes since the year 1987 when CPA came into effect. It is a dynamic definition which is getting expanded in view of the new developments, the latest being the unsettled question whether an RTI[4] applicant is a consumer or not[5].

In the next part, an analysis of various rulings of consumer fora as well as courts would be undertaken to appreciate the emerging judicial trends in this branch of consumer law *i.e*. the meaning of 'consumer' upon which depends the very jurisdiction of consumer fora and applicability of CPA.

II. MEANING OF 'CONSUMER': EMERGING JUDICIAL TRENDS

A brief survey of judicial approach in expanding or otherwise interpreting the definition of 'consumer' would indicate that the judiciary has construed it in the widest possible manner by applying liberal and purposeful interpretation even though some discordant knots have been struck in some cases where a too restrictive approach has been adopted.

(i) Consumer of Housing Services provided by Statutory Authorities

The issue before the Supreme Court in the case of *Lucknow Development Authority* v. *M.K. Gupta*[6] was whether the statutory authorities (such as Lucknow Development Authority)

[2]Section 2(d) of CPA defines "consumer".

[3]Explanation to section 2(d) of CPA.

[4]Right to Information.

[5]*Public Information Officer, Urban Improvement Trust, Ajmer*v.*TarunAgarwal*, (NCDRC,decided on December 16, 2013*), Dr. S.P. ThirumalaRao*v. *Municipal Commissioner, Mysore City Municipal Corporation*(NCDRC, decided onMay 28, 2009), *B. VasudevaShetty*v. *The Chief Manager, the Kota Co-operative Agricultural Bank Ltd.*(NCDRC, decided on February 25, 2013).

[6]AIR 1994 SC 787.

constituted under State Acts to carry out planned development of the cities in the States were amenable to the jurisdiction of CPA any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flats within the stipulated time, or defective and faulty construction *etc*.

The court after analysing the scheme of the Act held that: "…the test is not a person against whom the complaint is made is a statutory authority but whether the nature of the duty and function performed by it is service or even facility[7]." The court further held that a person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description' under section 2(1)(o) of the Act. Rejecting the plea that inclusion of 'housing construction' in clause (o) and 'avail' in clause (d) in 1993 would indicate that CPA as it stood prior to amendment did not apply to hiring of services in respect of housing construction, the court held that the amendment appeared to have been made by way of abundant caution as housing construction being "service" was included even earlier.

(ii) Patient as consumer of Medical Services

Different High Courts and consumer fora had contrary opinions as to the application of CPA to medical profession.

The controversy whether the medical profession is covered by the Consumer protection Act or not was set at rest by Supreme Court in its landmark judgment in the case of *Indian Medical Association* v. *V.P. Shantha*[8] and brought the whole debate to a close by holding applicability of CPA to the medical profession.

However, still some issues in this area *viz.* covering of government hospital under the purview of CPA and referring of cases containing complicated issues to civil courts are unsettled. It is submitted that consumer fora should not deprive consumers of an efficacious and cheaper remedy even in the cases involving complicated issues as the consumer fora are

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[7] *Lucknow Development Authority* v. *M.K. Gupta*, AIR1994 SC 787.

[8] AIR 1996 SC 550.

sufficiently empowered with the powers of a civil court with respect to recording of evidence[9].

(iii) Student as a Consumer

There had been some confusion and divergence in the decisions of National Consumer Disputes Redressal Commission (NCDRC) on the issue whether a statutory School Examination Board comes within the purview of CPA.

In some cases, it was held that Examination Boards do not come within the purview of the Act. In some other cases, it was observed that though holding of examinations is a statutory function, issue of mark-sheets and certificates *etc*., is an administrative function, and therefore, the Examination Boards are amenable to the jurisdiction of consumer fora if there is negligence amounting to deficiency in service in such consequential administrative functions.

Finally, the Supreme Court in the case of *Bihar School Examination Board* v. *Suresh Prasad Sinha*[10]settled the matter by holding that the Board is a statutory authority established under the Bihar School Examination Board Act, 1952. It was held that the process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It was further held that the examination fee paid by a student is not consideration for availing of any service, but the charge paid for the privilege of participation in the examination. In the result, it was concluded that CPA did not intend to cover discharge of a statutory function of examining whether a candidate is fit to be declared as having successfully completed a course by passing the examination. The fact that in the course of conduct of the examination, or evaluation of answer-scripts, or furnishing of mark-sheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service-provider for a consideration, nor convert the examinee into a consumer who can make a complaint under CPA.

However, the Consumer Fora held unscrupulous educational institutions involved in unfair trade practices, misleading advertisements liable for compensating the students. In *Buddhist*

[9]Section 13(4) of CPA.

[10](2009) 8 SCC 483.

Mission Dental College and Hospital v.*Bhupesh Khurana &Ors.*[11], students filed a complaint before NCDRC alleging that they had lost two academic years as the college was neither affiliated to Magadha University nor recognised by the Dental Council of India, as claimed by it. NCDRC held that imparting of education by an educational institution for consideration falls within the ambit of 'service' as defined in CPA. It noted that fees are paid for services to be rendered by way of imparting education by the educational institutions. If there is no rendering of service, question of payment of fee would not arise. The complainants had hired the services of the college for consideration so they were found to be consumers as defined in CPA. While NCDRC directed refund of the fee along with interest and Rs. 20,000 as compensation, the Supreme Court awarded an additional Rs. 1 lakh as compensation and Rs. 1 lakh as costs to each of the students.

Further, NCDRC in the case of *Deputy Registrar (Colleges)* v.*Ruchika Jain*[12], held that performance of statutory duties by a university or college in laying down criteria/rules/regulations for conducting examinations, eligibility criteria for permitting the student to appear in the examination or declaration of the results of a student who appeared in the examination and such other activities, cannot be considered to be hiring of service for fees. Those are statutory functions not depending upon the contract between the parties. The services which are to be rendered on the basis of the statutory provisions by the university/educational institution cannot be construed as rendering of service for consideration in the form of fees.

However, it was observed that if fees are taken for admitting students in a school/college/institution/university by collecting fees and in such cases if there is any dispute with regard to the validity of such admission or illegality, irregularity committed by such institution in giving admissions, such dispute would be covered under CPA.

[11](2009) 4 SCC 484.

[12]III (2006) CPJ 343 (NC).

(iv) Consumer of Telecom Services

In a major setback to the consumers of telecom services, the Supreme Court in the case of *General Manager, Telecom* v. *M. Krishnan &Anr.*[13], through a laconic order in 2009 held that the consumers of telecom services in case of any grievance against the telecom service providers may only resort to the machinery under the Indian Telegraph Act, 1885 and cannot invoke CPA.

It is submitted that the order of the Supreme Court is bad in law and appears to have ignored various statutes including the provisions of CPA.

It is gratifying that notwithstanding the above dicta of the Supreme Court, the Tamil Nadu State Consumer Dispute Redressal Commission in its order in the case of *J. Subramaniam*v. *M/s Bharti Airtel Ltd*[14]distinguished the reasoning by holding that the Supreme Court did not consider certain important aspect of the law while deciding in favour of the telecom companies. Firstly, it noted that the Supreme Court did not take into consideration the modern laws that had been enacted, since the invention of the telegraph[15]. Second, it apprehended a serious problem in appointing arbitrators for each complaint for a country like India having population of more than one billion. Reference was also made to TRAI Act which asserts in its "objects and reasons" that the legislation and the regulations there under are aimed at *inter alia* for protection and promotion of consumer interests and ensuring fair competition. It noted that those who avail of services are consumers and, therefore, a consumer complaint should clearly lie. Attention was also invited to the provisions of CPA to the effect that the provisions thereof are in addition to and not in derogation of existing laws[16]. In the result, TN SCDRC had no manner of doubt that the consumer law should apply to telecom services.

[13] (2009) 8 SCC 481 delivered on September 01, 2009. The order consisted of two pages only.

[14]Order of TN SCDRC decided on November 29, 2012.

[15] Some of the legislation that have come into effect, since the telecom revolution are: the Telecom Regulatory Authority of India (TRAI) Act, 1997; the Information Technology Act, 2000; the Indian Telegraph (Amendment) Act, 2003; the Telecom Consumers Protection and Redressal of Grievances Regulations, 2007; and, lastly, the Consumer Protection Act 1986. These laws preceded the Supreme Court judgment; still the court did not take serious note of them. See M J Antony, 'Disconnect with Consumers', Business Standard, issue dated December 05, 2012.

[16]Section 3 of CPA.

It is submitted that the ruling of TN SCDRC is likely to be contested by the telecom service providers and it is hoped that the Supreme Court would use this opportunity to revisit its decision in *Krishnan*[17]case.

(v) Farmer a 'consumer'

The year 2012 started with a boost for the Indian consumers with the liberal interpretation of the term 'consumer' by the Supreme Court in the case of *M/s National Seeds Corporation Ltd.* v.*M.Madhusudhan Reddy &Anr*.[18].In this case, complaints were filed by the farmers under CPA before various district fora against National Seeds Corporation Ltd. (NSCL) alleging losses due to failure of crops/ less yield because of the defective seeds/ supplied by NSCL. The district fora awarded compensation to the farmers and appeal/ revision there against were dismissed by State Commission and National Commission respectively.

The Supreme Court dismissing the appeals held that since the farmers/growers purchased seeds by paying a price to NSCL, they would certainly fall within the ambit of section 2(d)(i) of CPA and there is no reason to deny them the remedies which are available to other consumers of goods and services. Further, rejecting the plea of NSCL based on alternative remedy under the Seeds Act, 1966; the court observed that grievance of a farmer/grower who has suffered financially due to loss or failure of crop on account of use of defective seeds sold/supplied by NSCL or by an authorised person is not remedied by prosecuting the seller/supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer/grower does not get anything. Therefore, the remedy available to an aggrieved farmer/grower to lodge a complaint with the concerned Seed Inspector for prosecution of the seller/supplier of the seed cannot but be treated as illusory and he cannot be denied relief under CPA on the ground of availability of an alternative remedy.

The court further repelled the contention of NSCL based on availability of arbitration remedy to the growers by holding that '*…[t]he remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration,*

[17]*Supra* note 13.

[18](2012) 2 SCC 506.

then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996 Act. Moreover, the plain language of Section 3 of the Consumer Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force'[19].

Lastly, the Supreme Court rejected the plea of NSCL based on the ground that the growers purchased the seeds for 'commercial purpose' and as such they stood excluded from the definition of 'consumer' by falling in the exclusionary part thereof. After surveying the case law on the subject and marshalling the facts, the Supreme Court noted that '*…it is not possible to take the view that the growers had purchased the seeds for resale or for any commercial purpose and they are excluded from the definition of the term 'consumer'. As a matter of fact, the evidence brought on record shows that the growers had agreed to produce seeds on behalf of the Appellant for the purpose of earning their livelihood by using their skills and labour*[20]*'*.

It is submitted that the order of the Supreme Court is a step in the right direction which advances the legislative intent on all the counts discussed above.

(vi) Consumer of Electricity Services

Recently, the Supreme Court in a significant ruling in the case of *UP Power Corporation Ltd.* v. *Anis Ahmed*, (2013) 8 SCC 491 decided on July 01, 2013 held that a 'complaint' against the assessment made by an Assessing Officer under section 126 or against the action taken under sections 135 to 140 of the Electricity Act, 2003 is not maintainable before a Consumer Forum. In the present case, the following issues were involved for decision before the Supreme Court: (a) whether complaints filed by the corporation before the Consumer Forum constituted under CPA were maintainable and (b) whether the Consumer Forum has jurisdiction to entertain a complaint filed by a consumer or any person against the assessment made under section 126 of the Electricity Act, 2003 or action taken under sections 135 to 140 of the Electricity Act, 2003.

[19] *Ibid* para 29.

[20] *Ibid* para 33.

The Supreme Court while setting aside the order of NCDRC held:

(i) In case of inconsistency between the Electricity Act, 2003 and CPA, the provisions of CPA will prevail, but *ipso facto* it will not vest the Consumer Forum with the power to redress any dispute with regard to the matters which do not come within the meaning of 'service' as defined under section 2(1)(o) or 'complaint' as defined under section 2(1)(c) of CPA.

(ii) A 'complaint' against the assessment made by Assessing Officer under section 126 or against the actions taken under sections 135 to 140 of the Electricity Act, 2003 is not maintainable before a Consumer Forum.

(iii) The Electricity Act, 2003 and CPA run parallel for giving redressal to any person, who falls within the meaning of 'consumer' under section 2(1)(d) of CPA but it is limited to the dispute relating to 'unfair trade practice' or a 'restrictive trade practice adopted by the service provider'; or 'if the consumer suffers from deficiency in service'; or 'hazardous service'; or 'the service provider has charged a price in excess of the price fixed by or under any law'.

It is submitted that the judgment is a setback to the consumers of power who will now be relegated to other fora which may not be equally efficacious and expeditious in redressing the grievances of this set of consumers. It is submitted that the order of the Supreme Court has not sufficiently considered the scheme of the Electricity Act, 2003 which in section 173 in categorical terms provides that nothing contained in this Act or any rule or regulation made there under or any instrument having effect by virtue of the Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989. Hence, it is evident that CPA has been specifically excluded from the overriding effect of the Electricity Act, 2003 as provided in section 174 thereof[21]. Thus, even assuming inconsistency, the provisions of CPA

[21] The Electricity Act, 2003

Inconsistency in laws

Section 173.Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.

are to prevail over the Electricity Act, 2003. The judgment requires to be reviewed by the Supreme Court.

(vii) RTI Applicant is not a 'consumer'

The issue as to whether an RTI Applicant is a consumer within a definition of the term as given in the CPA is unsettled and is confounded by diversions rulings of NCDRC.

In *Dr. S.P. Thirumala Rao* v. *Municipal Commissioner, Mysore City Municipal Corporation*[22], NCDRC placing reliance upon the provisions of section 3 of CPA held that though the Karnataka Right to Information Act, 2002 provided for penalties on the competent authority for non-furnishing of information, the same did not provide for any remedy to the consumers who have sought information under the said Act for deficiency in service in the nature of compensation or damages for not furnishing the information. Accordingly, it was held that the consumer fora have the jurisdiction to entertain the complaints in respect of deficiency of service in not furnishing the requisite information as sought for by the applicant under the Information Act.

However a contrary view was taken by NCDRC in *B. Vasudeva Shetty*v. *The Chief Manager, the Kota Co-operative Agricultural Bank Ltd*.[23], NCDRC held that the Right to Information Act, 2005 ('the RTI Act') is a Code in itself as it provides for remedies available there under to a person who has been denied information. Resultantly, it was concluded that as the petitioner had a specific remedy available to him under the RTI Act which he had already availed, the consumer complaint was found not to lie under CPA.

Further, in *Public Information Officer, Urban Improvement Trust, Ajmer* v. *Tarun Agarwal*[24], the issue again before NCDRC was as to whether the consumer fora can entertain a complaint

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Act to have overriding effect

Section 174. Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

[22] Decision of NCDRC decided on May 28, 2009.

[23] Decision of NCDRC decided on February 25, 2013.

[24] Decision of NCDRC decided on December 16, 2013.

pertaining to the RTI Act, 2005. After placing reliance upon the provisions of sections 22[25] and 23[26] of RTI Act, 2005; NCDRC dismissed the consumer complaints and relegated the complainant to approach appropriate forum as per law.

It is submitted that the approach of NCDRC is not consistent and the same requires to be decided in an authoritative manner or providing clarity and guidance for the fora below.

III. CONCLUSIONS

The word 'consumer' is a comprehensive expression. As per CPA, the definition of the term 'consumer' is in two parts. The first deals with the goods and the other with services. Both parts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause in as much as it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with the approval of the person who purchased the goods or who hired services are included in it.

In the light of the analysis of the various rulings of the Supreme Court and NCDRC, it is evident that though the courts have interpreted the definition of 'consumer' in a liberal manner by considering its benevolent and social interest orientations, sufficient clarity has not been provided through judicial pronouncement in respect of consumers who also have the remedies under the relevant sector specific law. It is submitted that the provisions of section 3 of CPA have not been given their widest meaning and amplitude in relation to the other remedies. The law needs to be declared and pronounced in an authoritative manner for consistent application of CPA by lower consumer fora.

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[25]Section 22 of the RTI Act, 2005 gives overriding effect to this law over other laws.

[26] Section 23 of the RTI Act, 2005 bars the jurisdiction of Civil Courts in respect of orders made under the RTI Act, 2005.

