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National Essay Writing Competition on

**NEW CONSUMER PROTECTION LAWS AND
POLICIES- NOTIONS OF LIABILITY
REDEFINED?**

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New Consumer Protection Laws and Policies- Notions of Liability Redefined?

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ABSTRACT

[The purpose of this essay is to determine whether the new consumer protection laws and policies redefine notions of liability in India. For the aforesaid purpose, the author analyses the provisions of the Consumer Protection Bill, 2015 relating to product liability action. In order to understand the significance of the changes in notions of liability introduced in the Bill, the author traces the past notions of liability of the manufacturers of the products in the common law era and under the Consumer Protection Act, 1986. Finally, the author demonstrates how the 2015 Bill significantly alters the notions of liability of the manufacturers of defective products in case of physical harm, death or damage to property of the consumers.]

I. INTRODUCTION

The Consumer Protection Bill, 2015 [**“2015 Bill”**] has been introduced to remedy several shortcomings that have been noticed in administering the Consumer Protection Act, 1986 [**“1986 Act”**].¹ Unfortunately, the 2015 Bill has been further delayed as a result of an extension being given to the Parliamentary Committee on Food, Consumer Affairs and Public Distribution to review and submit its report on the Bill.² The Bill, among other things, seeks to make provisions for “product liability” action on account of personal injury, death, or property damage caused by or resulting from a defective product.³

The purpose of this essay is to determine whether the 2015 Bill has redefined notions of liability in relation to Consumer Protection Laws and Policies of India. For the aforesaid purpose, the author will first trace the historical origins of consumer protection against sale of defective

¹ Para.1, Statement of Objects and Reasons, Consumer Protection Bill,2015.

² Press Trust of India, *New Consumer Protection Bill to get delayed, panel's term extended*, Financial Express, Nov. 29, 2015, available at <http://www.financialexpress.com/article/economy/consumer-protection-bill-2015-to-get-delayed-panels-term-extended/171878/> (last visited Dec. 28, 2015).

³ Para. 5, Statement of Objects and Reasons, Consumer Protection Bill 2015, available at <http://www.prsindia.org/uploads/media/Consumer/Consumer%20Protection%20bill,%202015.pdf> (last visited 28 December 2015).

goods. Second, the author will examine the provisions of the Consumer Protection Act, 1986 to determine standards of liability set out therein. Third, the author will critically examine the provisions of the 2015 Bill to determine whether it makes a departure from the existing notions of liability for protection of the consumers. Lastly, the author will conclude by summarizing his findings.

II. HISTORICAL ORIGINS OF CONSUMER PROTECTION: LAW AND POLICY

A. Consumer Protection and Common Law

In the eighteenth century, the British established Mayor Courts in the three presidency towns of Madras, Bombay and Calcutta that gave “judgment and sentence in accordance to justice and right”.⁴ The Englishmen who administered these courts heavily relied on common law and statute law of England as found applicable to the Indian conditions to administer judgment in accordance with “justice and right”. Thus, common law principles were introduced into the law of India.⁵ By virtue of Article 372 of the Constitution of India, these common law principles continue to have force in India.⁶ Therefore, the author will begin by tracing the historical origins of liability of the manufacturers for consumer protection in common law.

i. Law of Warranties and Consumer Protection: From Caveat Emptor to Caveat Venditor

Earlier, the notion of caveat emptor, “let the buyer beware” held sway in common law.⁷ As a result, the buyer of the product had to protect himself against obvious (patent) as well as hidden (latent) defects in the goods. Thus, no remedy could be claimed against the seller of defective goods unless there was an express warranty or condition to that effect in the contract.⁸

In *Gardiner v. Gray*,⁹ the English Courts replaced the rule of caveat emptor with precisely the opposite doctrine that the seller impliedly ‘warrants’¹⁰ that his products contain no hidden defects. Further, the buyer was protected against obvious defects in goods if he “*had no opportunity to inspect the commodity*.” Thus, the buyer could now sue the seller of defective goods without any express contractual stipulations for damages or diminution in price.

⁴ Ratanlal & Dhirajlal, THE LAW OF TORTS, 1, (26th Ed., 2014). [hereinafter, “**R&D**”]

⁵ *Id.*

⁶ *Building Supply Corporation v. Union of India*, AIR 1965 SC 1061.

⁷ Owen, *The Evolution of Product Liability Law*, 26 REV. LITIG. 955, 958 (2007).

⁸ *Raghava Menon v. Kuttappan Nair*, AIR 1962 Ker. 318, para.7.

⁹ (1815) 171 Eng. Rep. 46, 47 (N.P)

¹⁰ A ‘warranty’ is collateral to the main purpose of the contract which entitles the buyer of the goods to sue the seller for damages or for diminution of the price of the product. On the other hand, a ‘condition’ is essential to main purpose of the contract that entitles the buyer to repudiate the contract, reject the goods and sue for damages.

However, he could not repudiate the contract and compel the seller to take back the product. This common law rule was further modified by Section 16(2) of the Sale of Goods Act, 1930 (“**1930 Act**”) to provide additional protection to the buyers of goods.

As per Section 16(2) of the 1930 Act, there is an implied ‘condition’ of merchantable quality for goods bought by description from the seller who deals in goods of that description.¹¹ Thus, a buyer was protected against both, obvious and hidden defects in goods.¹² Further, the buyer would lose protection against the seller for obvious defects only if actually “inspected the goods” as opposed to “a mere opportunity to inspect” being granted to him.¹³ Hence, if there was any defect in the product, the buyer could reject the goods and sue for the price of the goods.¹⁴ In the alternative, it was also open to the buyer to accept the goods and sue on the basis of warranty for damages or diminution in the price of the product.¹⁵ Though considerable progress was made by law of warranties in according protection to the consumers, doctrine of privity was a serious limitation with this approach. Thus, only immediate buyers of the product could sue only the immediate sellers of the product.¹⁶ For instance, in *Winterbottom v. Wright*,¹⁷ the driver of a stagecoach who suffered injury because of a defect in the product was refused damages as he was not a party to the contract between the seller and the buyer.

ii. Tort Law of Negligence to the Rescue: Donoghue v. Stevenson

As the functions of manufacturing and retailing of goods separated in the course of industrialization during the 1800s, the law of warranties proved thoroughly inadequate to address the concerns of consumers.¹⁸ In most of the cases, the consumers had purchased the

¹¹ In *Grant v. Australian Knitting Mills*, AIR 1936 PC 34, the Judicial Committee of the Privy Council was considering Section 14 of the South Australia Sale of Goods Act which is equivalent to Section 16 of the Indian Sale of Goods Act, 1930. The Court held that the goods are not merchantable if “it has defects unfitting it for its only proper use but not apparent on ordinary examination”. See *Ranbirsingh Shankarsingh Thakur v. Hindusthan General Electric Corporation Ltd.*, AIR 1971 Bom 97, para. 11.