3. Transition in the Scope and Dimension of a Consumer vis-à-vis Commercial Transactions

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ABSTRACT

The Consumer, a driving force and an integral component of the market, remains the most vulnerable element of the whole marketing system. Regulatory mechanisms for the protection of consumer interests have had a long history. It can be traced back to Kautilya's Arthashatra, which outline protective measures for the protection of consumers against the exploitation by unscrupulous traders. In the modern era, legislations such as the Indian Penal Code, 1860, Hire Purchase Act, 1972, Prevention of Food Alteration Act, 1954, Essential Commodities Act 1981, Indian Contract Act, 1872, Sale of Goods Act, 1930, Drug Control Act, 1950 put in place several safeguards to protect consumer interests. These laws were limited to punitive and preventive measures intended to protect the interest of the consumers against different forms of exploitation. Consumers were unable to seek any remedy against liable trader or manufacturer, hence, the consumer was left helpless from problems including adulteration of food, unauthentic drugs, misleading advertisements, black marketing, poor quality, high price, etc. Thus, India lacked an organized and systematic movement for protecting the interests of the consumers.

To check this situation, the Government of India enacted a comprehensive legislation, the Consumer Protection Act, 1986 to provide better protection to the interests of the consumers and instituted a formal mechanism for the Redressal of consumer grievances. This legislation applies to all commodities, except goods which are used for resale or for commercial purpose and also commodities given or rendered without of charge and under a contract for personal service. The nature of the provisions is that they are compensatory in nature. Recently, in order to increase the scope this act, Consumer Protection (Amendment) Bill, 2011 was tabled in Parliament. It proposes an extension in the scope of some definitions to give a wider horizon to the Consumer Protection Act. The bill proposes to change the type of definition from exclusionary to inclusionary like Deficiency, Branch Office, and Defects.

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The scope of an inclusive definition scope is wider as compared to an exclusionary definition. Also, the bill is intended to bring some new clauses in the existing definitions like unfair trade practice, complaint to identify the new grievances under the Consumer Protection Act. Also, there are some new definitions in the proposed bill like unfair contract, judicial background for to further increase the scope of the act.

In the Consumer Protection Act, a person is not a consumer if he purchases goods for commercial or resale purposes. This paper will focus on the interpretation of the word 'consumer' vis-a-vis commercial purposes like purchasing a product for its resale and, attempt to chart out the changing definition and dimension of a consumer through various judgements of the Courts and would provide suggestions for its future course.

ARTICLE

Our society has come a long way in the matter of recognition of status and position of a consumer. That is to say, the dimension of a consumer has been completely transformed. This transition is evident from the evolution of the doctrine of caveat emptor to caveat venditor. This evolution constitutes the basic reason behind the changing definition and dimension of consumer.

The long-standing, rule of "Caveat Emptor" rule or "Consumer Beware" which has had its derivation in common law, has undergone major change. This section, seeks to analyse the gradual death of the rule of caveat emptor and its replacement with a rule, which has subsequently originated i.e. "Caveat Venditor" or the rule of "Seller Beware" and the transition in the status of a consumer thereof.

The History

Tracing the origin, the reliance placed by the buyer on his own skill or judgment was the principle philosophy behind the rule of caveat emptor. It is based on the fundamental premise that once a buyer satisfies himself as to the suitability of the product for his use, he would subsequently have no right to reject the same[3]. The rule of caveat emptor, as it prevailed at the times of its origin, was quite rigid.

[3] Trideep Raj Bhandari, Caveat Emptor or Caveat Venditor: Where are We Heading? (March 22, 2014, 7:00 PM) http://www.legalserviceindia.com/articles/caveat1.htm.

A bare perusal of the English Sale of Goods Act, 1893, will bring into picture and will be not only noticeable but also quite evident that the seller's duties as to disclosure requirements when a product is sold was minimal. The primary responsibility was imbibed upon the buyer to examine the goods and this was considered paramount over any obligation upon the seller to provide information. No consideration was given to the concepts like 'fitness of goods' and 'merchantability', which if considered could be worked to shift the burden of quality and fitness on the seller. Another draconian proposition, which mandated that in cases where there was sale of 'specific' goods, the buyer could not reject the goods on any ground was present in the form of Section 11(1)(c), of the Act. Thus it was an established principle then that law was in complete favour of the seller, and seemed to bend towards his interest and in those times, one could not even contemplate a corresponding rule, which would put the burden on the seller[4].

Dawn of the new era

This approach, which was being practised when the rule of caveat emptor prevailed in its unqualified form, was later considered as one detrimental to the growth of trade and commerce. It is not wrong to contemplate this as caveat emptor, would certainly be harmful to the buyer's cause, in its absolute from because till then, the element of 'reasonable' examination was not introduced. Therefore a scenario wherein a buyer would not have any recourse against a seller who has in spite of being aware of a latent defect (one which cannot be detected by reasonable examination) not informed the buyer about the same, would certainly not encourage commercial transactions.

This rule suffered a blow for the first in the case of Priest v Last[5], where the reliance placed by the seller for the purposes of buying a 'hot water bottle' was taken into account for allowing the buyer to reject the goods. This was the first traceable decision in common law which had given importance to the reliance placed by the buyer on the seller's skill and judgment. However as the rule of Caveat Venditor has been subsequently upheld in many judgments, this proposition of law is a settled principle today and the rights of a consumer seem to be more protected now[6].

[4] *Id*.
[5] 2 KB 148 (1903).
[6] P.K. Majumdar, Law of Consumer Protection in India, Vol. 1 (6th ed. 2010).

Now, since the reasons behind a change in the definition and dimension of a consumer has been established, the author will try to analyse the present and the changed status of a consumer vis-à-vis, commercial transactions.

General Principles

If certain goods are purchased for commercial purpose, say, for hotel business and it is admitted in the complaint by the complainant that he is the owner of the hotel and he purchased the oil fired hot water boiler and mixing tank for the purpose of hotel business and got that installed in the hotel and he asked for refund of the price and also requested that in view of loss of business, he is entitled to damages amounting to Rs. 5 Lacs from the respondent. It is thus established that the complainant purchased the boiler etc., for commercial purpose. It is provided in the definition of "consumer" in the Act, that person purchasing goods for commercial purpose is not a consumer. Therefore the complainant is not a consumer in the present case[7]. Also, when a perusal of the complaint and other documents prima facie point out that the complainant purchased certain goods from the opposite party for commercial purpose. Such being the case, the complainant cannot at all be construed as a consumer falling within the definition of Section 2(1)(d) of the Consumer Protection Act[8]("The Act"). For further understanding, a complaint deserves to be dismissed on the solitary ground that the claim made by the complainant clearly arises out of commercial transaction between the parties. This might happen when a fact, was apparent from the contents of the complaints themselves. When a person obtains goods for commercial purposes, such a person does not fall within the ambit of the word "consumer"[9].

Let us also analyse the situation concerning consumption of electricity, where there is no doubt that, electricity comes under the ambit of "goods" and the complainant was buying electricity from the respondent for a commercial purpose, namely, the running of his factory where they were producing auto spare parts and obviously selling them for profit. If this was all, the complainant would not be a consumer according the Act. But according to Section 2(2)(d)(i) of this Act, a person who hires any services for consideration would be a consumer and clause (o) defines "service" as including the provision of facilities in connection with supply of electrical or other energy. In the instant case, after 4.12.1985, no electricity has been supplied to the complainant. The charges were the minimum charges which were to be

[7] *Lucky Star Estate (I)* v. *Laxmi Boilers (North)*, I CPJ 471 (471, 472) (1991).
[8] *Getanjali Kemektronix (P) Ltd.* v. *Intime Fire Appliances*, I CPJ 143 (T.N.)(2001).
[9] *Procolor Photographics Private Limited* v. *OCL Photo Ondustries (P) Ltd.*, II CPJ 658 (660)(1991).

paid only for maintaining the facility in connection with the supply of electrical energy. Therefore, the Bill dated 21.9.1987 was not for consideration for the sale of "goods", but consideration for the maintenance of the service line. Therefore, the complainant will be a consumer according to sub-clause (ii) of clause (d) of Section 2(1) of the Act[10].

Other principles

It is an accepted rule that a person who purchases machine/vehicle could be consumer only if he operated himself. Considering a situation in which it was held that, where vehicle purchased for earning livelihood, was defective, the person who had purchased the machinery/vehicle could be consumer if he operated it himself. But if the services of a driver were engaged, the owner could not be a consumer[11]. Also there might be a situation in which, a car is purchased for business purpose. Taking help of a decided case law in which it was held that, if a car is purchased by the complainant, who is indulged in business as a builder, and if it is being used by the Company and its Directors and the Employees or the Purpose of the company, such complainant will not come under the ambit of a complaint by a consumer[12] under the Act. Also, there might arise a situation in which, a motor car is purchased by State Government undertaking and it is to be utilised as taxi. In the present case such purchase is to be deemed as one for as involving commercial purpose and as such, the complainant was not a Consumer[13]. There also might arise a situation in which there is a purchase of vehicle by a Doctor for benevolent motive. In such a situation, it was held that, where a complainant practising as a Cardiologist booked a vehicle for starting Mobile Intensive Care Unit, he had not undertaken to carry out a profit making activity. Thus, such purchase is not for commercial purpose[14].

While dealing with cases involving purchase of Machinery and Furniture and Fixtures, it has been generally observed by the courts that such purchases are for commercial purposes. Following illustrations might be able to further clarify the correct position of law. In a case involving purchase of machinery to be used in setting up an oxygen plant, it was held that, it was in the complaint that the purchase of machinery was for commercial use in setting up an

[10] *Escon Private Limited* v. *Karnataka Electricity Board*, I CPJ 450 (453,454)(1991).
[11] *Ghulam Qadir Bhatt* v. *Bajaj Tempo Ltd*., I CPJ 488 (J&K) (2004).
[12] *Hindustan Motors Ltd*. v. *Prasenjit Chakraborty*, II CPJ 290 (W.B.) (1998).
[13] *Haryana Tourism Corpration Ltd*. v. *Hindustan Garage*, II CPJ 110 (U.T. Chandigarh) (2000).
[14] *Ajay H. Kantharia* v. *Car Mart Pvt. Ltd.*, III CPJ 502 (Mah.) (2000).

oxygen plant. The appellant was not therefore a "consumer" under the Act[15]. Also in a situation where, air conditioners are purchased for shop, are found faulty, it was held that, where the complainant was running a big Jewellery Shop, Air Conditioners purchased for shop were found faulty, these were purchased for commercial purpose, hence, complainant was not a consumer[16]. As such, the complaint was dismissed. Further, when the machinery purchased is defective, it was held that, where machinery was purchased for commercial purpose, and found defective and there was breach of warranty, purchaser was consumer on ground of deficiency in service[17]. Also, when the petitioner had purchased the machine for her own livelihood, she is a consumer and as such is entitled to have a defect free machine and can maintain a case before District Forum[18]. Also, even if a machine is purchased for commercial purpose, the purchaser becomes a consumer till existence of warranty.[19]. Concluding on a point involving machinery being purchased for commercial purpose, it was held that, there is yet another inseparable obstacle disentitling the complainant to approach this National Commission with a claim for compensation, namely, that he is not a "consumer" as defined in Section 2(1)(d)(i) of the Consumer Protection Act, 1986 as the machinery in question was purchased by the complainant for the purpose of its use in his Oswal Fine Arts Printing Press which is a commercial establishment. A person who obtains goods for a commercial purpose is specifically excluded from the scope of the expression "consumer" by the definition contained in Section 2(1)(d)[20].

Also, another major issue before the courts is when goods are purchased for resale. Perusing the various situations that might arise, including, a situation where, goods are purchased for re-sale or to use in profit-making activity, it was observed by the court that by analysing the definition of a consumer under the Act, the plain dictionary meaning of the words used, the intention of Parliament must be understood to exclude from the scope of the expression "consumer" any person who buys goods for the purpose of them being used in any activity engaged on a large scale for the purpose of making profit. Since re-sale of the goods has been separately and specifically mentioned in the earlier portion of the definition clause, the words "for any commercial purpose" must be understood as covering cases other than those of re-

[15] *Nirmala Chuhan* v. *Divisional Manager, New India Assurance Co*., II CPR 117(1999).
[16] *Shanker shah Ishar Dass Jewellers* v. *Fedders Lloyd Corporation Ltd.,* I CPJ 156 (J & K) (2004) : (1) CPR 264 (2004).
[17] *Tuticorin Plastic Pvt. Ltd.* V. *Ebenezer,* (1) CPR 338 (TN) (1993) ; see also *Hindustan Later Ltd*. v. *Neoplast Engineering Pvt. Ltd.,* II CPJ 285(2000): (2) CLT 6031999: (2) CPR 126 (Kerala) (1999).
[18] *Wipro G.E. Medical System Ltd*. v. *Dr. (Mrs.) Chhandasree Roy,* (2) CPR 25 (WB) (1998).
[19] *Bharat Industrial Complex* v. *Dilip Kumar Ghosh*, II CPI 340(1998): (2) CPR 147 (W.B.) (1998).
[20] *Oswal Fine Arts* v. *H.M.T.,Madras,* (2) CPR 1 (1991).

sale of the goods. Therefore, the Parliament wanted to exclude from the scope of the definition not merely persons who obtain goods for re-sale, but also those who purchase goods with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit. On this interpretation of the definition clause, persons buying goods for re-sale or for use in large scale profit making activity would not be "consumers" entitled to protection under the Act. The Parliament intended to restrict the benefits of the Act to ordinary consumers purchasing goods either for their own consumption or even for use in some small venture which they may have embarked upon in order to make a living as distinct from large scale manufacturing or processing activity carried on for profit. In order that the exclusion clause should apply it was, however, necessary that there would be a close nexus between the transaction of purchase of goods and the large scale activity carried on for earning profit[21]. Also, another situation may arise where, Cotton seeds are purchased for resale. Dealing with such situation in which, a complaint was filed alleging that the complainant has purchased cotton seeds produced by the opposite party, and after some days when there was no growth of the plants, the complainant came to know that the seeds supplied were not of good quality. The objection was taken by the opposite party that the seeds were purchased for the purpose of commercial activity and hence the complainant was not a consumer and that the complaint was not maintainable. Where the description of the complainant was given that he was an agriculturist and used to produce the cotton seeds for the purpose of selling the same to the cotton cultivators. But again it was clearly stated that he took the seeds to his lands and planted the same in his lands. It was nowhere mentioned that the purpose was for commercial purpose. In the absence of any plea or evidence adduced that the transaction was for commercial purpose, it cannot be said that it was purchased for a commercial purpose and that the complainant was not a consumer and the complaint was not maintainable[22]. Clarifying the position by citing another case in which there was a purchase of seeds for growing crops and their resale, the court observed, when the seeds purchased are large in number and the produce is to be sold, such purchase would be for a commercial purpose[23] but when the seeds are bought in small quantity for livelihood, such buyer would come under the definition of a “consumer” under the Act[24].

[21] *Synco Textiles Pvt. Ltd.* v. *Greaves Cotton & Co. Ltd.,* (1) CPR 615 (619) (1991):1 CPJ 499 (1991):CPC 35 (1991).
[22] *Nuzvid Seeds* v *Madal Baburao*, (2) CPR 538 (540) (AP) (1993) ;see also *Ravjibhai Babubhai Sadha Parmar* v. *Karunasagar Sales and Services*, 1 CPJ 100 (Gui.) (1995).
[23] *M.P. Rajya Beej Evam Farm Vikas Nigam* v. *Anand Pratap Singh*, (2) CPR 345 (347, 348) (1991).
[24] *Maharashtra Hybrud Seeds Co. Ltd.* v. *S. Pandaiah*, III CPJ 4 (A.P.) (2000).

Lastly, analysing a situation in which a purchase is made for self-employment of a photocopier, where the complainant was running a typing institute when he placed an order for Canon Photo-Copier, it cannot be said that the said copier would have enabled him to generate large profits. Therefore, the petitioner had not purchased the photo-copier for a "commercial purpose", as dealt under the Act. Thus, a person who purchases a photocopier for self-employment is a consumer even if purchased for commercial purpose.[25] Concluding by extending this discussion to a situation of purchase of goods or machinery for self-employment, it was observed, when goods were purchased for use in a small venture- such as for self-employment etc., which a person might embark upon in order to make a living, as distinct from a large scale manufacturing, processing or trading activity carried on for profit, in such a situation, such purchase of machinery for self-employment will not be covered under commercial purpose[26].