¹² *Id.*

¹³ Section 16(2) of the Sale of Goods Act, 1930; *National Traders v. Hindustan Soap Works*, AIR 1959 Mad. 112, para.7; See *Ranbirsingh Shankarsingh Thakur v. Hindusthan General Electric Corporation Ltd.*, AIR 1971 Bom 97, para. 11.

¹⁴ *National Traders v. Hindustan Soap Works*, AIR 1959 Mad 112, para.8; Section 12(2) of the Sale of Goods Act, 1930.

¹⁵ *National Traders v. Hindustan Soap Works*, AIR 1959 Mad 112, para.8; Section 59 of the Sale of Goods Act, 1930; *Board of Trustees of the Port of Calcutta v. Bengal Corporation Pvt. Ltd.* AIR 1979 Cal. 142.

¹⁶ Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard*, 51 AM.J.COMP.L. 751, 793. [hereinafter “**Reimann**”]

¹⁷ (1842) 152 Eng. Rep. 402 (Ex.).

¹⁸ *Supra* Owen.

goods from the retailers who in turn had purchased them from the manufacturer.¹⁹ It must also be noted that, in the modern economy, the manufacturers were in the most effective position to reduce hazards to life, health and property and hence they had to be made liable to evolve an effective mechanism for ensuring the safety of the consumers.²⁰ As there was no privity of contract between the manufacturer and the consumer, the consumer could not seek any recourse against the manufacturer.²¹ This changed drastically after the decision of the House of Lords in *Donoghue v. Stevenson*.²² In the aforesaid case, the appellant drank a bottle of ginger beer, manufactured by the respondent, which a friend had brought from the retailer and given to her. The bottle contained decomposed remains of a snail which were not, and could not be detected until the greater part of the bottle had been consumed. She suffered from shock and severe gastro-enteritis.²³ Thus, she instituted proceedings against the manufacturer alleging that he had exhibited carelessness in the conduct of his business which resulted in damage to her.²⁴ Upholding the action for tort of negligence, the House of Lords affixed liability on the manufacturer of the product on the ground that he had failed in his duty to consumers by failing to “ensure that the [ginger beer bottle] contained no deleterious foreign matter.”²⁵ Thus, the consumer who suffered damage as a result of defective goods now had two independent causes of action- one in tort against the manufacturer and other in contract against the seller of the goods.²⁶ These were the only civil remedies available to the consumer against defective goods sold to them until the enactment of Consumer Protection Act, 1986 (“**1986 Act**”). The next section will examine the provisions of 1986 Act to determine the notions of liability laid down by it.

III. CONSUMER PROTECTION ACT, 1986: FINALLY, LIGHT AT THE END OF THE TUNNEL!

A. Introduction

On 24th December 1986, the Government of India enacted the Consumer Protection Act, 1986 to safeguard the interests of the consumers.²⁷ Prior to this enactment, there was no exclusive

¹⁹ *Donoghue v. Stevenson*, 1932 AC 562; *McPherson v. Buick Motor Co.*, 217 N.Y. 382; *Grant v. Australian Knitting Mills Ltd.*, AIR 1936 PC 34; *G McKenzie & Co. Ltd. v. Nagendra Nath Mahalanabish*, MANU/WB/0176/1945.

²⁰ *Supra* Reimann, at 764.

²¹ *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Ex.).

²² 1932 AC 562.

²³ *Id.*, at 566.

²⁴ *Id.*, at 619.

²⁵ *Id.*

²⁶ *G McKenzie & Co. Ltd. v. Nagendra Nath Mahalanabish*, MANU/WB/0176/1945, para.5.

²⁷ *Supra* R&D, at 711.

legislation for actually safeguarding the interests of the consumers.²⁸ The 1986 Act provides an inexpensive and speedy remedy to the consumers with complaints against defective goods and deficient services by establishing quasi-judicial machinery at the Centre, State and District Level.²⁹ Additionally, it must be noted that the remedies under the 1986 Act are in addition to any other remedies available to the consumer under other laws in force.³⁰ For instance, in case of an arbitration agreement between the consumer and seller, the consumer could either seek a reference to an arbitrator or file a complaint under the 1986 Act.³¹

Having briefly examined the general scheme of the 1986 Act, the author will now endeavour to answer three questions: (a) Who could be sued under the 1986 Act?; (b) What are the conditions of liability; and (c) What are the principal defences available to avoid liability? The answer to these three questions will help us to determine the standard of liability under the 1986 Act.

B. Nature of Liability: Negligence or Strict Liability Standard?

i. Parties

A complaint can be filed by the consumers in relation to any defects in the goods or deficiency in services against the “trader” of the product.³² The term “trader” has been widely defined to include the seller, distributor, packer of goods, manufacturer of goods or any part thereof, any person who puts his mark on any goods made by another manufacturer and a person who assembles goods.³³ Thus, every commercial participant in the manufacturing and distribution process has been made liable. This seems to be done for two policy reasons: (a) if the manufacturer is not available as defendant, consumers should be able to turn to others; and (b) to hold everyone involved liable increases safety because it creates incentives on the part of downstream sellers to exert pressure on the manufacturer to produce safer goods.³⁴ However, in practice, action is initiated against the seller and manufacturer of the goods.³⁵

²⁸ *Id.*

²⁹ *C Venkatachalam v. Ajithkumar C. Shah*, (2011) 9 SCC 707, para.34.

³⁰ Section 3, Consumer Protection Act, 1986; *Thirumurgan Coop. Agricultural Credit Society v. M Lalitha*, (2004) 1 SCC 305, 312; *Fair Air Engineers (P) Ltd. N.K. Modi*, (1996) 6 SCC 385, 393; *Skypak Couriers Ltd. v. Tata Chemicals Ltd.*, (2000) 5 SCC 294, 296; *Trans Mediterranean Airways v. Universal Exports*, (2011) 10 SCC 316.

³¹ *National Seeds Corporation Ltd. v. M Madhusudhan Reddy*, (2012) 2 SCC 506, paras.17, 66.

³² Section 12 read with Section 2(c)(ii) of the Consumer Protection Act, 1986.

³³ Section 2(q) read with Section 2(j) of the Consumer Protection Act, 1986.

³⁴ *Supra* Reimann, at 764.