Conclusion

From the definition and dimension of the term 'Consumer' as given in the Act it is clearly seen that in relation to transactions of purchase of goods, Parliament has excluded from the scope of the definition any person who obtains goods for re-sale or for any commercial purpose, except a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

Mahatma Gandhi, remarked 'a consumer is the most important visitor on our premises; he is not dependent upon us, we are on him; he is not interruption to our work, he is the purpose of it. We are not doing a favour to a consumer by giving him an opportunity; he is doing us a favour by giving an opportunity to serve him.' This statement of Gandhi, seems to have been realised by the market including the legislators, and as a result, a consumer today stands protected better than what he used to be before. The changing definition and dimension has aimed at protecting the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services.

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[25] *Vijay Narayan Agrawal* v. *Chowgule Industries Ltd*., II CCJ 904 (1993).
[26] *Secretary, Consumer Guidance and Research Society of India* v. *B.P.L. India Ltd.*, (1) CPR 564 (568) (1992).

4. Consumer Protection in the Financial Sector

Ashwin Harischandran[1]

The Need for Consumer Protection in the Financial Sector

Regulation of the Financial Sector in India is carried out by various regulators appointed by the government for a particular sector. For instance the Insurance Regulatory and Development Authority (IRDA) for the insurance sector and the like. These Regulators often have exclusive jurisdiction over their exclusive sectors and the Securities and Exchange Board of India (SEBI) has over capital markets and its regulation while banking is controlled and regulated by the Reserve Bank of India, these regulatory bodies promulgate rules and regulations for functioning of companies in their respective sectors, consumer protection was initially never the mandate of these regulators, but as the name suggests to regulate the markets and access to it, by having high entry barriers and restriction of competition. But after liberalization of the Indian economy in the 1990s, many players entered the market; it became imperative that investors and end users of financial products be protected. In India, end users of financial services like Mutual Funds, Chit Funds, and Investors in Stock Market[2] do not fall under the purview of the Consumer Protection Act of 1986, as per Section 2 (d) of the Act. Hence Consumer Forums do not have jurisdiction over majority of the financial products in availability, as the Act was drafted and enacted before times of such seemingly exotic financial products in the Indian Economy in those times.

The Suitability vs Caveat Emptor Argument.

Unlike normal goods and services, end users in the financial sector suffer from a knowledge and information asymmetry, where the provider of such services and products has more knowledge than the consumer not just about the products but generally of the market conditions too. Another factor contributing to the problem is the frequency of the financial decisions taken by a retail consumer of financial products. For example mortgage for a house is taken mostly once in a lifetime by most people. Reality is information in prospectuses and other information modules supplied by financial institutions as part of disclosure compliance

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[2] *Morgan Stanley Mutual Fund v. Kartick Das* 1994 SCC (4) 225

or advertisements are highly technical and "customers lack expertise to analyze the information to determine the value of promises made to them by financial institutions"[3]. Another drawback of the Protection mechanism of end users in the Indian Financial Market is that there is no provision for compensation for losses that the end user incurs in cases of products like Mutual Funds, Equity trading and Insurance Policies in case of mis-selling as the market regulators and the regulations work on the assumption that the end user has all the required information due to the mandatory disclosures required as per compliance mechanisms in place, but due to such low levels of financial literacy even in Urban middle class citizens it is unreasonable to put the onus on the consumer of such products. Also most financial products are becoming exceedingly complex due to complicated financial engineering. "It can be difficult to ascertain whether the reasons behind poor outcomes were primarily on account of product mis-sale or the consequence of random shocks."[4] Thus there is a need for consumer protection mechanisms with a holistic approach towards the Disclosure method and the Suitability method, especially due to low levels of financial literacy and access to formal finance it is indeed a difficult proposition.

Consumer protection in specific Financial Products and Sectors

Insurance Sector

The Insurance sector anecdotally has the highest amount of mis-selling. This happens due to poor advice given by agents either unintentionally or for malafide intentions. The end result though is that the policy holder loses his investment or the promised misrepresented returns. This capital which could have been invested in some instruments better elsewhere, thereby also proving harmful in the long run for the financial health of the economy. Incidentally the insurance sector regulated by the Insurance Regulatory and Development Authority (IRDA) is a sector which submits to the jurisdiction of the Consumer Dispute Redressal Forums, but the drawback being that the consumer has to first approach the insurer first, and in case of a non favorable reply has to then approach the IRDA Grievance Cell, but only in cases of Public Sector Insurance Companies such as LIC, GIC, United India and New India Oriental, and in Cases of Private Insurance Companies has to approach the Insurance Ombudsman and then on to the Courts under the COPRA Act or other Civil courts. On Paper though it seems structured following the rule of Law, often times in practicality, due backlog of cases it takes

[3]S. ADUKIA. RAJKUMAR S. An Overview Of Regulatory Framework Of Non Banking Financial Institutions
[4] SAHASRANAMAN.ANAND (IFMR POSITION PAPER) *A New Framework For Financial Consumer Protection In India*

long time before any Redressal is granted to the consumer. Especially in cases where Medical Insurance Claims are concerned and are processed by TPAs or Third Party Administrator, who has outsourced the responsibility of vetting and processing medical insurance claims, since these TPAs are for profit concerns, their initial response is to deny the claims or have complex agreements which are to the detriment of the policy holder, together with the added time of approaching the other relevant foras it is the consumer who is left in the lurch and in difficult times. There is absolutely no rederessal for such systemic lapses and are often times considered part of the parcel by policy makers.

Securities Market

Securities Market in India is regulated by the Securities Exchange Board of India (SEBI) established in the year 1988. It is one of the most proactive regulators in the country. Its mandate is to "protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto"[5]. The structure of regulation of the Indian Capital Market begins from the bottom at Stock Exchanges and Depository Participants, Stock Exchanges require certain criteria for companies to be listed on them and the companies also have to fulfill all conditions in the Listing Agreement prescribed by SEBI[6] under its regulations. These Stock exchanges have rules and regulations which extend to member registration, securities listing, transaction monitoring, and compliance by members to SEBI / RBI regulations, investor protection and education. Stock Exchanges have a duty to make sure all disclosures required under SEBI guidelines are made from time to time, such as the Insider Trading Guidelines and the Takeover Code. SEBI, through stock exchanges, also requires the stock exchanges to conduct regular events on Investor Protection. Such guidelines are again, as mentioned before, based on the principle of making maximum disclosure of information and increasing financial literacy.

The Next step of redressal is the SCORES System also known as the SEBI Complaints Redressal System where a complaint can be filed by an investor against a listed company, regarding non-payment of dividends; transfer of securities and against other intermediaries such as broking houses and depository participants.[7] In certain circumstances the regulators order maybe challenged by institutions and taken to the Securities Appellate Tribunal under

[5] Preamble of the SEBI Act 1992
[6] Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations
[7] http://scores.gov.in

Section 15K of the SEBI Act 1992 , from where the appeals then lies to the Supreme Court on matters of law.

Collective Investment Schemes

A collective investment scheme is a way of investing money alongside other investors in order to benefit from the inherent advantages of working as part of a group. The SEBI Act, 1992 defines CISs as schemes in which the funds of investors are pooled, yield profits or income and are managed on behalf of investors. It also exempts certain types of investments which are regulated by other authorities. SEBI defines CIS as *Any scheme or arrangement made or offered by any company under which the contributions, or payments made by the investors, are pooled and utilised with a view to receive profits, income, produce or property, and is managed on behalf of the investors is a CIS. Investors do not have day to day control over the management and operation of such scheme or arrangement.* [8]

In case of a collective investment scheme (CIS), money is pooled in by at least 10 people for the sole purpose of making further profits on their investment and depends on the efforts of a third party to help generate those gains. In effect, money collected by a CIS is invested in lucrative avenues and not given as a kitty to one investor. Unlike chit funds, CIS is mandatorily regulated by SEBI.[9] The danger with collective investment schemes is that often investors do not have information regarding where their funds are being diverted and for what purpose, and most of them, though there are stringent guidelines regarding CIS companies, often run CIS schemes under the guise of Chit Funds, which are regulated by State Governments. More often than not these companies are running a Ponzi Scam where the investors will keep getting promised returns till the inflow of funds is always higher than the outflow, which is inevitable as number of investors is bound to be limited. The modus operandi of such companies in the short run is to redirect money to investments which may get quick returns, or keep the inflows high. Such companies avoid registering as CIS companies to avoid stringent regulations and disclosures mandatory for CIS companies; at the end of 2013 only one Company in India was registered as Collective Investment Company. SEBI has recently rendered that any unauthorized pooling of money without approval and a certificate under SEBI (Collective Investment Schemes) Regulations, 1999, as fraudulent and

[8] Section 11AA (2) SEBI Act.
[9] CHOPRA. SHAILI *The Truth About 'Cheat' Funds* 2013-05-11 ,Tehelka Issue 19 Volume 10

prosecutable under SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, which carry stringent penalties including criminal trial.

Recommendations of the Financial Services Legislative Reforms Committee and the Draft Indian Financial Code with regards to Consumer Protection

The Financial Sector Legislative Reforms Commission (FSLRC) was commissioned with the task of consolidating the legislative, administrative, and executive aspects of the financial sector. The FSLRC was established by the Ministry of Finance, Government of India on March 24, 2011. The two volumes of the Report of the Commission were presented to the Government of India on March 22, 2013. The Commission was set up to remedy the regulatory gaps, overlaps and Regulatory Arbitrage due to a century of piecemeal legislations and amendments. As is the case in the modern landscape, transactions between multiple conglomerates will fall under the purview of multiple regulatory authorities.

Regarding Consumer Protection the FSLRC proposed merging of existing sector specific financial regulators (SEBI, IRDA, PFRDA, and FMC) into a Unified Financial Authority. The UFA would be the primary consumer protection and micro-prudential regulator for sectors other than banking and payment systems, which would remain with the RBI.

Another significant change the FSLRC recommends is the adoption of a consolidated, non-sector-specific, consumer protection framework for the entire financial system that will empower and require regulators to pursue consumer protection for the financial activities regulated by them.[10] Another major shift has been to putting the onus on the provider rather than the consumer regarding information and a shift to a doctrine of suitable advice, professional diligence, Misleading Conduct, Abusive Conduct and unfair contractual terms. It also recommends the creation of a unified Redressal Agency called the Financial Services Appellate Tribunal, which includes the current Securities Appellate Tribunal.

Conclusion

A Consumer of a financial service is indeed more vulnerable than a consumer of any other product, not only due to lack of expertise, but also systemic risks, market regulation and regulatory oversight. The FSLRC has recommended sweeping changes, putting the onus on providers, moving away from the principle of Caveat Emptor, and a simplified one umbrella

[10] Page 43, *Report of the Financial Sector Legislative Reforms Commission*

regulator for all financial services, to make it easier to conduct business in India and avoid regulatory arbitrage which is damaging to the real economy in the long run. The only way forward for the Indian financial market is to aim to bring as many citizens under the formal financial sector as possible and increase financial literacy and awareness, to avoid the destruction of public wealth. In the meanwhile Financial services industry too has to be aware that for short term profits they may actually the destroy the whole market for the long run, as was said Economist George Akerlof.[11]

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[11] The Market for Lemons: Quality Uncertainty and the Market Mechanism, 1970.

5. EQUIPPING CONSUMER DISPUTE REDRESSAL AGENCIES FOR THE PRESENT AND THE FUTURE

Nishigandha Paniphukan[1]

Sujata Sarma[2]

ABSTRACT

The moment a person comes into this world he becomes a consumer and attains every right to the goods and services he/she purchases. The enactment of the consumer protection act 1986 has brought about changes in the market sphere of India; it has laid down various rights for the promotion and protection of the consumers with the speedy redressal of their grievances. But the fact of life is that the 'Consumer is sovereign' and 'customer is the king' are nothing more than myths in the present scenario particularly in the developing society. The definition and dimension of consumer has transformed from *caveat emptor*[3] to *caveat venditor*[4]. Consumers are still victims of unscrupulous and exploitative practices. Exploitation of consumers assumes numerous forms such as adulteration of food, high prices, poor quality, deficient services, deceptive advertisements, black marketing etc. The first and foremost problem is that most state governments do not evince the requisite enthusiasm and attention in promptly implementing the provisions of COPRA by carrying out their mandatory obligation of establishing District Forums and State Commissions. Secondly, even with the existence of a justice delivery system, the system is plagued by systemic problems resulting in inordinate delays. The appointment of members is another problem. In the past, members were appointed on the basis of their connections rather than merit. Now the system has improved substantially due to an amendment in the law requiring a selection committee to appoint them. However, due to very poor compensation packages, good people are not attracted to these positions. To fulfil the objective of effective consumer redressal, some legislative and administrative measures are to be taken, such as- to strengthen the existing forums for consumer disputes, by adopting legislation for alternative dispute resolution or binding arbitration etc. Three things have to be done on a priority basis for the purpose of

[1] Fourth semester, National Law University and Judicial Academy, Assam
[2] Fourth Semester, National Law University and Judicial Academy, Assam
[3] Let the buyer be aware
[4] Let the seller be aware

speedy redressal i.e. to improve the institutions; to upgrade the quality of the personnel and simplify the procedures and consumers cells under Chief Executive needs to be established.

INTRODUCTION:

In India the marketing scenario has been undergoing a phenomenal change over the last few years. Currently in India, the national economy and marketplace are undergoing rapid changes and transformation. With the growing ambit of the market economy the consumers are also exposed to a wide variety of goods and services and many have very little knowledge regarding the quality of goods or services that are available in the markets that they tend to buy or hire. Consumers are vulnerable to the exploitations as they are fully dependant on the goods and services that an economy provides.

Exploitation of consumers assumes numerous forms such as adulteration of food, spurious drugs, dubious hire purchase plans, high prices, poor quality, deficient services, deceptive advertisements, hazardous products, black marketing and many more. Thus, to protect and promote the rights of the consumers from the exploitations that they are facing, the COPRA, 1986 under section 6 promotes the following rights to the consumer:

1) Right to Safety
2) Right to be informed
3) Right to choose
4) Right to be heard
5) Right to seek redressal
6) Right to consumer education

Consumer Forums have been established across the country at different levels with view to provide speedy, less expensive and simple dispute redressal to the consumers:

6. District Forum: It is a dispute redressal body under the purview of State Government, which is constituted at least one in each district or in certain cases one District Forum may cover multiple districts.

   The District Forum shall have jurisdiction to entertain complaints where the value of services and compensation claimed does not exceed Rs. Twenty Lakhs.

7. State Commission: It is the second tier of dispute redressal mechanism body, constituted by State Government for redressal of the Consumer Grievances at State Level. The State Commission has jurisdiction to entertain those Complaints where the value of services and compensation exceeds Rs. 20 Lakhs, but not exceeding Rs. 1 Crore; and or appeal against the orders of any District Forum within the state/revision petitions against the District Forum.

8. National Commission: It is the third tier of dispute redressal body, constituted by the Central Government for redressal of the Consumer Grievances at National Level. The National Commission has jurisdiction to entertain those Complaints where the value of services and compensation amount exceeds Rs. 1 Crore; and or appeal against the orders of any State commission/revision petitions against the State Commission.

The above mentioned forums are setup for the speedy redressal of the grievances of the consumer. Hence, speed of disposal should be increased to decrease the pending cases. Moreover, efforts should be made to remove the inconsistency in the speed of disposal.

In the case of the *Thiruvalluvar Transport Corporation*[5] a consumer, using a bus service, passed away when the bus met with an accident. The bus driver was trying to overtake a bullock cart and while doing so, the bullocks got frightened, due to which the driver had to take a sharp turn which resulted in an accident. Here, the Claimant is a consumer who was using a service and due to a defect on the part of the driver, an accident was caused which proved fatal to him. Had the bus driver not been driving recklessly, the bullocks would not have been frightened and the accident could have been avoided. Hence, the Claimant had a remedy under the Consumer Protection Act.

[5] The Chairman, Thiruvalluvar .vs The Consumer Protection Council on 9 February, AIR 1384, 1995 SCC (2) 479

Historical Evolution

India being a late starter, as compared to many countries in the west, in adopting the Consumer protection legislation, has just reached the take –off stage in consumerism though there has been significant development before this stage.

The Consumer Protect Act[6] is regarded as the "*Magna Carta*" in the field of consumer protection for checking the unfair trade practices and deficiency in goods and services.