³⁵ *C N Anantharam v. Fiat India Limited* (2011) 1 SCC 460; *Maruti Udyog Ltd. v. Susheel Kumar*, (2006) 4 SCC 644.

ii. Conditions of Liability

The 1986 Act imposes strict liability on the producers for any defects in the products.³⁶ Thus, on finding that a product is defective, the quasi-judicial bodies under the 1986 Act can direct the producers to remove the defect in goods,³⁷ to replace the goods with new goods of similar description free from any defect or to return to the complainant the price paid for the goods.³⁸ Further, they may also order for adequate costs to be paid to the parties.³⁹ For instance, in *C Anantharam v. Fiat India Limited*,⁴⁰ the Supreme Court directed that price of the vehicle along with lifetime tax and EMI to be paid to the purchaser as they deemed the other expenses to be 'adequate costs' for which the purchaser had to be compensated for.

Most importantly, the consumer is entitled to claim compensation for any loss or injury suffered only if he is able to establish that the opposite parties were negligent in their conduct.⁴¹ Therefore, from the aforesaid analysis we may conclude that the 1986 Act has adopted a hybrid mechanism of affixing liability to the manufacturers and the sellers of the product for addressing the grievances of the consumers.

iii. Defences available to avoid liability

Though the 1986 Act is an additional remedy available to the consumer,⁴² in *Maruti Udyog v. Susheel Kumar*,⁴³ it was held that the manufacturer of the product can limit his liability by an express warranty. It is respectfully submitted that the decision does not have any statutory basis and hence not sound law.

Having examined the 1986 Act, the next section will critically analyse the provisions of the Consumer Protection Bill, 2015 and determine whether it redefines notions of liability in India.

³⁶ *C Venkatachalam v. Ajithkumar C. Shah*, (2011) 9 SCC 707; *H N Shankara Shetty v. Asst. Director of Agriculture*, (2004) 6 SCC 230, para.6.

³⁷ *Jose Philip Mampillil v. Premier Automobiles*, AIR 2004 SC 1529.

³⁸ Section 14(a), 14(b) and 14(c) of the Consumer Protection Act, 1986; Also see Section 18 and 22 of the Consumer Protection Act, 1986. The aforesaid provisions stipulate that the procedure for disposal of complaints in Section 12, 13 and 14 apply *mutatis mutandis* to proceedings before the State Commission and National Commission.

³⁹ Section 14(i) of the Consumer Protection Act, 1986.

⁴⁰ *C N Anantharam v. Fiat India Limited* (2011) 1 SCC 460, para.22; *Hindustan Motors Ltd. v. N Siva Kumar* (2000) 10 SCC 654.

⁴¹ Section 14(d) of the Consumer Protection Act, 1986. However, *H N Shankara Shetty v. Asst. Director of Agriculture* (2004) 6 SCC 230, compensation was granted for loss of paddy despite of no negligence being averred and proved by the consumer of the product.

⁴² Section 3 of the Consumer Protection Act, 1986.

⁴³ (2006) 4 SCC 644, para.11

IV CONSUMER PROTECTION BILL, 2015: FALSE MESSIAH?

As noted earlier, the 2015 Bill introduces provisions for “product liability” action for or on account of personal injury, death or property damage caused by or resulting from a product.⁴⁴ So, if the 2015 Bill is enacted into law, the manufacturer or producer of the product will be liable to the consumer of the product if he can prove defect, injury and proximate relationship between the defect and injury caused.⁴⁵ Most importantly, the consumer will be able to recover compensatory damages from the manufacturer without proving negligence on part of producer.⁴⁶ Therefore, the standard of liability for recovering compensation has been altered from negligence under 1986 Act to that of strict liability under the 2015 Bill in case of defective products leading to physical injury, death or damage to property.

Secondly, it must be noted that product liability can be maintained against the seller of the product who is not the manufacturer only if the manufacturer is not identifiable or beyond jurisdiction, the seller has altered the product and that resulted in injury or he was negligent in his conduct.⁴⁷ Thus, in case of consumers seeking to recover damages from sellers of the product, they will have to establish negligence as earlier.

Thirdly, it must be noted that the “product liability” regime is limited in certain aspects in scope of its application. For instance, the manufacturer of the product will be exonerated from liability if the claimant fails to prove that in light of existing scientific and technical knowledge, the manufacturer should have known of the danger caused by the product.⁴⁸ Further, only those products produced for introduction in trade or commerce are covered under the product liability regime.⁴⁹

IV. CONCLUSION

To conclude, it must be noted that the 2015 Bill retains all the remedies available to the consumers under 1986 Act. For instance, strict liability of the manufacturers and sellers of the defective goods have been retained.⁵⁰ Thus, effectively, the 2015 Bill makes only one important change to the existing consumer laws and policies as far as the notions of liability are

⁴⁴ Statement of Objects and Reasons and Clause 72-75, Consumer Protection Bill, 2015.

⁴⁵ Clause 72 read with Clause 73(e) & 73(f) of the Consumer Protection Bill, 2015.

⁴⁶ Clause 72(e) of the Consumer Protection Bill, 2015.

⁴⁷ Clause 75 of the Consumer Protection Bill, 2015.

⁴⁸ Clause 73(2) of the Consumer Protection Bill, 2015.

⁴⁹ Clause 2(30) read with Clause 72 of the Consumer Protection Bill, 2015.

⁵⁰ *See generally* Clause 35 of the Consumer Protection Bill, 2015.

concerned. It requires manufacturers to pay compensation to consumers for defective products leading to physical injury, death or property damage irrespective of any fault on their part. As far as other defects are concerned, the consumers will be entitled to compensation only if they are able to demonstrate negligence on part of the manufacturer. Hence, we can conclude that the changes favour consumers and have been redefined notions of liability to a limited extent.



The Consumer Protection Bill 2015: Redefining Notions of Liability

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ABSTRACT

The legislative validation of the concepts of product liability and unfair contractual terms through the Consumer Protection Bill (CPB), paves way for attuning Indian consumer laws with the global wavelength. Though the Indian judiciary has dealt with issues concerning product liability and unfair contractual terms, legal certainty has remained elusive, thus necessitating predictability. The extension of consumer protection to the domain of e-commerce further reformulates the existing notion of liability and the prevalent impunity. This paper analyzes the manner in which the CPB redefines the notions of liability and the existent lacunae that need to be remedied.

INTRODUCTION:

*“A customer is the most important visitor in our premises. He is not dependent on us, we are dependent on him. ...He is not an outsider to our business, he is part of it. We are not doing him a favour by serving him, he is doing us a favour by giving us an opportunity to do so.”*¹

The Indian Consumer market has drastically evolved after the telecom revolution whereby online transactions have become the norm, with increase in internet penetration.² But the Consumer Protection Act of 1986 has not been able to keep pace with the technological advancements in the domain of e-commerce. The vulnerability of the consumer from emerging unfair trade practices and unethical business practices has been cited as the reasoning for reforming the status quo of consumer protection laws in India.³ As the first draft National Consumer Policy, 2013 states as one its objectives, it seeks to ensure ‘a high level of consumer protection through a simple legal framework.’⁴ The CPB addresses a number of disadvantages

¹ Final Draft of National Consumer Policy, 1998, [Online], Available: <http://cuts-international.org/NCP.htm> (26 Dec 2015).

² Internet and Mobile Association of India, Internet users in India, [Online], Available: <http://www.iamai.in/media/details/4486> (28 Dec 2015).

³ Ministry of Consumer Affairs, Consumer Protection Bill, 2015, [Online], Available: <http://consumeraffairs.nic.in/writereaddata/CP%20Bill%202015.pdf> (25 Dec 2015).

⁴ Ministry of Consumer Affairs, Draft National Consumer Policy, [Online], Available: http://consumeraffairs.nic.in/consumer/writereaddata/Final%20Draft_Consumer%20Policy_iipa_revised.doc (25 Dec 2015).

faced under the Consumer Protection Act particularly relating to specific provisions on product liability, unfair contractual terms and the applicability to e-commerce transactions.

The CPB 2015 has been criticized primarily on the basis of building on the foundational concepts of termination of contract by the buyer under the Sale of Goods Act and explicitly stating consumer rights.⁵ The Committee had proposed that the definition of compliant has to be broadened to encompass the losses accruing out of unfair contractual terms. The Committee had also recommended widening the definitional ambit of terms such as unfair trade practices, defect, deficiency in service, to cover all forms of violations.⁶ This recommendation was based on the ever emerging contingencies that remained outside the scope of Consumer Protection Act.

UNFAIR CONTRACTUAL TERMS: STEMMING THE EVASION OF LIABILITY

*“[Courts] still had before them the idol freedom of contract .They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called the true construction of the contract.”*⁷ Lord Denning

The Indian legal system has grappled with the issue of determination of unfair contractual terms, resulting a chilling effect of prohibitive litigation costs for a consumer against such ‘take it or leave it’ contracts. The majority of issues pertaining to unfair contractual terms have been resolved through a judicial approach based on common law principles such as unconscionability of contracts. In the western world, all European Commission members have enacted specific legislation to deal with unfair contracts.⁸ Certain jurisdictions have opted for black lists, which provide for a list of contractual terms, which are considered unfair.⁹ The Law Commission of India in its 199th Report identified the necessity for general provisions to deal with unfair contractual terms, whilst clearly distinguishing procedural and substantive unfairness.¹⁰

⁵Akhileshwar Pathak, The Consumer Protection Bill, 2015:(Lack of) Rights of the Consumer to Terminate Sale Contract, W.P. No. 2015-09-01 Sep. 2015.

⁶ Ministry of Consumer Affairs, Standing Committee on Food, Consumer Affairs and Public Distribution, [Online], Available: [http://www.prsindia.org/uploads/media/Consumer/SC%20Report-Consumer%20Protection%20\(A\)%20Bill,%202011.pdf](http://www.prsindia.org/uploads/media/Consumer/SC%20Report-Consumer%20Protection%20(A)%20Bill,%202011.pdf) (25 Dec 2015).

⁷*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1982] EWCA Civ 5 and [1983] 2 AC 803.

⁸Ewoud H. Hondius, *Unfair Contract Terms: Toward a European Directive*, 1 Essays on Comparative Commercial and Consumer La B. King ed. 109 (1992).

⁹*Id.* at 120.

¹⁰ Law Commission of India, Unfair Terms in Contract, <http://lawcommissionofindia.nic.in/reports/rep199.pdf> (Aug. 2006).

The Consumer Protection Bill also provides for invalidating unfair contractual terms, which prevent a waiver of legal liability by imposing onerous terms, which are unfair to the interests of the consumers. Though the Indian courts have adequately dealt with unfair contractual terms by applying the principle of justice, equity and good conscience in the absence of statutory rights, it created legal uncertainty for the consumer. Moreover litigation costs before the civil courts being prohibitive to the average consumer, would render pursuing their rights impracticable.

The CPB provides the consumer to file a complaint against an unfair contractual term,¹¹ which previously required a determination of unconscionability before the civil courts. Section 2(s) of the CPB defines unfair contractual terms by specifically stating certain contractual terms as unfair, in addition to a general clause which renders any unreasonable obligation to the disadvantage of the consumer as unfair. The Standing Committee¹² had recommended the inclusion of an illustrative list of examples which could be considered unfair, but the CPB lists only a handful of unfair contracts.

The need to clearly state the prevailing unfair contracts in addition to those declared by the Supreme Court is that it would aid the average consumer identify his legal rights and create an obligation upon the consumer to adjudicate the unfairness of a contractual term. This not only impacts the consumer interest by requiring the party to approach the courts, but would create ambiguity as to the kind of contractual terms which are unfair, which are prohibited by law to be used by the producer or manufacturer in the contract. In contrast, foreign jurisdictions¹³ lay down specifically onerous contractual terms, which are unfair, whilst the Indian consumer bill, leaves it to be decided by the courts. The European Commission Directive on Unfair Terms in Consumer Contracts provides for an enumerative list of unfair contractual terms.¹⁴ The reasoning behind a comprehensive list of unfair contractual terms is the certainty it lends to commercial transactions resulting in the supplier modifying contractual terms instantaneously rather than through court orders.¹⁵ Therefore there is a need to provide a non- exhaustive list of unfair contractual terms to further judicial efficacy and effective consumer grievance redressal.

¹¹*supra* note 3.

¹²*supra* note 4.

¹³South African Law Commission, Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts Project 47 (April 1998).

¹⁴ Jesse Elvin, *The Application of the Unfair terms in Consumer Contracts Regulations* 1999, 14 K.C.L.J. 39 (2003).

¹⁵ R.D Sharrock, *Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act*, 22 S. Afr. Mercantile L.J. 317 (2010).

This non-exhaustive list should be created based on industry specific requirements, which is essential to cater to the differential disadvantages¹⁶ that consumers face under a specific industry.