The very first Consumer Protection Council of our country was founded by C. Rajagopalachari in Madras around 1950. A few years later, in 1966, the Consumer Guidance Society of India was formed in Bombay. It was in 1966 that consumer protection grew into a movement as per the records of the International Organisation of Consumer Unions (1OCUs). In the 70s more Consumer Unions were formed in Delhi, Calcutta and Ahmedabad. There are more than 30 legislations in India to protect consumer interests of which the latest is the Consumer Protection Act, 1986.[7]

The industrial revolution and the development in the international trade and commerce has led to the vast expansion of business and trade, as a result of which a variety of consumer goods have appeared in the market to cater to the needs of the consumers and a host of services have been made available to the consumers like insurance, transport, electricity, housing, entertainment, finance and banking. The advertisements of goods and services in television, newspapers and magazines influence the demand for the same by the consumers though there may be manufacturing defects in the quality, quantity and the purity of the goods or there may be deficiency in the services rendered. In addition, the production of the same item by many firms has led the consumers, who have little time to make a selection, to think before they can purchase the best. In spite of various provisions providing protection to the consumer and providing for stringent action against adulterated and sub-standard articles in the different enactments like Code of Civil Procedure, 1908, the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Indian Penal Code, 1860, the Standards of Weights and Measures Act, 1976 and the Motor Vehicles Act, 1988, very little could be achieved in the field of Consumer Protection. Though the Monopolies and Restrictive Trade Practices Act, 1969 arid the Prevention of Food Adulteration Act, 1954 have provided relief to the

[6] Consumer Protection Act 1986 (No. 68 of 1986), assent of the President of India was accorded on 24-12-1986

[7] E. A. Lizzy, *Consumer Redressal Agencies: How effected? Kerela Experience*. Economic and Political Weekly, Vol. 28, No. 32/33 , pp. 1638-1639 (Aug. 7-14, 1993)

consumers, it became necessary to protect the consumers from the exploitation and to save them from adulterated and sub-standard goods and services and to safe guard the interests of the consumers.[8]

Present Scenario

Indian consumer markets are growing rapidly, changing in nature and composition, and many manufacturers and service providers are adapting them-selves to these changes.[9]

A latest addition to the list of legislations is the Competition Act, 2002. A high level Committee was constituted in October 1999 under the Chairmanship of Shri SVS Raghavan, which submitted its report on May 2000. The committee framed the new Competition Policy which proposed the repeal of Monopolies and Restrictive trade Practices Act, 1969 and enactment of a new Competition Law and establishment of a regulatory authority Competition Commission for implementation of Competition Act. On the recommendation of the Committee the Competition Act was passed and the Monopolies and Restrictive Trade Practices Act, 1969 has been repealed. The Competition Act is a comprehensive legislation, which deals with matters of competition and monopolies.[10]

The Consumer Protection Bill, 1986 seeks to provide better protection of the interests of consumers and for this purpose, to make a provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matters connected therewith.[11]

From the various reports and feedback received by the Central Government, it is evident that many of the consumer forums have not been provided with adequate accommodation, infrastructure facilities and staff. In many State Commissions and District Forums, vacancies of Presidents/Members have not been filled up which adversely affects the disposal of cases. It should be remembered that the confidence of the consumer ultimately depends upon the successful functioning of the Consumer Commissions/Forums. It is, therefore, a matter of

[8] Consumer Protection Act 1986 (No. 68 of 1986), assent of the President of India was accorded on 24-12-1986.

[9] S. L. Rao, "*India's Rapidly Changing Consumer Markets*", Economic and Political Weekly, Vol. 35, No. 40 (Sep. 30 - Oct. 6, 2000), pp. 3570-3572

[10] S.S. Singh and Sapna Chadah, *Consumer Protection in India: Some Reflections*, aegis of consultancy assignment. Promoting Involvement of Research Institutions/Universities/ Colleges, etc., in Consumer Protection and Consumer Welfare. Sponsored by : The Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, Government of India.

[11] Statement of Objects and Reasons of the Consumer Protection Act 1986 (No. 68 of 1986), assent of the President of India was accorded on 24-12-1986.

utmost importance that these agencies must function effectively, efficiently and without any interruption. For this to happen state governments have to perform a definite role. [12]

As stated earlier, one of the concerns of the good governance movement is to promote and ensure accountability of producers and providers in public domain. The judgement of the Supreme Court in *Lucknow Development Authority Vs. M.K.Gupta*[13] may be cited as an illustration. In the instant case the Supreme Court while establishing the jurisdiction of the Consumer Disputes Redressal Agencies created under the Consumer Protection Act emphasised that the service provided by a private body or a statutory or public authority are within the jurisdiction of the Consumer Protection Act. In this context, the Supreme Court also laid down that any defect or deficiency in such service would be treated as unfair trade practice and would amount to denial of service. It would be instructive to highlight the observation of the Supreme Court in the above case with regard to the concept of public accountability. The Supreme Court observed as follow: "The administrative law of accountability of public authorities for their arbitrary and even *ultra-vires* actions has taken many strides. It is now accepted that the state is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees. No functionary in exercise of statutory power can claim immunity. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. Each hierarchy in the Act is empowered to entertain a complaint by the Consumer for value of the goods or services and compensation. The Commission or the Forum in the Act is thus entitled to award not only value of the good or services but also to compensate a consumer for injustice suffered by him."[14]

The concept of public functionary has undergone tremendous change with passage of time and change in socio-economic outlook. In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is now imperative and implicit in the exercise of power that it should be for the sake of society. "It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression then it should, further direct the department concerned to pay

[12] S.S. Singh and Sapna Chadah, *Consumer Protection in India: Some Reflections*, aegis of consultancy assignment. Sponsored by : The Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, Government of India

[13] (1994) 1SCC 243, See also *Ghaziabad Development Authority vs Balbir Singh,* AIR 2004 SCW 2362.

[14] *Ibid.*

the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour"[15]

CONSUMER DISPUTE REDRESSAL AGENCIES AND ITS LOOPHOLES

Mahatma Gandhi once said that, "A customer is the most important visitor on our premises. We are dependent on him.. He is the purpose of it. He is not an outsider of our business. He is a part of it. We are not doing a favour by serving him. He is doing us a favour by giving us the opportunity to do so." The consumer protection bill, 1986 seeks to provide for better protection of the interests of consumers and for that purpose consumer councils and dispute redressal agencies are set up, but the orders of these forums are not very well implemented on time because somewhere Consumer Courts lack executing power. [16]As far as performance is concerned, these Courts were examined for the period of six years from 2005 to 2010 and as per the statistical report the number of pending cases is more than that of the disposed cases. In the year 2010 the pending cases were 64.79% and the number of disposed cases were 36.12%. National Commission, State Commissions and District Forum's performance were low. Consumer Protection Councils have been established according to the provisions of CPA, but their ultimate objectives remained unachieved. One of the most important rights of the consumers is the right to redressal. Majority of the consumers are not sure as to whom they should approach in case the service providers or the suppliers of goods are taking them for a ride. For this purpose, the existing consumer courts need to be strengthened. The members of the consumer courts, particularly the non-judicial members, should be given training similar to that given to the food inspectors and other Government officials, but these training programmes need to be organised by professional groups. The Government should also conduct a study regarding the present state of consumer education.

Bihar was the first state to set up these consumer courts and yet its record is being described by activists as 'dismal'. The problem is not the law, its absence or limitations; the real problem is the lack of commitment to public accountability even among those appointed to interpret the law.[17]

[15] *Ibid.*
[16] Shakuntala Narasimhan, *Consumer Redressal Courts: missing commitment to the public interest*, Economic and Political weekly,vol.27 no.22,(1992),pp. 1129-1130 available at http://www.jstor.org/stable/4398434
[17] *Ibid*

CONCLUSION:

Although there is a policy in position regarding redressal of consumer protection, it appears the government has not acted to utilise the mechanism for the benefit of the consumer or the populace, for which it was aimed at. The whole point in setting up redressal courts is lost if those sitting in judgment miss the spirit of the enactment and prefer instead to go by technical hair-splitting and legerdemain from lawyers as in a conventional court of law. The same Consumer Protection Act applies all over the country, but citizens in some fora have a better record of redressal of grievances than in others, depending on how the presiding official perceives the rationale underlying the enactment. The need of the hour is to bring awareness to the common people to seek justice against the exploitation by the unscrupulous traders and their unfair trade practices. It is proved from the discussion made in this research that the mechanism for consumer protection redresssal is ill equipped as much as that the designated officials of the courts are not doing their rounds. On the other hand the majority of the consumers of the country like India are either illiterate or poorly educated to have clear understanding of the rules of the dispute redressal courts in order to get justice. Therefore it will be in the fitness of things to -

- Educate the common people about their rights and duties
- Evolve mechanism to bring about awareness on this issue to help the country as a whole develop in a much better way
- Strict vigilance to be resorted to so that the law of the country regarding consumer protection are strictly implemented else to punish the offenders.

To overcome the menace faced by the consumers of Indian market, it will not be out of context, to recommend that the protection of consumer may be included as a subject at school level itself in order to educate the new generation about the rights and duties that they possess.

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7. Nexus between Consumer Protection and Competition Law: An examination of the impact of the new Competition Policy on Consumer Protection in India

Danish[1]

Abstract

Consumer Protection and Welfare in India has been the subject of great debate with several opinions on how it can be most effectively implemented. The original legislation that was responsible for ensuring consumer welfare was the Monopolies and Restrictive Trade Practices Act of 1969, which had the directive of preventing monopolies in the market, thereby leading to a greater competition in the market and more choice for the consumers. However, with economic liberalisation and shift to a more consumerist society, a need for newer legislative frameworks was felt. It was in response to this that the Consumer Protection Act of 1986 and the Competition Act of 2002 were enacted. These legislations are mutually reinforcing, with some overlap in their spheres of influence and are aimed at the direct benefit of consumers. The biggest difference between them rests in the section of the economy targeted by the Acts and the methodology applied by their respective enforcement agencies in resolving disputes. This essay focuses on the new Competition Policy that was envisioned as part of the 11th Five Year Plan of the Government of India and examines its impact on the arena of Consumer Protection. It further delves into the procedural aspects of the enforcing agencies and makes suggestions on how it can be improved by taking cognizance of the best practices followed by each for the benefit of the consumers, businesses and the economy as a whole.

I. Introduction

Consumers and producers have historically had an extremely unequal relationship, with the producer having much greater power and influence over consumers and their choices. This was particularly true in cases where the markets were dominated by a single producer, also known as monopolies, whether naturally evolved or government mandated. The advent of

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economic liberalisation in India brought on a highly globalised economic system that we seen in contemporary times. The protection of the welfare of the consumer has assumed a position of paramount importance in this system. The olden maxim of "*Caveat emptor*" no longer holds true, with the consumer having a large array of options at their disposal for upholding their rights as a consumer.

Consumerism, before the term got hijacked to mean something else, used to stand for the protection or promotion of the interests of the consumers. As commonly understood, consumerism refers to wide range of activities of government, business and independent organisations designed to protect rights of the consumers. Consumerism is a process through which the consumers seek redress, restitution and remedy for their dissatisfaction and frustration with the help of their all organised or unorganised efforts and activities.[2] According to Merriam Webster, Consumerism is a movement or policies aimed at regulating the products, services, methods, and standards of manufacturers, sellers, and advertisers in the interests of the buyer. Such regulation may be institutional, statutory, or embodied in a voluntary code accepted by a particular industry, or it may result more indirectly from the influence of consumer organizations.[3]

Consumerism remains the wellspring of the rationale of any enactment that purports to control the market and improve consumer welfare. In India, it was originally embodied in the form of the Monopolies and Restrictive Trade Practices Act, 1969, which had the original directive of prohibiting monopolies and restrictive trade practices. However, the Sachar Committee recommendations were actualized in the form of a 1984 amendment that defined various Unfair Trade Practices so that consumers, manufacturers, suppliers, traders and others in the market could conveniently identify practices that are prohibited.[4]

With economic liberalization and advent of conglomerates into the Indian economy, it became even more essential that the consumers be protected from the abuse of dominance held by these enterprises. To this effect, the Consumer Protection Act, 1986 (COPRA) and the Competition Act, 2002 have been instrumental in actualizing real protection of consumer interests and welfare in the marketplace. This essay examines the confluence of these two

[2] Singh & Chadah, *Consumer Protection in India: Some Reflections*; Available at www.cccindia.co/corecentre/Database/Docs/DocFiles/Consumer%20Protection%20in%20India.pdf; Last visited on 24 March 2014

[3] Available at www.merriam-webster.com/dictionary/consumerism

[4] Dr. S. Chakravarthy, *MRTP Act Metamorphoses into Competition Act;* Available at www.cuts-international.org/doc01.doc

enactments and their respective policy parameters and how they aid in overall consumer welfare.

II. National Competition Policy and Consumer Welfare

The Planning Commission Report on the 11th Five Year Plan states that "Promotion of consumer welfare is the common goal of consumer protection and competition policy".[5] The combined pressures exerted by market forces has resulted in the creation of a new system of policy frameworks for governing behaviour in the marketplace for the ultimate welfare of consumers.

The World Trade Organisation (WTO) defines competition policy as, "the full range of measures that may be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises".[6] The main objective of Competition policy and law is to preserve and promote competition as a means to ensure efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest possible prices and adequate supplies to consumers. Under these, the maximization of consumer welfare becomes the most predominant concern.[7]

A National Competition Policy for India was first mooted as part of the 10th Five Year Plan with the stated objective of bringing about a competition culture amongst economic entities to maximize economic efficiency, protect consumer interests and improve international competitiveness. Currently in its draft form, it envisages the adoption of principles of competition and fair trade by market enterprises, for the ultimate benefit of consumers.

The consumer protection policy in India is meant to create an environment whereby the clients, customers, and consumers receive satisfaction from the delivery of goods and services needed by them.[8] It was supposed to provide effective and efficient safeguards to

[5] Planning Commission Report on the 11th Five Year Plan, 2007 – 2012, Volume 1, ¶ 11.1; Available at www.planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11th_vol1.pdf
[6] WTO Secretariat, The Fundamental Principles of Competition Policy; WT/WGTCP/W/127, 7 June 1999. Available at docsonline.wto.org/Dol2FE/Pages/FormerScriptedSearch/directdoc.aspx?DDFDocuments/t/WT/WGTCP/W127.doc
[7] Pradeep S. Mehta, *Competition Policy and Consumer Welfare* in 'A Functional Competition Policy for India', pp. 124
[8] *Supra* n.4 ¶ 11.6

consumers against various types of exploitations and unfair dealings in the marketplace. It led to a unique piece of legislation since, unlike other laws which are basically punitive or preventive in nature, the provisions of the COPRA are compensatory and meant for specific grievance redressal.

Competition and consumer protection policy and law have several common, mutually complementary elements. The Report observes that Competition law concentrates in maintaining the process of competition between enterprises and tries to remedy behavioural or structural problems in order to re-establish effective competition in the market. The consequence of this is higher economic efficiency, greater innovation and enhancement of consumer welfare. Thereby the consumer experiences wider choices and greater availability of goods at affordable prices. On the other hand, the consumer protection policy and law are primarily concerned with the nature of consumer transactions, trying to improve market conditions for effective exercises of consumer choice. Thus, the two disciplines focus on different market failures and offer different remedies, but are both aimed at maintaining well-functioning, competitive markets that promote consumer welfare. The two disciplines are therefore mutually re-enforcing.[9]

III. Evolving Enforcement Agencies

The Preamble to the Consumer Protection Act, 1986, provides for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith,[10] while the Preamble to the Competition Act, 2002, provides, keeping in view the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. Hence, it is easily ascertainable that the basic purpose of both these enactments is the protection of the interests of the consumer by establishment of enforcement agencies for the respective enactments.