UNFAIRNESS IN COMMERCIAL CONTRACTS: NEED FOR A RELOOK

The confinement of the principles of unconscionability to consumer contracts, deprives commercial contracts of this essential legislative protection and requires reconsideration. In the United States¹⁷ and Sweden,¹⁸ the principle of unfairness in contracts is applicable to all contracts, irrespective of their commercial nature. This approach is based on the disadvantaged bargaining position, irrespective of the nature of the party.¹⁹ The exception that has been carved out in the case of commercial transactions is that judicial intervention is not necessitated when the parties 'are not of unequal bargaining power.'²⁰ Therefore consumer protection can be extended to small businesses with a certain turnover as in the case of South African consumer protection law.²¹ This would protect unfairness in commercial contracts whereby due to unequal bargaining power, small businesses have to accede to onerous contractual terms against large corporations. As Elizabeth Crawford notes "Businesses are consumers, whose confidence in efficiency, fairness and certainty are important to any economy."²²

The German Standard Terms Act states that it is limited to standard terms and does not apply to 'individually negotiated contracts.'²³ Therefore there is a need to address the competing interests of not only freedom of contracting but also address unfair contractual terms in commercial contracts. As Hein Kotz posits, only in cases where there is a standard form contract, which is not negotiated between the parties, would there be a need for 'statutory interference with the freedom of contract.'²⁴ In the case of the United Kingdom, the UCTA²⁵ was generally held to be applicable to consumer contracts and commercial matters where the

¹⁶Chris Field, *The Death of Unfair Contracts*, Alt. L.J. 8 (2004).

¹⁷Art 2-302, Uniform Commercial Code (2002).

¹⁸ Sec. 36, Swedish Contract Terms Act, SFS 1915:218.

¹⁹ Hein Kotz, *Controlling Unfair Contract Terms: Options for Legislative Reform*, 103 S. African L.J. 411 (1986).

²⁰ *Photo Production Ltd v. Securicor Transport Ltd* [1980] UKHL 2.

²¹Sec. 1, South Africa Consumer Protection Act, 68 (2008).

²² Elizabeth Crawford Spencer, *The Applicability of Unfair contract terms Legislation to Franchise Contracts*, 37 U.W. Austl. L. Rev. 159 (2014).

²³ German Standard Terms Act, BGBI. I., 3138.

²⁴*supra* note 19 at 405.

²⁵Unfair Contract Terms Act, 1977.

parties did not enjoy equal bargaining power.²⁶ In commercial matters the courts adopted a non-interventionist approach, unless there existed an inequitable bargaining power between the parties.²⁷ The hesitance of courts in applying the unfair contractual principles of adjudication to commercial matters is the absence of policy reasons justifying such intervention.²⁸ The primary reasoning that is adopted in favour of the interventionist approach is the obligation to conform to standards of commercial morality²⁹ and that commercial entities are expected to set an example for society.³⁰ As the laissez-faire principle of non-intervention based on freedom of contract has eroded to a great extent, it entails protection for small businesses and franchises in India.

PRODUCT LIABILITY: CREATING LEGAL CERTAINTY

The term product liability has been defined as ‘responsibility of a manufacturer or vendor of goods or service provider to compensate for injury or damage caused to a consumer by defective product sold to a consumer or deficiency in service’.³¹ The liability is based on manufacturing defect³² and is subject to exceptions.³³ The sellers liability on the other hand is restricted and is subject to certain exceptions.³⁴ Therefore the product liability regime under the Bill provides for a balanced approach to the essential issues pertaining to the liability of the manufacturer and the supplier.

The acceptability of certain defenses for product liability also needs to be provided for under the Consumer Protection Bill. The concept of product liability has evolved considerably in India but has also been subjected to non-recognition³⁵ based on the absence of specific statutory rights. Product liability extends the scope of liability to various goods and services, which remained outside the domain of consumer protection laws, resulting in sustained impunity.

The generic drugs industry in India has prospered over the years. When Ranbaxy’s drugs were declared unsuitable for U.S market, the Indian market was impervious to the degraded quality

²⁶*supra* note 20.

²⁷M. H. Ogilvie, Reasonable Commercial Contracts and the Unfair Contract Terms Act 1977, 19 Can. Bus. L.J. 359 (1991).

²⁸*Id.* at 361.

²⁹*Harry v. Kreutziger* (1979), 95 D.L.R. (3d) 232.

³⁰ *Canadian Aero Services Ltd. v. O'Malley* [1974] S.C.R. 594.

³¹Sec. 2(31) Consumer Protection Bill, 2015.

³²Sec. 73, Consumer Protection Bill, 2015.

³³Sec. 74, Consumer Protection Bill, 2015.

³⁴Sec. 75, Consumer Protection Bill, 2015.

³⁵*Airbus Industries v. Laura Howell Linton* 1994 (5) Kar. L.J. 63.

of drugs being manufactured in India.³⁶ Moreover Indian produce has been rejected by the European Union due to the presence of higher amounts of pesticides.³⁷ Therefore the Indian standards have been questionable to a certain extent, which are to be remedied through the Bureau of Indian Standards Bill 2015. The Consumer Protection Bill defines defective product to include 'deviations from hallmark standards of pharmaceutical product under any law or contract'.³⁸ This creates a potent mechanism of liability for contract manufacturers of generic drugs.³⁹ In other jurisdictions, the term 'generic drugs' is defined in order to provide for similar labelling.⁴⁰ Therefore there is also the need to define generic drugs to exclude the onerous liabilities that will be imposed on the manufacturers due to product liability litigation.

THE NEED TO STATE THE ACCEPTABLE DEFENCES:

Consumer Protection laws around the world provide for the acceptable defences of state of the art and development risk defence. Most jurisdictions provide for the defences applicable in the case of product liability, which is necessary in creating the necessary balance between the manufacturer and the consumer. As in the case of China, the Product Quality Law⁴¹ provides for certain defences that can be claimed by the manufacturers, which are based on the availability of technology to detect the defect when the product was manufactured. When such defences are resorted to by the producer then the need to state as to who bears the financial burden for the consumer liability in such cases. The development risk clause is essentially premised on the logic of the exculpating the producer from liability when it can be proved that the 'state of scientific and technical knowledge at the time when the product was put into circulation was insufficient to ensure the discovery of the defect'.⁴²

³⁶ The Hindu, FDA bans Ranbaxy's fourth plant in India, [Online], Available: <http://www.thehindu.com/business/Industry/fda-bans-ranbaxys-fourth-plant-in-india/article5613095.ece> (25 Jan 2014).

³⁷ The Hindu, EU bans Indian Alphonso mangoes, 4 vegetables from May 1, [Online], Available: <http://www.thehindu.com/news/international/world/eu-bans-indian-alphonso-mangoes-4-vegetables-from-may-1/article5956482.ece> (28 Apr 2014).

³⁸ Sec. 2(s), Consumer Protection Bill, 2015.

³⁹ TwoFour Insight Group, Product Liability coming to India, [Online], Available: <http://twofourinsight.com/product-liability-coming-to-india/> (11 Dec 2015).

⁴⁰ *Id.*

⁴¹ Art. 41, Product Quality Law of the People's Republic of China (1993).

⁴² Art. 7(e), European Directive Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts of 5. April 1993, ABl. EG 1993, Nr. L 95/29.

The Fondazione Rosselli Report⁴³ which analyzed the development risk clause stated that the clause is essential in striking a balance between the competing interests of manufacturer innovation as well as consumer welfare.⁴⁴ As a study by Mitchell Polinsky and Steven Shavell reveals that as a cost-benefit analysis of product liability to the market economy, the case for product liability law is majorly fragile in the case of a vast variety of products.⁴⁵ The CPB does not lay down the defences that can be resorted to by the producer. Therefore the product liability regime in India needs to ensure a balanced approach to the interests of the manufacturer as well as the consumer.

CONCLUSION:

*“Markets are useful instruments for organizing productive activity. But unless we want to let the market rewrite the norms that govern social institutions, we need a public debate about the moral limits of markets.”*⁴⁶ - Michael J. Sandel

These words aptly summarize the evolving global order of a consumer centric society, whereby questions of want are subsumed under the disguise of need without limitations of morality. In such a scenario the need to effectuate a functional market economy which not only caters to the idea of utilitarianism but also to the need for morality and justice becomes quintessential for a just society. In this context, the Consumer Protection Bill provides for the remedy from standard form contracts by prohibiting unfair contractual terms, which grants equal bargaining power to the consumer. The CPB has also advanced on several fronts, such as the need to secure online transactions with consumer rights and provide statutory rights for product liability.

The CPB redefines the notions of liability on the grounds that it places volatile judicial concepts of product liability and unfair contractual terms into legislation, creating legal certainty. This in effect does reformulate the notions of liability existent in India in a volatile scenario where the Karnataka High Court even rejected the concept of product liability in India.⁴⁷ In essence the Bill provides for statutory consumer rights, which were subject to judicial uncertainty and

⁴³ The Fondazione Rosselli Report, Analysis of the Economic Impact of the Development Risk Clause, Study for the European Commission.

⁴⁴ Lauren Sterrett, *Product Liability: Advancements in European Union Product Liability Law and a comparison between the EU and U.S regime*, 23 Mich. St. Int'l L. Rev. 889 (2015).

⁴⁵ A. Mitchell Polinsky and Steven Shavell, *The Uneasy case for Product Liability*, 123 Harv. L. Rev. 1440 (2010).

⁴⁶ SANDEL, M. J. (2009). Justice: what's the right thing to do? New York, Farrar, Straus and Giroux.

⁴⁷ *supra* note 35.

thereby re envisions the notions of liability for the manufacturer, supplier and e-commerce platforms.

Moreover the powers of the Central Consumer Protection Authority to inquire suo moto violations of consumer rights,⁴⁸ is crucial to creating necessary deterrence against erring manufacturers and suppliers. The evidentiary standard necessitated under the Consumer Protection Bill is based on satisfying the conditions under Section 73 on the preponderance of evidence for sustaining a claim for product liability. Therefore the consumer rights are effectively prioritized under the Bill, which is a pre-requisite for a developing economy such as India. But the nitty-gritties of the manner in which the concepts of product liability and unfair contractual terms have been provided under the Bill, have to be reformed in order to secure maximum judicial, consumer and economic efficiency. The passage of the Bureau of Indian Standards Bill, 2015 will also complement the standard of liability envisioned under the CPB. However in their present form, the provisions of product liability, unfair contractual terms and e-commerce transactions under the Bill cannot be completely termed as a panacea for impeding consumer issues. Therefore the Bill has initiated the pending reforms of India's consumer protection laws, in an effort keep pace with the technological advancements and the workings of the market economy.

⁴⁸Sec. 17, Consumer Protection Bill, 2015.

New Consumer Protection Laws and Policy – Notions of Liability Redefined?

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ABSTRACT

The growth of consumerism and the dependence of world economy on the enormous technological impact on quality and quantity of goods and services, there is also an increase in corruption and fraudulent practices in terms of misleading advertisement, unfair trade practices and many more. Consumers are exploited to a larger extent. To deal with these situations, the present consumer laws have to be adequate and the provisions inscribed in it have to be practicable enough. With the proposed amendment bill, liabilities are being redefined and new redressal methods including harsher punishments and fines are suggested.

INTRODUCTION

For the first time in the consumer protection history, Consumer Affairs Ministry filed a suit under a provision in the Consumer Protection Act, 1986 against Nestle. The government decision came after the company's popular noodles; 'Maggi' were alleged to be unsafe for human consumption because of the hazardous level of lead found in it. Moreover they are also accused of misrepresenting the product in the advertisement.¹ But the present Consumer Protection Act, 1986 (hereinafter referred as CPA) is not a utopian document as it remains silent on situations like misleading advertisement, unfair trade practices and other fraudulent practices adopted by such producers with the development in consumer transaction whether offline or online. So with the changing situations there was a need for transition in CPA in order to protect the consumers from the vicious practices of producers and to clear the black clouds hovering over the consumer rights, the Union Cabinet took a progressive step by approving the Consumer Protection Bill, 2015² so as to replace the 29 year old existing

¹ In Public interest, The Indian Express, August 13, 2015, available at: <http://indianexpress.com/article/opinion/editorials/in-public-interest-2/> (last accessed on 24/12/2015).

² It was tabled in Lok Sabha on August 10, 2015, Consumer Protection Bill tabled in Lok Sabha, The Economics Times, August 10, 2015, available at:

legislation. First, let us emphasize on the theory of consumer protection and the background of CPA, 1986 before moving on to the changes in liability suggested by the new amendment bill.

The goal of the consumer protection policy is the promotion of consumer welfare. The root of the policy is the recognition of an unequal relationship between consumers and producers. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanism to redress their grievances. In Kautilya's *Arthashastra*, there are references to the concept of consumer protection against exploitation by the trade and retailer with respect to quality, short weight, measurement and adulteration of goods. The concern in Indian Constitution for protection and promotion of an individual's rights welfare as a consumer, a customer are enshrined. The rights under the Consumer Protection Act, 1986 flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. This Act was enacted in 1986 based on United Nations guidelines with the objective of providing better protection to consumer's rights and interests. The Act provides for effective safeguards to consumers against various types of exploitations and unfair dealings.