The UN Guidelines for Consumer Protection states that each Government should set its own priorities for the protection of consumers in accordance with the economic, social and

[9] *Id* ¶ 11.37
[10] Preamble to the Consumer Protection Act, 1986

environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures.[11] These Guidelines do not envisage a single enactment for protection of consumers, and gives highest priority to the sovereign state to design its own mechanisms for this purpose. Hence, a complaint under COPRA can even include any allegation that an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider.[12]

The definition of Consumer as given under section 2(d) of the COPRA and 2(f) of the Competition Act are very similar. However, the biggest difference between them is the fact that COPRA envisages a system of complainants for the consumer dispute redressal agencies who have suffered some violation of their individual right as a consumer while the Competition Act allows for any person to come forward as an informant and tell the CCI about any violation of the provisions of the Act. Further, the Consumer Protection Councils as envisaged in Sections 6 and 8 of the COPRA have the stated objective of promoting and protecting the consumer's right to be assured, wherever possible, access to a variety of goods and services at competitive prices;[13] Similarly, the CCI is vested with the duty to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.[14]

Presently, competition and regulation laws ignore the potential jurisdictional overlaps between the two areas of law. Several key, substantial provisions of the Competition Act are not market specific and apply generically to regulated and unregulated markets. So it is inevitable that sectoral regulators and the competition authority will issue directives to the same market players, which are likely to conflict given the diverse perceptions of the respective authorities.[15]

The cause of this situation can be directly traced to the minimal institutional interface that currently exists between the sectoral regulators and competition authorities. Though Section 21 of the Competition Act allows any statutory body, which includes a regulator, to refer matters that may potentially violate the competition law, this is optional and regulators may

[11] Available at unctad.org/en/docs/poditcclpm21.en.pdf
[12] § 2(c)(i) of the Consumer Protection Act, 1986, which reads "(c)"complaint" means any allegation in writing made by a complainant that — (i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;"
[13] § 6(c) of the Consumer Protection Act, 1986
[14] § 18 of the Competition Act, 2002
[15] *Supra* ¶ 10.105

choose not to do so. Section 21 reads thus: "Reference by statutory authority: (1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission; Provided that any statutory authority, may, *suo motu*, make such a reference to the Commission."[16]

The Competition Commission of India has itself come up with several options with regard to regulating the relationship between sectoral regulators and competition authorities within India. First, mandatory consultation between regulators and competition authorities before any action is taken in regulated industries may be a formal and effective technique. This may be institutionalized by allowing some members of each institution to participate in the decision-making processes of the other. Second, each authority must have the right to intervene in any dispute adjudication before the other. If such a participation right is prescribed by allowing each institution an intervention right in any dispute, this will allow for a reasonable degree of inter-institutional communication.[17]

IV. Conclusion

The Parliament enacted the laws for protection of consumer welfare, such as the COPRA to ensure a remedy for negligence on the part of the different Government agencies and also in other cases where quick redressal can be made by way of giving reasonable compensation to the aggrieved party which had been harmed. In fact, the idea behind providing this remedy was to create a mechanism for summary redressal without payment of court fees and less involvement of technical procedure followed in the civil court. However, the actual experience is otherwise. Nowadays, disposal of redressal of complaints has become just like civil court proceedings.[18]

As part of the strategy of the 11th Five Year Plan, it has been suggested that a National Quality and Standardization Authority be established. This body would supplant the Bureau of India Standards and certain sectoral regulators as the National Standards Body. It would also create a legal framework wherein it would set up voluntary standards in all areas of

[16] § 21 of the Competition Act, 2002; Available at www.cci.gov.in/images/media/competition_act/act2002.pdf
[17] *Supra* ¶ 10.107
[18] *Jeet Singh Bisht* v. *State Of U.P. And Others*; 1999 (1) AWC 22

economic and social activities, and mandatory regulations in areas that impact on health, safety, and the environment.[19]

Secondly, the working of the consumer grievance redressal forums is a very individualistic process with individual consumer being given the highest priority. However, in many cases, there are large scale violations of consumer rights by a single producer, such as is often seen in the case of builders such as DLF.[20] In such conditions, it is necessary that the individual character of proceedings in the consumer forums be discarded in favour of a class action suit type proposition, wherein consumers with similar grievances can be joined together into a single entity for obtaining relief under the COPRA.

Thirdly, the extant provisions of the COPRA do not allow for any punitive measures that can be taken against errant enterprises over and above what is due to the consumer. This leads to a situation wherein even a repeat offender can compensate the consumer who approaches these forums and other consumers are left in the lurch. It is suggested that the COPRA be amended to include monetary sanctions and penalties that can be imposed against repeat offenders and particularly egregious violators of consumer rights. This can be implemented in a manner similar to the provisions and procedure related to imposition of monetary penalties as laid down in the Competition Act.

The welfare of the consumers remains a paramount consideration for all legislations that purport to govern and regulate the market and economy. It is necessary that there be a dynamic framework to cope with the changes and pressures exerted by the market and society. The extant enactments have provided a modicum of control, however fragile. It is essential that this is strengthened by a joint effort by legislative, executive and members of civil society.

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[19] *Supra* ¶ 11.13
[20] *Belaire Owner's Association* v. *DLF Ltd. And Ors.*, Case Number 19/2010 before CCI; Available at www.cci.gov.in/May2011/OrderOfCommission/192010S.pdf

8. RELIEF UNDER CONSUMER PROTECTION LAW AND POLICY – A STUDY IN MEDICAL NEGLIGENCE

Srinivas Raman[1]

ABSTRACT

It has been seen in the jurisprudence of cases involving medical negligence and miscarriage of medical ethics, that hospitals and doctors are not necessarily covered under the law of consumer protection. This is mystifying when one views it in light of comparative consumer laws in other countries – in the UK and the US, there are specific provisions under torts claims to proceed in medical malpractice cases, but this does not exclude a residual category of *consumer protection law* cases that implicate hospitals and doctors. A strict reading of the Consumer Protection Act, 1986, reveals that the definitional clause envisages two possibilities – goods and services. Whereas it is easy to argue that hospitals and the *services* rendered by doctors come under this definition, the practice has not reflected this in India.

The recent Supreme Court ruling in the *Anuradha Saha* case where the long suffering plaintiff was finally awarded exemplary damages in an unprecedented and creative calculation of damages by the apex body, demonstrates the shaky grounds of relief available for violations of consumer rights in India. The standing of this decision in common law, being grounded in the doctrine *stare decisis* now provides a persuasive and even binding authority for future litigation as to the costs of relief in medical malpractice. But hard cases make bad law.

The proposed paper seeks to explore the dynamic that the *Anuradha Saha* case created in the context of judicial remedies under consumer law. The problematic for this paper will be the definition of *who is a consumer?* Having situated itself in the space provided by recent cases on medical negligence, the paper will seek to argue that aggrieved victims and patients *do, in fact,* come within this definition. Having established this, the paper will elucidate the ruling on calculation of damages in order to come to a better understanding of what relief is available under consumer law. Finally, the paper will draw lessons from the gaps in consumer policy in order to better assess the needs of litigants towards achieving fuller justice.

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INTRODUCTION

October 24, 2013 was a historical day for the Indian judiciary - the Supreme Court delivered a landmark judgment in the award of compensation in an important case on medical negligence, the *Anuradha Saha* case[2]which had been languishing in lower courts for over a decade. The unprecedented compensation amounting to a whopping Rs. 11 crore is the highest quantum of monetary damages ever awarded in India in a medical negligence case. Several questions have been raised in retrospect about the significance of this decision and its future ramifications in the context of the established doctrine of *stare decisis*. The judgment on damages implicates the question of the relationship between tortious remedies and the legal relief provided for by consumer protection law in India. Some of the key analytical points raised by this relationship are the definition of who is a consumer; whether victims of mass torts and injured patients of medical negligence cases are covered by this definition; and what the economic and policy implications of this unprecedented ruling on exemplary damages may be.

This paper is divided into two parts. The first part will examine the definitional clauses of the Consumer Protection Act 1986 and review its scope through case law to show the present position of the law. The argument in the first part will pitch patients and victims of medical negligence cases within the scope of the statute.

The second part will discuss the rationale behind the award of damages to the claimant in the *Anuradha Saha* case and will focus mainly on the method of computation of damages adopted by the apex court. The object of decoding the computation of damages will be to understand the precedential value of the formula it creates. Using the calculation created by this case, the thesis of the paper will be the articulation of the effects, in the common law doctrine of precedent or *stare decisis,* of applying this case to future litigation on medical negligence in India. The paper will conclude by identifying the implications of this judgment from a legal as well as policy perspective.

[2]*Balram Prasad v. Kunal Saha* (2014) 1 SCC 384, judgment of 24 October 2013 (*hereinafter "Anuradha Saha cse")*

1. CONSUMER PROTECTION LAW: THE PROMISE AND THE PRICE

a. Who is a consumer?

According toSection 2(d)of the Consumer Protection Act, 1986, a consumer means any person who -

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or,

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly prom-ised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 'hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes.[3]

It has been held that the services rendered for consideration by medical practitioner, hospitals and nursing homes fall within the scope of Section 2(d).[4]

According to Section 2(g) of the Act, deficiency means *any fault, imperfection, shortcoming or inade-quacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service*.[5]

Thus, when a qualified medical practitioner[6] negligently causes injuries to the patient, he may come under the understanding of "deficiency of service" or medical negligence. In medical negligence cases, in which doctors have negligently, or through no wrongdoing by the patient

[3] Consumer Protection Act, 1986.
[4] *Indian Medical Association v. V.P. Shanta and Ors* 1996 AIR 550.
[5] *Supran.* 1.
[6] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

or consumer concerned, left foreign matter in the body during operation[7] or when they have carelessly administered wrong treatment to patients resulting in injuries or death[8] they have been held liable to pay compensation to the claimants.

Another pertinent question which arises is whether the kin of a deceased patient (victim of medical negligence) can claim compensation since he is not a direct consumer himself. It has been held that the kin of the deceased is entitled to invoke the redressal machinery provided under the Act.[9]

Though the definition of 'consumer' in the Act does not explicitly include legal representatives, case law does[10]. The judicial reasoning adopted in such cases of gross negligence in which the consumer (patient) dies, is usually that the family of the deceased will be left with no remedy if a hard-headed view or a literal reading of the text of the provision is adopted; courts tend to apply well-established jurisprudential principles of equity and good conscience so that he provisions of social welfare legislation can be followed to give force to the spirit of consumer protection legislation and bring justice to the aggrieved consumer.[11]

b. Justice delayed is justice denied…

The delay in delivery of justice is a major problem plaguing India.[12] It has been observed[13] in several cases[14] that compensation took over a decade and even then was inadequate[15].

[7] *Aparna Dutta v Apollo Hospital Enterprises Ltd and Ors.*, AIR 2000 Mad 340.
[8] *V. Kishan Rao v. Nikhil Super Speciality Hospital and Anr*. 2011ACJ500.
[9] *Cosmopolitan Hospitals and Anr v. Vasantha P Nair*1 (1992) CPJ 302 (NC) echoing *Salmond on Jurisprudence*(1930) - The rights which a dead man leaves behind him vest in his representative. They pass to some person whom the dead man or the law on his behalf has appointed to represent him in the world of the living.
[10] *See*, L. H. LaRue, *Hohfeldian Rights and Fundamental Rights*, The University of Toronto Law Journal, Vol. 35, No. 1, pp. 86-93 (1985).

[11] *Supra n.* 6. *See also, Medical Negligence Liability Under The Consumer Protection Act: A Review Of Judicial Perspective*, Indian Journal of Urology, Vol. 25(3), pp. 361-371 (2009).
[12] *Pendency of cases are "gigantic problems": SC Judge, Daily News & Analysis*, Times of India, 12 October 2011.
[13] *Municipal Corporation of Delhi* v. *Association of Victims of Uphaar Tragedy* (2011) 14 SCC 481
[14] *Union Corporation v. Union of India*, 1995 Supp. (4) SCC 59
[15] *See*,http://www.thehindu.com/news/national/kolkata-hospital-3-doctors-told-to-pay-rs-596-cr-for-negligence/article5268364.ece (last visited 22 March 2014) for a chronology of events in the *Anuradha Saha case*.

However, in India, medical negligence cases rarely hold in favour of the aggrieved claimant and even when held in favour of the claimant, the damages awarded are not adequate.[16] The reason behind this is that the burden of proof in such cases is on the plaintiff. [17]

Apart from the inequality of arms that the law creates through this burden of proof, the unholy web of connections in the medical industry in India make it extraordinarily difficult to pin liability on those responsible because of the extremely technical nature of the suit.[18] In most cases, a medical expert's verification is required and to safeguard the mutual interests of the profession, the experts by and large rarely testify in favour of the claimant.

However this may be changing. It has recently been held that in *prima facie* cases of medical negligence, the doctrine of *res ipsa loquitor* is to be followed and the verification by a medical expert is not required in such cases[19]. Expert opinion is required only in complicated cases in which the Consumer Forum feels that it is required and the facts are not such that they can be deciphered by the members of the Fora. In apparent cases of medical negligence the principle of *res ipsa loquitur* applies and the plaintiff does not have to prove anything further, this is in consonance with the principle of evidence[20] intended to aid a plaintiff to recover compensation who for no fault of his is unable to provide evidence as to how the wrong occurred.[21]

2. THE JUDGMENT ON COMPENSATION IN THE *ANURADHA SAHA* CASE

Anuradha Saha, a child psychologist from USA had come to Kolkata on a vacation with her husband Kunal Saha. What started out as an idyllic vacation quickly turned into a nightmare when Anuradha complained of skin rashes and tragically lost her life one month later after going through *a series of unfortunate events* which caused immense mental and physical agony to the couple. Her death was preceded by a wrong diagnosis, wrong and possibly lethal treatment, drug overdose and deficiency in medical service. Finally when her condition

[16]*Supra n.*11 and 12
[17]*Supra n.* 9
[18]*See, Tackling Corruption In Indian Medicine*,The Lancet, Volume 382, Issue 9905, Pages e23 - e24, 16 November 2013
[19]*V. Kishan Rao v. Nikhil Super Speciality Hospital and Anr.* 2011ACJ500
[20]Indian Evidence Act 1872
[21]*Supra n.* 5

deteriorated she was moved from Kolkata to one of India's largest hospitals, in Mumbai, where she was diagnosed with an extremely rare disease – Toxic Epidermal Necrolysis (TEN) which is contracted by less than one in a million people. Soon after, she died in Mumbai on May 28th 1998[22]. Her husband Kunal Saha soon filed criminal and civil charges against the doctors and hospital responsible, and after the criminal suit was dismissed, represented her in a lengthy and tough civil suit for 15 years which finally ended with the Supreme Court's order to award compensation to the claimant in excess of Rs.11 crore including interest.

a. Situating *Anuradha Saha* in the common law doctrine of *stare decisis*

The compensation was warranted by the exceptionally challenging nature of tortious litigation involving medical negligence but was the quantum rational? What judicial precedents will it set for the future? The calculation of damages in this case sows seeds of confusion for future litigations of similar nature.

This unprecedented amount was calculated by taking into account various factors especially the economic factors. The mode of calculation of damages adopted by the apex court was the Multiplier Method[23], where the income of the victim is multiplied by the number of years of working capacity left. In this case, the annual income of the deceased was $30,000 which was multiplied by 30 years which was argued to be her minimum working capacity. Earlier precedents show that the annual net income of the victim was multiplied by 10-18 years even if the victim's earning capacity was higher because when the patient comes for treatment he is already in a compromising state. In the present case, it was expected that the victim would have worked for at least 30 years more had not her life been cut short by medical negligence, and hence the value of the multiplier is rational without being confined to arbitrary limits set by precedents.

b. Stare decisis versus fundamental principles of human rights

The question which arises with respect to future cases is whether the income of the deceased should be taken into consideration while awarding damages? Should a rich person and a poor person get different damages for loss of life? If this is so, then by logical reasoning it would

[22]*See, The Anuradha Saha Case and Medical Error in India*, Vol - XLVIII No. 47, Economic and Political Weekly (November 2013).
[23]*See, Deterrence and Damages: The Multiplier Principle and Its Alternatives*, Michigan Law Review, Vol. 97, No. 7 (1999).

mean that the Court values a rich person's right to life more than that of poor person's. But this idea would be in stark contrast to the Right to Equality under the Constitution[24].The patients, under consumer protection law discussed in Part 1, are all consumers. There is no hierarchy in the scope of the application of the Act to different economic strata of consumers. Irrespective of their social, cultural and economic background, patients, victims of medical negligence, consumers, are entitled to be treated with dignity, which not only forms their fundamental right but also their human right.[25]

c. *Stare decisis* and the dangers of forum shopping under Indian law on compensation

If, in arguendo, consumers under the law of consumer protection are a *discrete* category against victims of acts of medical negligence, an interesting, and perhaps frightening thesis presents itself.

India has emerged as a popular international destination for healthcare services. This development is at clear cross purposes with the wanton commission of acts of medical negligence. However, if we leave these un-reconciled for the sake of argument, it appears that the logic applied by the Court in *Anuradha Saha* may become a precedent for rich patients from the USA and other economically higher countries to come to India and demand higher compensation in cases of medical negligence though the value of services in both the countries is very different as are the precedents.