HIGHLIGHTS OF THE CPA, 1986

The CPA was enacted to provide a simpler and quicker access to redress consumer grievances. The Act seeks to promote the interest of consumers against deficiencies and defects in goods and services. It also seeks to secure the rights of a consumer against unfair trade practices, which may be practiced by manufacturers and traders. Other provisions prescribe for the setting-up of Consumer Forum so as to gear the dispute redressal and discourage long litigation. It is also provided that every district should have at least one Consumer Redressal Forum also known as Consumer Court where the consumers can get their grievances heard. Above the District Forums (which can hear claims less than Rs 5 lakh) there is the State Commission (claims of Rs 5 Lakh-20 Lakh) and at the top level, there is the National Consumer Redressal Commission (claims more than Rs 20 Lakh) in New Delhi.

The Act applies to all goods and services unless specifically exempted by the central government. It covers all sectors whether private, public or cooperative. It has provided machinery whereby consumers can file their complaints which will be heard by the consumer

forums with special powers so that action can be taken against erring suppliers and the possible compensation may be awarded to consumer for the hardships they underwent. Moreover, consumers under this law are not required to deposit huge court fees, which earlier used to deter consumers from approaching the courts. The rigors of court proceedings have been replaced with simple procedures as compared to the normal courts, which help in quicker redressal of grievances. The provisions of the Act are compensatory in nature. Noteworthy is that the cases of products or services for personal use are only entertained consumer courts and the defects in products used for commercial purposes are not redressed.

The main objective of the CPA is to ensure the better protection of consumers. The Act is also intended to provide simple, speedy and inexpensive redressal to the consumers' grievances and reliefs of specific nature and award of compensation wherever appropriate to the consumer.

LIMITATIONS OF THE ACT

In the present socio economic scenario, the consumer is a victim of many unfair and unethical tactics adopted in the market place as he is often cheated in the quality, quantity and price of goods or services. The doctrine of *caveat emptor* i.e., 'let the buyer beware' which was the philosophy of the law of sales has been replaced by 'let the seller beware'. But in India, consumers are confronted invariably with the non-availability of effective and speedy machinery for redressal of their grievances in the market place. The consumer's problem in the market ranges from fraud or deception to the outright rejection of their right to information about goods. Though the Act has aroused enormous expectation amongst the masses for redressal of their grievances, these expectations will not be fulfilled unless the redressal machinery laid down in the Act is made functional. The Act envisages the setting up of District Forums in each district but no concern has been shown by the respective state governments. The delays and default on the part of the State Government was brought to the attention of the Supreme Court in *Common Cause v Union of India*³, where the court issued directions to all State and Union Territories to constitute District Forums and the State Commissions within six weeks. Moreover the National Consumer Disputes Redressal Commission is confronted with appeals and original complaints filed in the period 2008-2010 which means consumers are being made to suffer for an average of five years to get their grievances redressed.

³ (1991) II CPR 523 (SC).

The CPA was enacted in the pre-liberalization years, and was set in a qualitatively different economy. Since there has been expansion of goods and services, diversification in the means of reaching consumer, proliferation of trade practices, coming in of e-commerce, vigorous sales promotion and aggressive advertising for sweeping such changes and in order to give more teeth to the present law, the Union Cabinet had in July approved the new bill as ‘Consumer Protection Bill 2015’.⁴ This Bill if approved by both the houses will widen the ambit and modernize the law on consumer protection due to the changes in the markets. The primary motive of replacing the 29 year law is to modernize the law with respect to the development of new markets and to widen the scope of law so as to fill the gaps so that the consumers cannot be exploited by the companies and to increase the accountability of the companies. The rationale behind the new bill is as rightly explained by our Consumer Affairs Minister Ram Vilas Paswan that the misleading advertisement, tele marketing, multilevel marketing, direct selling poses new challenges to consumer protection hence there is a need to modernize the act so as to deal the situation effectively. What are the proposed amendments and how the liabilities are being redefined will be dealt in the next heading.

PROPOSED AMENDMENTS

[A] UNFAIR TRADE PRACTICES

Unfair Trade Practices include false and misleading advertising and other means of promoting sale of goods and services. So as to regulate such practices, in 1984 a chapter was added in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). Under this act, any person or trader could approach the MRTP Commission against unfair trade practice by which the Commission could order the discontinuation of such practice and also award damages. The CPA which was enacted in 1986 copied the aforesaid provisions and provided a parallel platform against unfair trade practices. In 2002, the Competition Act was enacted (which replaced the MRTP Act) and it did not include the provisions relating to unfair trade practices as the makers thought that the provisions under the CPA would be enough in order to provide a redressal mechanism to unfair trade practices. But CPA had very limited protection against unfair trade practices. Under the CPA, only a natural person can approach the consumer forum, but the condition is that he should be a consumer which he would be by buying goods and

⁴ Cabinet approves Consumer Protection Bill, 2015, The Financial Express July 29, 2015, *available at*: http://articles.economictimes.indiatimes.com/2015-07-29/news/64996601_1_consumer-courts-consumer-fora-new-bill (last accessed on 18/12/2015).

services, but companies are not treated as consumer and thus they cannot approach the consumer forum. As the field has become completely unregulated, business entities have indulged in unfair trade practices without fetters.

The amendment bill is proposing for the creation of a Central Consumer Protection Authority which will be an executive agency.⁵ The authority will have its jurisdiction on unfair trade practices, safety in goods and services, quality standards, unfair contract terms and enforcement of consumer protection laws. Despite CPA under the proposed bill, a person reporting to the authority need not be consumer it can be any person including business organization. Moreover upon its knowledge or information received from others, the authority can inquire into any unfair trade practice. Even inquiry can be made to misleading or false or deceiving advertisements.

Even such authority can intervene in proceeding in which allegation of violation of consumer rights before a court with the permission of respective court.⁶ When a direction is being given by government into violation of consumer rights, the authority can launch prosecution⁷.

On non-complying with the order of the Central Authority, a fine not less than twenty five thousand rupees and extending up to one lakh rupees for each day may be imposed with a maximum limit of ten lakh rupees. The complaint has to be disposed within a period of thirty days of receipt of such complaint subject to the justification for not disposing the complaint period can be extended.⁸ It is recognized that the authority will be dealing with a very large number of cases which will definitely involve cases of high value investment in advertisement or cases pertaining to unfair trade practices which will be affecting larger public interest.⁹ This authority is empowered to initiate class action including enforcing recall, refund and return of products.¹⁰ Thus the task of prevention of or acting against unfair trade practice will be invested in an authority which till now does not exist.