What will happen if in the light of this judgment foreigners purposely file suits for medical negligence in India to get higher compensation from Indian Courts? This would add to the already large pile of undecided cases in India and would harm the economy. The difficulties of litigation are the prime deterrent for non- reporting of instances of medical negligence in India. In the present case, the victim belonged to a very wealthy family living in USA and whose husband was a doctor with in depth knowledge of the disease and treatment and who persisted in fighting the case against all odds and at a huge personal expenditure for 15 years.

[24]Jordan Wilder Connors, *Treating like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*,Columbia Law Review, Vol. 108, No. 3, pp. 681-715 (2008).
[25]*Supra n.*1.

d. Cascading effect on Indian policy

This judgment on damages may thus trigger a series of adverse consequences – by sending a warning signal to the medical community; practitioners may become apprehensive and over cautious while treating their patients in fear of incurring huge losses if something goes wrong. It may also lead to the practice of *defensive medicine* in India which occurs when the diagnostic treatment of the patient does not prioritize recovery of the patient but rather treats the patient with the view to safeguard the doctor from medical negligence litigation. This will lead to a situation akin to policy paralysis in the Indian bureaucracy. Well intentioned doctors may become averse to taking small risks while treating patients which would result in degradation of medical services in India affecting the lives of millions of patients. Ironically, this in itself could successfully paralyse the position that India enjoys as an affordable healthcare destination internationally!

The mathematical formula created in the judgment on compensation will also send an alert to insurance companies; this may well create an excessive burden on patients all over the country in terms of medical insurance costs. In the light of the award, doctors will naturally look to insure themselves against potential liability; the extra cost would trickle down to the lowest common denominator, i.e. the patient who will, once again, suffer.

CONCLUSION

Hard cases make bad law[26] is a common legal adage which means that an extreme case is a poor basis for making a general law to be used in less extreme or ordinary cases. The present case is *prima facie* a hard case, partly due to the extremely rare nature of the disease and partly due to the quantum of damages awarded. Therefore, according to the maxim, if this case is allowed to be a precedent, it would act as a poor precedent for future litigation as the facts and circumstances of this case are exceptional in nature. In an interesting economic segue, a hypothetical presents itself thus: had the Supreme Court passed its judgment a decade earlier, the award for damages would have been significantly lesser in comparison, this is due to the devaluation of the Indian Rupee against the U.S. Dollar![27] The deceased's net annual income was measured in dollars which were converted into rupees for the purpose

[26] *Korematsu v. United States*, 323 U.S. 214 (1944), *following Winterbottom v Wright* (1842) 10 M&W 109.
[27] *See* foranalysis on thedevaluation of the rupee and its implications on policy- http://www.indiastat.com/article/59/nikhil/full%20text.pdf

of compensation. Therefore, the delay in justice has resulted in a significant increase in compensation.

The *Anuradha Saha* case after 15 years of hard litigation battles has finally come to an end. But this case will not be forgotten as it will be debated and deliberated on for years to come as a landmark judgment in the area of Consumer Protection law and Medical Negligence in India and also the repercussions on public policy.

But this case is an exception and invokes the question of whether money is power and plays a role in the administration of justice in India…all over the country there are thousands of such cases where medical practitioners unscrupulously indulge in professional malpractices and escape all liabilities either because the patient/ kin of the patient is too poor to enter into what is doomed to be, by the same power of precedent, a protracted and often one sided legal battle This case has created history by sending a signal to the entire medical community at large that impunity for the tort of medical negligence is unacceptable; medical practitioners do indeed come within the definition of a service provider and a patient is a consumer and is entitled to get relief for medical negligence.

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9. EXPERT WITNESSES IN MEDICAL NEGLIGENCE: Recognizing the importance of the Martin D'souza Case

Sruthi Anil[1]

Sushma Sosha Philip[2]

The production of witnesses in cases heard in the various consumer fora remains a directory provision of the Consumer Protection Act. However, the opinion of expert witnesses in medical negligence cases contributes greatly to the outcome of the case and the judgment passed. The law regarding the production of expert witnesses in medical negligence cases has evolved with judgments passed on various cases.

On October 24th 2013,a historical verdict was passed by the Apex court in which Kolkata based AMRI hospital along with three other doctors were directed to pay Rs5.96 crores with interest to Kunal Saha, who tragically lost his wife due to negligence rendered by medical practitioners. This decision is a turning point in law relating to medical negligence.

"Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident,is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether these precautions were taken in which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence"[3]

In medical negligence, doctors in India may be held liable depending on the damage caused or degree of negligence. It is said in The Consumer Protection Act 1986, that the District

[1] Sixth semester, The National University of Advanced Legal Studies
[2] Sixth semester, The National University of Advanced Legal Studies
[3] *Dr. Kunal Saha v Dr. Sukumar Mukherjee and Ors.*, IIICPJ142NC(2006)

forum is considered to be a civil court .The line demarcating civil liability and criminal liability is very thin in situations of medical negligence. Liability in civil law is based on the amount of damages incurred[4]. Degree of negligence is a determinative factor for liability under criminal law. However in practice, it is extremely difficult to distinguish between these two. A doctor can only be held to be liable if he has not exercised the same skill and care that another professional would have exercised if placed in the same position. The complainant should prove his allegation by citing the best evidence available in medical science and by presenting expert opinion.

The doctrine of *res ispa loquitor*(the accident speaks for itself)can be invoked in certain situations. In those situations, no proof is required for negligence. This principle was expounded in Dr. Janak Kanthimathi's case.[5]

But this principle cannot be applied in cases of medical negligence due to the numerous factors that contribute to the commission of such negligence. The negligence conducted by a medical practitioner is determined by judges who are not trained in the field of medicine. If all the facts and circumstances relating and contributing to the case are not properly understood by the judges, the concept that the action or accident speaks for itself cannot be effectively applied.

The present scenario is that reliance is placed on the testimony of expert witnesses only in situations where the judge deems such reliance to be necessary. This arbitrary manner in which the law is applied is prejudicial to doctors. The expert witness in medical negligence has two functions. The first is to provide assistance to the forum in determining whether the act conducted by the accused comes under the purview of negligence or not. The second duty is to explain the nuances of medical knowledge relating to that particular matter in a manner understandable to the common man in general and the practitioners of law trying the case in particular.

Relevance of expert witness was explained in detail in Martin F. D'Souza's case[6]. In this case, the respondent was undergoing treatment in Nanavati hospital under the appellant doctor, for chronic renal failure. The respondent wanted to be operated on by a particular doctor who was not available. The deterioration in his health led to a high fever and the

[4]*State of Haryana vs Smt Santra,* AIR 1888 (SC 2000)
[5]*Dr Janak Kanthimathi Nathan v Muralidhar Eknath Masanae,* ICPJ191NC(2008)
[6]*Martin F. D'Souza v Mohd. Ishfaq,* AIR 2049 (SC 2009)

appellant doctor suggested admission into the hospital. However the respondent refused to heed to the advice of the doctor, so the appellant doctor had to prescribe antibiotics to him. Once on antibiotics, the respondent had to undergo three sessions of dialysis in nine days. Realizing the seriousness of his condition, he got admitted to the hospital. His blood reports showed the presence of serious infections and the respondent demanded an immediate transplant. The appellant doctor, however, advised him against taking such action, due to his fragile condition. The respondent got discharged and was prescribed antibiotics, three sessions of dialysis a week and an injection which suited his condition. The medicine resulted in tinnitus (a mild ringing in the ear) and the appellant doctor immediately advised him to stop taking this medicine. The respondent ignored the doctor's instructions and, at his will, continued taking the medicine and did not complain of any deafness .After one month he got a transplant done in another hospital. The dosage of antibiotics given after this transplant resulted in deafness. The respondent filed a complaint for compensation in the National Commission, Delhi which upheld his complaint and granted him compensation. The appellant filed an appeal in the Apex court seeking redressal.

The Apex Court came to the conclusion that the appellant was not to be blamed and it was the non–cooperative behaviour of the respondent which led to his impairment. The court stated that "(a) *patient who does not listen to his doctor's advice often has to face adverse consequences"*[7]. The Apex court also restrained other courts, including the various consumer fora (district, state and national) from issuing notices to doctors for alleged medical negligence without seeking opinions from experts. This order laid down by the Supreme Court is an important principle in reference to the production of expert witnesses in medical negligence cases. The absence of an independent expert witness is a detrimental factor, contributing to the decision rendered by the court. The judges are not knowledgeable in medical science and the decision rendered by them may be prejudicial to the accused.

S. 13 (4), clause (i) to (vi) of the Consumer Protection Act, discusses the procedure relating to the production of witnesses and documentary evidence before the Consumer forum. However, the wordings of this provision indicate that it is only directory and not mandatory and hence only persuasive in value. Thus, 'the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath' [8] and 'issuing of any

[7] *Ibid.*
[8] The Consumer Protection Act, 1986 S 13 (4) (i)

commission for the examination of any witness'[9] are not procedures which must be carried out by the Consumer forum mandatorily, for all cases.

The persuasive value of this provision has been further underlined by the decisions in various recent cases.

As mentioned above, one of the orders passed in the Martin D'Souza case was that all the consumer forums- district, state and national-before issuing notice to a doctor or hospital against whom the complaint was made, must refer the matter to a committee of doctors and only when the committee reports of a *prima facie* case in medical negligence, should the notice be issued[10]. This order repaired the lacuna in the Consumer Protection Act by making the opinion of an expert in all medical negligence cases mandatory. However, in later cases, this decision was over ruled, thus undoing any good that came from the judgment.

Both in the Kishan Rao case[11] and Minor Marghesh case[12], the necessity of an expert witness in medical negligence cases was dispensed with. In Kishan Rao's case, the individual, Kishan Rao, got his wife admitted in a hospital complaining of fever and chills. She was treated for typhoid instead of malaria. When her condition worsened, she was shifted to another hospital where she died of malaria and cardio-respiratory arrest. The court held that the facts of the case a very apparent in pointing to wrong treatment and an expert opinion was not required. In Minor Margesh's case, a glucose saline injection to Margesh's leg caused swelling and gangrene which resulted in amputation. In this case as well, the Supreme Court decided that it was a clear case of negligence despite the absence of an expert witness. The Supreme Court's change of mind regarding expert witnesses could be due to the fact that in Minor Margesh's case, the National Commission to which the case was first referred to,based the decision that the doctor was not negligent, purely on expert opinion. It was later discovered that the doctor in question had not produced the most important witness. Thus, when the case was referred to the Supreme Court, the court disregarded an expert opinion and declared the doctor to be medically negligent.

By these decisions, it is clear that as of today, production of expert witnesses before the court in medical negligence cases is the prerogative of the courts in question and not mandatory

[9]The Consumer Protection Act, 1986 S 13 (4) (v)
[10] Anurag K. Agarwal, *Medical Negligence: Law and Interpretation* (March 2011), http://pbtindia.com/wp-content/uploads/2011/10/Medical-Negligence-Law-and-Interpretation.pdf
[11]*V. Kishan Rao v Nikhil Super Speciality Hospital*, 5 SCR 1 (2010)
[12]*Minor Marghesh K. Parikh v Dr. Mayur H. Mehta*, AIR 249 SC (2011)

.Also, as per the present consumer law, there is no provision for a committee of doctors to give a *prima facie* report, if so required.

The principle of interest to this paper, elucidated by the court in the Martin D'Souza case was the order that all cases of medical negligence were to be first brought before a committee of doctors to state that the case is indeed one of medical negligence. Through the Martin D'Souza case, it was stated that in all cases of medical negligence, brought before any forum, the production of an expert witness is necessary.

The function of an expert is to simply place before the Court all the materials, together with the reasoning which induced him to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials.[13]It has been held that the evidence of an expert witness is not binding on the court.[14] It is only advisory in nature. Thus, the production of an expert witness will only serve to make the facts of the case clearer to the judges, especially in cases where the medical sciences are involved. The need for this was succinctly stated in the judgment of the Martin D'Souza case.

"Judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence."[15]

It was further stated in the same judgment that,

"The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood."[16]

As already mentioned, in cases which include medical sciences, especially, a practitioner of law is not well-equipped to decide the case based on his or her own expertise on the subject. Even if the facts of the case seem to indicate a clear negligent action on the part of the doctors or support staff, it is impossible to judge the true nature of the action without a thorough knowledge of medicine. This is where the relevance of an expert's opinion comes into play. S. 45 and 46 of the Indian Evidence Act discuss the definition and importance of an

[13] Vakil No.1, *Role of Experts in Litigations*(March 25, 2013), http://www.vakilno1.com/legalviews/role-of-experts-in-litigations.html
[14]*Malay Kumar Ganguly v Dr. Sukumar Mukherjee*, IIICPJ17 SC(2009)
[15]*Supra* 4
[16]*Ibid.*

expert's opinion. It has been laid down that where the court has to form an opinion upon a point of foreign law or of science or art, persons specifically skilled in such foreign law, science or art must be called upon by the court to assist it in forming a judgment.

It has been held that in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words, that he is skilled and has adequate knowledge of the subject. An expert is a person who devotes his time and study to a special branch of learning. However, he does not act as a judge or a jury.[17] His opinion is merely advisory nature and he is not a witness of fact. His duty is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgement by the application of these criteria. No expert can claim that he could be absolutely sure that his opinion is correct.[18]

It must be stated, in conclusion, that a statute mandating the provision of an expert witness in cases of medical negligence will do more good than harm. The primary reasons the orders passed in the Martin D'Souza case not being applied is that the production of expert witnesses for every case of medical negligence may be inconvenient and may cause a long drawn out litigation. Also, it has been stated that different experts on any particular subject may not have the same opinions. But, the opinions of such witnesses do not bind the court and are only to give the judges a clearer picture of the case. The inconvenience faced by the courts in summoning such expert witnesses is far out-weighed by the opportunity to give a well-informed judgment. If stringent measures relating to the procedure of producing such expert witnesses are laid down, then blunders, such as the one committed by the National Commission in the Minor Margesh case can be safeguarded against.

When the Consumer Protection Act was brought into existence, its objective was to deliver speedy and simple justice. This laudable objective may indeed be hampered by bringing in the opinion of expert witnesses. But, the aim of delivering justice is to provide a proper and adequate remedy to the aggrieved and not for the sake of giving it. Sometimes justice delayed is not justice denied, it is justice properly rendered.

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[17] *Ramesh Chandra Agarwal v Regency Hospital Ltd,* 14 SCR 424(2009)
[18] *Supra* 6

ANNEXURE

AS INTRODUCED IN LOK SABHA

Bill No. 127 of 2011

THE CONSUMER PROTECTION (AMENDMENT) BILL, 2011

A

BILL

further to amend the Consumer Protection Act, 1986.

BE it enacted by Parliament in the Sixty-second Year of the Republic of India as follows:—

Short title and commencement.

1. (*1*) This Act may be called the Consumer Protection (Amendment) Act, 2011.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Amendment of section 2.

68 of 1986.

2. In section 2 of the Consumer Protection Act, 1986 (hereinafter referred to as the principal Act), in sub-section (*1*),—

(*i*) in clause (*aa*), for the word "means", the word "includes" shall be substituted;

(*ii*) in clause (*c*), after sub-clause (*v*), the following sub-clause shall be inserted, namely:—

"(*va*) he has suffered a loss in pursuance of an unfair contract entered into by him;";

(*iii*) in clause (*f*), for the word "means", the word "includes" shall be substituted;

(*iv*) for clause (*g*), the following clause shall be substituted, namely:—

'(*g*) "deficiency" include—

(*i*) any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

(*ii*) any act of omission or commission which causes any damage to the consumer on account of negligence or consciously withholding of relevant information to the consumer;';

(*v*) after clause (*g*), the following clause shall be inserted, namely:—

'(*ga*) "political party" shall have the meaning assigned to it under clause (*f*) of sub-section (*1*) of section 2 of the Representation of the People Act, 1951;'; 43 of 1951.

(*vi*) after clause (*h*), the following clause shall be inserted, namely:—

'(*ha*) "electronic form" shall have the meaning assigned to it under clause (*r*) of sub-section (*1*) of section 2 of the Information Technology Act, 2000;'; 21 of 2000.

(*vii*) in clause (*r*), after sub-clause (*6*), the following sub-clauses shall be inserted, namely:—

"(*7*) after selling such goods or rendering of such services, fails to issue bill or cash memo or receipt for the goods sold or service rendered;

(*8*) after selling such goods or rendering of such services, refuses to take back or withdraw the goods or withdraw or discontinue the service and refuses to refund the consideration thereof, if paid, within a period of thirty days after the receipt of goods or availing of services it is so requested by the consumer;

(*9*) discloses to any other person any personal information given in confidence by the consumer:

Provided that disclosure of personal information given with express or implied consent of the consumer or under provisions of any law in force or in public interest shall not be constructed as a deficiency of service':

(*viii*) after clause (*r*), the following clause shall be inserted, namely:—

'(*s*) "unfair contract" means a contract which contains any one or more of the following clauses:—

(*i*) requires excessive security deposits to be given by a party to the contract for the performance of contractual obligations; or

(*ii*) impose any penalty on a party to the contract for the breach thereof which is wholly disproportionate to the loss ocurred due to such breach to the other party to the contract; or

(*iii*) refuses to accept early repayment of debts on payment of applicable penalty;

(*iv*) entitles a party to the contract to terminate without reasonable cause the contract unilaterally.'.

3. In section 9 of the principal Act, in clause (*a*), after the proviso, the following proviso shall be inserted, namely:— Amendment of section 9.

"Provided further that in a district where no District Forum has been established or if established, there exists at any time vacancy in the office of the President or a member, in such case, the State Government may, by notification, direct that—

(*a*) a District Forum, as specified in the notification, shall exercise the jurisdiction in respect of such District Forum as may be specified in the notification; or

(*b*) the President or a member of a District Forum, as the case may be, shall exercise the power or discharge the functions of the President or the member, as the case may be, of any other District Forum as may be specified in the notification .".

4. In section 10 of the principal Act,— Amendment of section 10.

(*i*) **in sub-section (*1*), in clause (*b*),—**

(*I*) **in the opening portion, for the words "two other members", the words "not less than two and not more than such number of members, as may be prescribed, and at least" shall be substituted;**

(*II*) **in sub-clause (*iii*), after the words "public affairs", the words "consumer affairs" shall be inserted;**

(*III*) **after sub-clause (*iii*), the following proviso and *Explanation* shall be inserted, namely:—**

'Provided that not more than fifty per cent. of the members shall be from amongst persons having a judicial background.

***Explanation*.—For the purpose of this clause, the expression "persons having judicial background" shall mean persons who have served as a presiding officer for at least one year in a judicial court:';**

(*IV*) **in the proviso,—**

(*A*) **in the opening portion, for the words "Provided that a person shall be disqualified for appointment", the words "Provided further that a person shall be disqualified for appointment or for continuation as such" shall be substituted;**

(*B*) **after clause (*e*), the following clause shall be inserted namely:—**

"(*ee*) is or continues to be, after appointment, a member or office bearer of any political party; or";

(*ii*) **after sub-section (*1A*), the following sub-section shall be inserted, namely:—**

"(*1B*) The State Governments may, if it is of the opinion that any person recommended by the Selection Committee under sub-section (*1A*) has not been found fit for such appointment, it may, within a period of two months from such recommendation and for reasons to be recorded in writing, refer the matter to the Selection Committee for fresh recommendation.";

(*iii*) **in sub-section (*2*),—**

(*a*) **after the first proviso, the following provisos shall be inserted, namely:—**

"Provided further that a person appointed as a President of the District Forum shall also be eligible for re-appointment in the manner provided in sub-section (*1A*):

Provided also that the Selection Committee shall take into consideration the observations or performance appraisal report, if any, made by the President of the State Commission in respect of the President or member of the District Forum being considered for re-appointment as such:";

(*b*) **in the second proviso, for the words "provided further", the words "Provided also" shall be substituted;**

(*iv*) **after sub-section (*3*), the following sub-section shall be inserted at the end, namely:—**

"(*4*) The President or member of the District Forum, on ceasing to hold office as such, shall not appear, act or plead before any District Forum in that State in which he had been as the President or member, as the case may be, of the District Forum.".

Insertion of new section 10A.

5. After section 10 of the principal Act, the following section shall be inserted, namely:—

Staff of District Forum.

"10A. (*1*) The State Government shall determine the nature and categories of the officers and other employees required to assist the District Forum in the discharge of its functions and provide the District Forum with such officers and other employees as it may think fit.

(*2*) The officers and other employees of the District Forum shall discharge their functions under the general superintendence of the President.

(*3*) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the District Forum shall be such as may be prescribed by the State Government:

Provided that officers and other employees employed on or before the commencement of the Consumer Protection (Amendment) Act, 2011, in a District Forum, shall continue to be employed as such unless the nature and categories thereof has been determined by the State Government.".

Amendment of section 11.

6. In section 11 of the principal Act, after sub-section (*2*), the following sub-section shall be inserted, namely:—

"(*3*) (*a*) The jurisdiction, powers and authority of the District Forum may be exercised by benches thereof.

(*b*) A Bench may be constituted by the President with one or more members as the President may deem fit:

Provided that the single member bench shall exercise jurisdiction, power and authority in relation to such matters as may be prescribed by the State Government in consultation with the State Commission and it shall not, in any case, dispose of any case fixed for final hearing.".

Insertion of new section 11A.

7. After section 11 of the principal Act, the following section shall be inserted, namely:—

Circuit benches.

"11A. The District Forum shall ordinarily function in the district headquarters and perform its functions at such other place, as the State Government may, in consultation with the State Commission, notify in the Official Gazette from time to time.".

Amendment of section 12.

8. In section 12 of the principal Act,—

(*a*) in sub-section (*1*), in the opening portion, after the words "agreed to be 45 provided", the words "or in respect of any restrictive trade practice or unfair trade practice adopted" shall be inserted;

(*b*) in sub-section (*2*), after the words "in such manner", the words and brackets "(including electronic form)" shall be inserted;

(*c*) in sub-section (*3*),—

(*i*) in the second proviso, for the words "twenty-one days", the words "twenty-eight days" shall be substituted;

(*ii*) after the second proviso, the following proviso shall be inserted, namely:—

"Provided also that if the District Forum does not decide the issue of admissibility of the complaint within the period specified in the second proviso, it shall be deemed to have been admitted except in the case where the complainant has failed to appear before the District Forum on the day of hearing without any reasonable ground.".

Amendment of section 14.

9. In section 14 of the principal Act,—

(*a*) in sub-section (*1*),—

(*i*) in the opening portion, after the words "about the services", the words "or restrictive trade practices or unfair trade practices" shall be inserted;

(*ii*) in clause (*c*), after the word "by the complainant", the words "along with reasonable rate of interest on such price or charges as may be decided by the District Forum" shall be inserted;

(*iii*) in clauses (*g*), (*h*) and (*ha*), after the word "hazardous", the words "or unsafe" shall respectively be inserted;

(*iv*) in clause (*hb*), in the first proviso, for the words "five per cent.", the words "twenty-five per cent." shall be substituted;

(*b*) in sub-section (*2A*), after the proviso, the following proviso shall be inserted, namely:—

"Provided further that the other member shall give his opinion on such point or points referred to him within a period of three months from the date of such reference.".

Amendment of section 15.

10. In section 15 of the principal Act, in the second proviso, the words "or twenty-five thousand rupees, whichever is less" shall be omitted.

Amendment of section 16.

11. In section 16 of the principal Act,—

(*i*) in sub-section (*1*), in clause (*b*)—

(*a*) in the opening portion, for the words "and one of whom" the words "at least one of whom" shall be substituted;

(*b*) in sub-clause (*i*), for the words "thirty-five years", the words "forty-five years" shall be substituted;

(*c*) in sub-clause (*iii*) ,—

(*A*) for the words "ten years", the words "twenty years" shall be substituted;

(*B*) after the words "public affairs", the words "consumer affairs" shall be inserted;

(*C*) in the first proviso, in the *Explanation*, for the words "ten years", the words "twenty years" shall be substituted;

(*D*) in the second proviso,—

(*I*) after the word "appointment", the words "or for continuation as such" shall be inserted;

(*II*) after clause (*e*), the following clause shall be inserted, namely:—

"(*ee*) is or continues to be, after appointment, a member or office bearer of any political party; or";

(*ii*) in sub-section (*1A*), for the words, brackets and figure "under sub-section (*1*)", the words, brackets, letter, and figure "under clause (*b*) of sub-section (*1*)" shall be substituted;

(*iii*) after sub-section (*1A*), the following sub-section shall be inserted, namely:—

"(*1AA*) The State Governments may, if it is of the opinion that any person recommended by the Selection Committee under sub-section (*1A*) has not been found fit for such appointment, it may, within a period of two months from such recommendation and for reasons to be recorded in writing, refer the matter to the Selection Committee for fresh recommendations.";

(*iv*) in sub-section (*1B*), in clause (*iii*), the following proviso shall be inserted, namely:—

"Provided that the President or the members, as the case may be, shall give his or their opinion on the point or points referred to him or them within a period of three months from the date of such reference.".

(*v*) in sub-section (*3*), after the second proviso, the following proviso shall be inserted, namely:—

"Provided also that the Selection Committee shall take into consideration the observations or performance appraisal report, if any, made by the President of the National Commission in respect of the member of the State Commission being considered for re-appointment:";

(*vi*) after sub-section (*4*), the following sub-section shall be inserted at the end, namely:—

"(*5*) The President or member of the State Commission, on ceasing to hold office as such, shall not appear, act or plead before the State Commission or any District Forum in that State in which he had been as the President or member, as the case may be, of the State Commission.".

Insertion of new section 16A.

12. After section 16 of the principal Act, the following section shall be inserted, namely:—

Staff of State Commission.

"16A. (*1*) The State Government shall determine the nature and categories of the officers and other employees required to assist the State Commission in the discharge of its functions and provide the Commission with such officers and other employees as it may think fit.

(*2*) The officers and other employees of the State Commission shall discharge their functions under the general superintendence of the President.

(*3*) The salaries and allowances payable to and the other terms and conditions of service of, the officers and other employees of the State Commission shall be such as may be prescribed by the State Government:

Provided that the officers and other employees employed on or before the commencement of the Consumer Protection (Amendment) Act, 2011, in a State Commission, shall continue to be employed as such unless the nature and categories thereof has been determined by the State Government.".

Amendment of section 19.

13. In section 19 of the principal Act, in the second proviso, the words "or rupees thirty-five thousand, whichever is less" shall be omitted.

Insertion of new section 19B.

14. After section 19A of the principal Act, the following section shall be inserted, namely:—

Power of Commission to review order.

"19B. Without prejudice to the provisions contained in section 18, the State Commission shall have the power to review any order made by it, when there is an error apparent on the face of record.".

Amendment of section 20.

15. In section 20 of the principal Act,—

(*i*) in sub-section (*1*), in clause (*b*)—

(*a*) in the opening portion, for the words "and one of whom" the words "at least one of whom" shall be substituted;

(*b*) in sub-clause (*i*), for the words "thirty-five years", the words "fifty-five years" shall be substituted;

(*c*) in sub-clause (*iii*) ,—

(*A*) for the words "ten years", the words "thirty years" shall be substituted;

(*B*) after the words "public affairs", the words ",consumer affairs" shall be inserted;

(*C*) for the Explanation, the following *Explanation* shall be substituted, namely:—

'Explanation.— For the purposes of this clause, the expression "persons having judicial background" shall mean persons who are or have been a Judge of a High Court or Supreme Court:';

(*D*) in the second proviso,—

(*I*) after the word "appointment", the words "or for continuation as such" shall be inserted;

(*II*) after clause (*e*), the following clause shall be inserted, namely:—

"(*ee*) is or continues to be, after appointment, a member or office bearer of any political party; or";

(*E*) in the third proviso, after clause (*a*), the following clause shall be inserted, namely:—

"(*aa*) the President of the National Commission - Member;";

(*ii*) after the third proviso, the following proviso shall be inserted, namely:—

"Provided also that the Central Government may, if it is of the opinion that any person recommended by the Selection Committee under this section has not been found fit for such appointment, it may, within a period of two months from such recommendation and for reasons to be recorded in writing, refer the matter to the Selection Committee for fresh recommendations.";

(*iii*) in sub-section (1*A*), in clause (*iii*), the following proviso shall be inserted, namely:—

"Provided that the President or the members, as the case may be, shall give his or their opinion on the point or points referred to him or them within a period of three months from the date of such reference.".

(*iv*) for sub-section (*2*), the following sub-section shall be substituted, namely:—

"(*2*) The conditions of service of the members of the National Commission shall be the same as are applicable to a Judge of a High Court:

Provided that the salary or honorarium and other allowances payable to the Members of the National Commission shall be such as may be prescribed by the Central Government'';

(*v*) after sub-section (*4*), the following sub-section shall be inserted, namely:—

"(*5*) A member of the National Commission, on ceasing to hold office as such, shall not appear, act or plead before the National Commission or any State Commission or District Forum.".

Insertion of new section 22E.

16. After section 22D of the principal Act, the following section shall be inserted, namely:—

Power of Commission to seek assistance.

"22E. Where the National Commission or the State Commission, as the case may be, on application by a complainant or otherwise, is of the opinion that it involves the larger interest of consumers, it may direct any individual or organisation or expert to assist the National Commission or the State Commission, as the case may be.".

Amendment of section 23.

17. In section 23 of the principal Act, in the second proviso, the words "or rupees fifty thousand, whichever is less" shall be omitted.

Amendment of section 25.

18. For section 25 of the principal Act, the following section shall be substituted, namely:—

Enforcement of orders of District Forum, State Commission or National Commission.

"25. (*1*) Every order made by the District Forum, the State Commission or the National Commission shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the District Forum, the State Commission or the National Commission to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,—

(*a*) in the case of an order against a company, the registered office of the company is situated; or

(*b*) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated.

(*2*) Where any order made by the District Forum, State Commission or the National Commission, as the case may be, is not complied with, such person not complying with the order shall be required to pay not less than five hundred rupees or one-half per cent. of the value of the amount awarded, whichever is higher, for each day of delay of such non-compliance of the order till it is paid, in addition to the payment of the awarded amount.

(*3*) Without prejudice to the provisions contained in sub-sections (*1*) and (*2*), where any order made under this Act is not complied with, the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached.

(*4*) No attachment made under sub-section (*3*) shall remain in force for more than three months at the end of which, if the non-compliance continues, the property attached may be sold and out of the proceeds thereof, the District Forum or the State Commission or the National Commission may award such damages, as it thinks fit, to the complainant and shall pay the balance, if any, to the party entitled thereto.

(*5*) Where any amount is due from any person under any order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district (by whatever name called) and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

(*6*) Notwithstanding the provisions contained in this section, it shall be the duty of the party against whom the order is passed by the District Forum or the State Commission or the National Commission, as the case may be, to report back to the District Forum or the State Commission or the National Commission, as the case may be, about the status of implementation of the order and the proceedings would be

deemed to be continuing till the implementation of the order and it shall be the responsibility of the District Forum or the State Commission or the National Commission, as the case may be, to monitor the same till its implementation and to take appropriate penal action wherever necessary.".

Amendment of section 27.

19. In section 27 of the principal Act, in sub-section (*2*), the words "on such conferment of powers" and the words "on whom the powers are so conferred" shall be omitted.

Insertion of new sections 28B and 28C.

20. After section 28A of the principal Act, the following sections shall be inserted, namely:—

Power to call for information.

"28B. (*1*) The Central Government may, by a general or special order, call upon the National Commission to furnish, periodically or as and when required any information concerning the pendency of cases in such form as may be prescribed.

(*2*) The State Government may, by a general or special order, call upon the State Commission or any District Forum to furnish, periodically or as and when required any information concerning the pendency of cases in such form as may be prescribed by the State Government.

Returns and reports.

28C. (*1*) Every District Forum shall furnish to the State Commission at such time and in such form and manner as may be specified by regulations the returns and statements and particulars in regard to pendency of cases before the District Forum.

(*2*) Every State Commission shall furnish to the National Commission and the State Government at such time and in such form and manner as may be specified by regulations the returns and statements and such particulars in regard to pendency of cases before the State Commission or the District Forum.

(*3*) The National Commission shall furnish to the Central Government at such time and in such form and manner as may be specified by regulations the returns and statements and particulars in regard to pendency of cases before the National Commission, State Commission and the District Forum.

(*4*) The District Forum, the State Commission and the National Commission shall publish all data relating to pendency of cases (including the details of filing of a case or application and disposal thereof, daily cause list and orders passed on such date and other related information) on their respective website.

Amendment of section 30.

21. In section 30 of the principal Act,—

(*a*) in sub-section (*1*), for the words and figures "and section 23", the words, figures, brackets and letter "section 23 and sub-section (*1*) of section 28B" shall be substituted;

(*b*) in sub-section (*2*),—

(*i*) after the word and figures "section 10", the words, brackets, figures and letter "sub-section (*3*) of section 10A" shall be inserted;

(*ii*) for the words, brackets, letter and figures "and clause (*b*) of sub-section (*1*) and sub-section (*2*) of section 16 of this Act", the words, brackets, letters and figures "clause (*b*) of sub-section (*1*) and sub-section (*2*) of section 16, sub-section (*3*) of section 16A and sub-section (*2*) of section 28B of this Act or any other matter which is to be, or may be, required to be prescribed" shall be substituted.

STATEMENT OF OBJECTS AND REASONS

The Consumer Protection Act, 1986 (the said Act) was enacted by Parliament to provide for better protection of the interests of consumers and for that purpose to make provision for establishment of consumer councils and other authorities for the settlement of consumer disputes, and for matter connected therewith. The aforesaid Act has been amended in the years 1991, 1993 and 2002 to make the provisions of the Act more effective.

2. Although, the working of the consumer dispute redressal agencies has served the purpose under the said Act to a considerable extent, the disposal of cases has not been as quick due to the various constraints. Several shortcomings have been noticed while implementing various provisions of the Act. With a view to widening and amplifying the scope of some of the provisions of the said Act, to facilitate faster disposal of cases and to rationalize the qualifications and procedure of selection of the Presidents and Members of the National Commission, State Commission and District Forum, it has been felt necessary to amend the said Act. The Consumer Protection (Amendment) Bill, 2011, *inter alia,* makes the following provisions, namely:—

(*a*) define the expression 'unfair contract' and include the same within the scope of the Act;

(*b*) confer power upon the State Government to direct, by notification,—

(*i*) that a District Forum shall exercise the jurisdiction of any other District where no District Forum has been constituted; or

(*ii*) that the President or a member of a District Forum shall discharge the functions of President or members of any other District Forum in which there exist a vacancy of President or members, as the case may be;

(*c*) confer power upon the State Government to refer back the recommendation of the Selection Committee to it for making fresh recommendation, within a period of two months from such recommendation and for reasons to be recorded in writing, in case the State Government is of the opinion that any person recommended by the Selection Committee for appointment as President or member of a District Forum or a member of the State Commission, as the case may be, has not been found fit for appointment as such;

(*d*) make a provision that the Selection Committee shall take into consideration the observations or performance appraisal report, if any, made by the President of the State Commission or the President of the National Commission, as the case may be, in respect of any member of the District Forum or the State Commission, as the case may be, being considered for reappointment as such;

(*e*) make a provision to the effect that the President or member of the District Forum, on ceasing to hold office as such, shall not appear, act or plead before any District Forum in that State in which he had been working as the President or member, as the case may be, of the District Forum;

(*f*) make a provision to provide that the District Forum shall ordinarily function in the district headquarters and perform its functions at such other place, as the Sate Government may, in consultation with the State Commission, notify in the Official Gazette from time to time;

(*g*) make a provision for making of a complaint by electronic form also to the District Forum;

(*h*) make a provision for admissibility of the complaint to be decided twenty-eight days instead of twenty-one days from the date on which the complaint was received and in case the District Forum does not decide the issue of admissibility of the complaint within the said period it shall be deemed to have been admitted except in the case where the complainant has failed to appear before the District Forum on the day of hearing without any reasonsable ground;

(*i*) confer power upon the District Forum to issue an order to the opposite party to pay reasonable rate of interest on such price or charges as may be decided by the District Forum in case the price of the goods or charges paid by the complainant have been ordered to be returned to the complainant;

(*j*) make provision for additional disqualification of a member of the District Forum or the State Commission or the National Commission if he is or continues to be, after appointment, a member or office bearer of any political party;

(*k*) make provision for increase of the minimum age for appointment as member in case of the State Commission from thirty-five years to forty-five years and in the case of the National Commission from thirty-five years to fifty-five years;

(*l*) make provision for increase of the period of experience for appointment as member in case of the State Commission from ten years to twenty years and in case of the National Commission from ten years to thirty years;

(*m*) make provision for substitution of the explanation relating to definition of the expression "person having judicial background" in case of the National Commis-sion, as to include therein the persons who are or have been a Judge of a High Court or the Supreme Court;

(*n*) make provision that the President or member of the District Forum, the State Commission and the National Commission, on ceasing to hold office as such, shall not appear, act or plead before the District Forum or the State Commission or the National Commission, as the case may be;

(*o*) make provision that the conditions of service of the members of the National Commission shall be the same as are applicable to a Judge of a High Court;

(*p*) confer power upon the National Commission or the State Commission, as the case may be, to direct any individual or organisation or expert to assist the National Commission or the State Commission, as the case may be, on application by a com-plainant or otherwise, if the National Commission or the State Commission is of the opinion that it involves the larger interest of consumers;

(*q*) make a provision that an order of the District Forum, the State Commission or the National Commission may be enforced by it as if it were a decree of a civil court or it may send, in case of its inability to execute such order to the court having jurisdic-tion;

(*r*) make a provision for payment, by every person not complying with the order of the District Forum, State Commission or the National Commission, as the case may be, of an amount of not less than five hundred rupees or one-half per cent of the value of the amount awarded, whichever is higher, for each day of delay of such non-compliance of the order, till it is paid, in addition to the payment of the awarded amount;

(*s*) confer power upon the Central Government to call upon the National Commission to furnish, periodically or as and when required any information concerning the pendency of cases in the prescribed form; and confer power upon the State Government to call upon the State Commission or any District Forum to furnish, periodically or as and when required any information concerning the pendency of cases in the prescribed form;

(*t*) make provisions for furnishing of returns and statement and particulars in regard to pendency of cases, by—

(i) the District Forum to the State Commission,

(*ii*) the State Commission to the National Commission and the State Government,

(*iii*) the National Commission to Central Government.

3. The Bill seeks to achieve the aforesaid objectives.

NEW DELHI; K. V. THOMAS.

The 2*nd November*, 2011.

FINANCIAL MEMORANDUM

Clause 4 of the Bill seeks to amend section 10 of the Act to enable the State Government to appoint in the District Forum such number of members as may be prescribed in place of two members.

2. Clause 5 of the Bill seeks to insert a new section 10A to enable the State Government to determine the nature and categories of officers and other employees required to assist the District Forum in the discharge of its functions and provide the District Forum with such officers and other employees as it may think fit. The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the District forum shall be such as may be prescribed by the State Government.

3. Clause 6 of the Bill seeks to insert a new sub-section (*3*) in section 11 so as to enable the President of the District Forum to constitute benches with one or more members.

4. Clause 7 of the Bill seeks to insert a new section 11A to enable the State Government to notify in consultation with the State Commission, the other place of sitting of the District Forum to perform its functions.

5. Clause 12 seeks to insert a new section 16A to enable the State Government to determine the nature and categories of the officers and other employees required to assist the State Commission in the discharge of its functions and provide the Commission with such officers and other employees as it may think fit. The salaries and allowances payable to and the other terms and conditions of service of, the officers and other employees of the State Commission shall be such as may be prescribed by the State Government.

6. It is not possible to indicate the exact expenditure involved in appointment of additional members and officers and employees of the District Forum and the State Commission as this would depend upon the actual number of such members or officers and other employees appointed. However, the expenditure on this account would be incurred by the State Governments.

MEMORANDUM REGARDING DELEGATED LEGISLATION

Clause 4 of the Bill seeks to amend section 10 of the Act which empowers the State Government to prescribe the number of members of District Forum for appointment.

2. Clause 5 of the Bill seeks to insert new section 10A which empowers the State Government to prescribe the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the District Forum.

3. Clause 12 of the Bill seeks to insert new section 16A which empowers the State Government to prescribe the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the State Commission.

4. Clause 20 of the Bill seeks to insert new sections 28B and 28C. Sub-section (*1*) of section 28B provides to prescribe the form in which any information concerning the pen-dency of cases shall be furnished by the National Commission to the Central Government. Sub-section (*2*) of said section provides to prescribe the form in which any information concerning the pendency of cases shall be furnished by the State Commission to the State Government. Sub-section (*1*) of section 28C empowers the National Commission to specify by regulations the time, and the form and manner in which returns and statements and such particulars in regard to pendency of cases before the District Forum shall be furnished by the District Forum to the State Commission and, by the State Commission to the National Com-mission.

5. The rules made by the Central Government and the regulations made by the National Commission shall be laid, as soon as they are made, before both the Houses of Parliament under sub-section (*1*) of section 31 and the rules made by the State Government shall be laid, as soon as may be after it is made, before the State Legislature under sub-section (*2*) of that section. The matters in respect of which rules and regulations may be made are matter of procedure and administrative detail and it is not practicable to provide for them in the Bill itself. The delegation of legislative powers, therefore, is of normal character.

ANNEXURE

EXTRACTS FROM THE CONSUMER PROTECTION ACT, 1986

(68 OF 1986)

* * * * *

2. *(1)* In this Act, unless the context otherwise requires,— Definitions.

* * * * *

(aa) "branch office" means—

* * * * *

(f) "defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods;

(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

* * * * *

(r) "unfair trade practice'' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

(*1*)* * * * *

CHAPTER III

CONSUMER DISPUTES REDRESSAL AGENCIES

9. There shall be established for the purposes of this Act, the following agencies, namely:— Establishment of Consumer Disputes Redressal Agencies.

(*a*) a Consumer Disputes Redressal Forum to be known as the "District Forum" established by the State Government in each district of the State by notification:

Provided that the State Government may, if it deems fit, establish more than one District Forum in a district;

* * * * *

10. (*1*) Each District Forum shall consist of,— Composition of the District Forum.

* * * * *

(*b*) two other members, one of whom shall be a women, who shall have the following qualifications, namely:—

* * * * *

(*iii*) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years, in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that a persons shall be disqualified for appointment as a member, if he—

* * * * *

(*2*) Every member of the District Forum shall hold office for a term of five years or up to the age of sixty-five years, whichever is earlier:

* * * * *

Provided further that a member may resign his office in writing under his hand addressed to the State Government and on such resignation being accepted, his office shall become vacant and may be filled by appointment of a person possessing any of the qualifications mentioned in sub-section *(1)* in relation to the category of the member who is required to be appointed under the provisions of sub-section *(1A)* in place of the person who has resigned:

* * * * *

Manner in which complaint shall be made.

12. (*1*) A Complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by—

* * * * *

(*2*) Every complaint filed under sub-section *(1)* shall be accompanied with such amount of fee and payable in such manner as may be prescribed.

(*3*) On receipt of a complaint made under sub-section *(1)*, the District Forum may, by order, allow the complaint to the proceeded with or rejected:

* * * * *

Provided further that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was received.

* * * * *

Finding of the District Forum.

14. (*1*) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any other defects specified in the complaint or that any or the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:—

* * * * *

(*c*) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

* * * * *

(*g*) not to offer the hazardous goods for sale;

(h) to withdraw the hazardous goods from being offered for sale;

(ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

(hb) to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

Provided that the minimum amount of sum so payable shall not be less than five per cent. of the value of such defective goods sold or services provided, as the case may be, to such consumers:

* * * * *

(*2A*) Every order made by the District Forum under sub-section (*1*) shall be signed by its President and the member or members who conducted the proceeding:

Provided that where the proceeding is conducted by the President and one member and they differ on any point or points, they shall state the point or points on which they

differ and refer the same to the other member for hearing on such point or points and the opinion of the majority shall be the order of the District Forum.

* * * * *

Appeal.

15. Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed:

* * * * *

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty per cent. of that amount or twenty-five thousand rupees, whichever is less.

Composition of the State Commission.

16. (*1*) Each State Commission shall consist of—

* * * * *

(b) Not less than two, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely:—

(i) be not less than thirty-five years of age;

* * * * *

(iii) be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Provided that not more than fifty per cent. of the members shall be from amongst the persons having a judicial background.

Explanation.—For the purposes of this clause, the expression "persons having a judicial background" shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level:

Provided further that a person shall be disqualified for appointment as a member, if he—

* * * * *

(*1A*) Every appointment under sub-section *(1)* shall be made by the State Government on the recommendation of a Selection Committee consisting of the following members, namely:—

* * * * *

(*1B*)* * * * *

(*iii*) If the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more or the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it.

* * * * *

(*3*) Every member of the State Commission shall hold office for a term of five years or up to the age of sixty-seven years, whichever is earlier:

* * * * *

Provided further that a person appointed as a President of the State Commission shall also be eligible for re-appointment in the manner provided in clause (*a*) of sub-section (*1*) of this section:

* * * * *

Appeals.

19. Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (*i*) of clause (*a*) of section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

* * * * *

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent. of the amount or rupees thirty-five thousand, whichever is less:

* * * * *

Composition of the National Commission.

20. (*1*) The National Commission shall consist of—

* * * * *

(*b*) not less than four, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely:—

(*i*) be not less than thirty-five years of age;

* * * * *

(*iii*) be persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy industry, public affairs or administration:

* * * * *

Explanation.—For the purposes of this clause, the expression "persons having judicial background" shall mean persons having knowledge and experience for at least a period of ten years as a presiding officer at the district level court or any tribunal at equivalent level:

Provided further that a person shall be disqualified for appointment, if he—

* * * * *

Provided also that every appointment under this clause shall be made by the Central Government on the recommendation of a Selection Committee consisting of the following, namely:—

(*a*) a person who is a Judge of the Supreme Court, to be nominated by the Chief Justice of India —Chairman;

* * * * *

(*1A*)(*i*)* * * * *

(*iii*) If the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more or the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it.

(*2*) The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of the National Commission shall be such as may be prescribed by the Central Government.

* * * * *

23. Any person, aggreived by an order made by the National Commission in exercise of its power conferred by sub-clause (*i*) of clause (*a*) of section 21, may prefer an appeal against such order to the Supreme Court within a period of thirty days from the date of the order: Appeal.

* * * * *

Provided further that no appeal by a person who is required to pay any amount in terms of an order of the National Commission shall be entertained by the Supreme Court unless that person has deposited in the prescribed manner fifty per cent. of that amount or rupees fifty thousand, whichever is less.

* * * * *

25. (*1*) Where an interim order made under this Act is not complied with, the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached. Enforcement of orders of the District Forum, the State Commission or the National Commission.

(*2*) No attachment made under sub-section (*1*) shall remain in force for more than three months at the end of which, if the non-compliance continues, the property attached may be sold and out of the proceeds thereof, the District Forum or the State Commission or the National Commission may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled thereto.

(*3*) Where any amount is due from any person under an order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district (by whatever name called) and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

* * * * *

27.(*1*)* * * * * Penalties.

2 of 1974. (*2*) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 the District Forum or the State Commission or the National Commission, as the case may be, shall have the power of a Judicial Magistrate of the first class for the trial of offences under this Act, and on such conferment of powers, the District Forum or the State Commission or the National Commission, as the case may be, on whom the powers are so conferred, shall be deemed to be a Judicial Magistrate of the first class for the purpose of the Code of Criminal Procedure, 1973.

* * * * *

30. (*1*) The Central Government may, by notification, make rules for carrying out the provisions contained in clause (*a*) of sub-section (*1*) of section 2, clause (*b*) of sub-section (*2*) of section 4, sub-section (2) of section 5, sub-section (*2*) of section 12, clause (*vi*) of sub-section (*4*) of section 13, clause (*hb*) of sub-section (*1*) of section 14, section 19, clause (*b*) of sub-section (*1*) and sub-section (*2*) of section 20, section 22 and section 23 of this Act. Power to make rules.

(*2*) The State Government may, by notification, make rules for carrying out the provisions contained in clause (*b*) of sub-section (*2*) and sub-section (*4*) of section 7, clause (*b*) of sub-section (*2*) and sub-section (*4*) of section 8A, clause (*b*) of sub-section (*1*) and sub-section (*3*) of section 10, clause (*c*) of sub-section (*1*) of section 13, clause (*hb*) of sub-section (*1*) and sub-section (*3*) of section 14, section 15 and clause (*b*) of sub-section (*1*) and sub-section (*2*) of section 16 of this Act.

* * * * *

LOK SABHA

A

BILL

further to amend the Consumer Protection Act, 1986.

(*Shri K.V. Thomas, Minister for Consumer Affairs, Food and Public Distribution*)

GMGIPMRND—3094LS(S3)—09-12-2011.

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