⁵ Statement of Objects and Reasons, para 4 at pg 40, Consumer Protection Bill, 2015, *available at*: <http://consumeraffairs.nic.in/writereaddata/CP%20Bill%202015.pdf> (last accessed on 19/12/2015).

⁶ Consumer Protection Bill, §16(1) (2015).

⁷ Consumer Protection Bill, § 16(1)(i) (2015).

⁸ Consumer Protection Bill, § 21(4) (2015).

⁹ Consumer Protection Bill, § 16(2) (2015).

¹⁰ *id.* 5.

[B] E-COMMERCE

The rapid development of e-commerce has led to new delivery systems for goods and services and has provided new options and opportunities for consumers. But there is a problem to it while purchasing such goods or products, the buyer is not able to inspect or sample the same. He/she can do such examination of the product only when it is delivered to him/her. Sometimes this also happens in case of face to face transactions. In case a defective product is being passed on by the seller, and refuses to take back the same or refund the sum for such case, the present law i.e., CPA 1986 remains silent but the proposed amendment provides for remedy that the consumer can cancel any contract within a period of 30 days of the delivery of goods and availing of services.¹¹ Thus a consumer has the right to terminate a contract made through e-commerce or through other means, thus vitiating the fraudulent or unfair trade practices adopted by the sellers. In this way the proposed amendment is helping the preservation of consumer rights.

[E] UNFAIR CONTRACT TERMS

The Contract law which we are having today is drawn from the British Common law. With subsequent development and with the judicial pronouncements so as curb the unreasonable practice been followed by the corporations of limiting the rights of the consumer and exempting the liability of the corporation, the British government brought in the Unfair Terms in Consumer Contracts Regulations, 1999 (which dealt with both quality of goods and services) to give effect to European Union Directives on consumer rights. But in Indian perspective, no such reforms have been made. The proposed amendment in the CPA allows a consumer to file a complaint before a consumer forum if the consumer has suffered a loss due to an unfair contract entered into by him.¹² In the amendment bill, it is defined as constituted by:¹³

[1] Excessive security deposits given by a party to the contract for performance of contractual obligations; or

[2] An imposition of penalty on a party which is disproportionate to the loss incurred due to the breach to the other party; or

[3] Refusal to accept early payment of debts on payment of penalty; or

¹¹ Consumer Protection Bill, § 2 (41) (H) (2015).

¹² Consumer Protection Bill, § 7(vii) (2015).

¹³ Consumer Protection Bill, § 2(42) (2015).

[4] Power to terminate the contract unilaterally without reasonable cause; or

[5] Power to assign contract to a third party without the consent of the customer; or

[6] Imposition of unreasonable charge, obligation, conditions on a consumer which put him/her at disadvantages.

Thus with such enactment, if there has been a condition by which any contract for supplying goods and services and such conditions if found unfair, will be dealt as per the aforesaid changes brought by the proposed amendment. Moreover, the corporation tactics of printing standard terms which not only reduces their liability but also limits the rights of the consumers will also be redressed through this.

[C] PRODUCT LIABILITY¹⁴

Another significant right created by the amendment bill is the provisions for product liability. Altogether a new chapter has been added in the proposed amendment bill under which an action can be made in case of any personal injury¹⁵, death or property damage arising out of the defects in the product, then manufacturer or producer of such product shall be liable for the same.¹⁶ An action will commence only in situation where the product was not misused, altered or modified¹⁷ and the defect results from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, labelling of any product. Moreover such manufacturer though not engaged in negligent or fraudulent conduct in making the express warranty may also be subjected to liability.¹⁸ This practice has been prevalent in US and European countries falling under the field of law of tort. Thus, such amendments will definitely redefine the notions of liability and will make the producers focus on providing an efficient product.

[D] MEDIATION PROCESS

A new chapter has been added to the proposed amendment bill, named 'Mediation'. As per Section 2 (22) of the amendment bill, mediation means the process by which a mediator is appointed by the National Commission or a State Commission or a District Commission to

¹⁴ Consumer Protection Bill, § 2 (31) (2015).

¹⁵ Here personal injury does not includes mental anguish or emotional harm in absence of proof of related personal injury illness or death as enshrined in the proviso to Section 72(1), Consumer Protection Bill, 2015.

¹⁶ Consumer Protection Bill, § 72(1) (2015).

¹⁷ Consumer Protection Bill, § 74(1) (2015).

¹⁸ Consumer Protection Bill, § 73(4) (2015).

mediate the dispute between the parties to the complaint or appeal. Such mediator communicates between the two in order to reduce misunderstanding, clarify priorities, generate options to solve the dispute etc. Such a process will definitely take lesser time to redress the grievance and will be a better option for protection of consumer rights. The provision of Mediation as an Alternated Dispute Resolution Mechanism makes the process less cumbersome, simple and faster.

[F] OTHER CHANGES

[1] DEFINITION OF CONSUMER- As per the section 2 (8) of the said amendment bill, consumer means any person who buys goods or hires a service for a consideration. This includes the user of such goods or service; it also covers transactions through all modes including offline, online, electronic means, teleshopping or multi-level marketing.

[2] ENHANCED PUNISHMENT- In case where any person sells or manufacturers any articles of food for human consumption containing extraneous matter, then the Central Consumer Protection Authority as established under the Act will have the power to impose penalties which may extend to one lakh rupees.¹⁹ In case of non-complying with the orders, a fine not less than twenty-five thousand rupees and extending up to one lakh rupees for each day and further it can extend up to twenty lakh rupees or with a maximum of six months imprisonment. In case of not coming with the order of District/State/ National Commission, imprisonment for not less than one month extending to three years and fine with a limit of ten thousand rupees to a maximum of fifty thousand rupees is to be imposed.²⁰

Thus with the proposed amendment bill, liabilities are redefined and if enacted, it will definitely help in redressing grievances in lesser time and with harsher punishments and fines, thus giving more teeth to the consumer laws.

¹⁹ Consumer Protection Bill, § 18(2) (2015).

²⁰ Consumer Protection Bill, § 79(1) (2015).

New Consumer Protection Laws and Policy – Notions of Liability Redefined?

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ABSTRACT

In today's globalized world, the rapid advancements in technologies especially information technologies, have revolutionized the manufacturing and service sectors. Modern technological developments have made a huge impact on the quality, availability and safety of goods and services. But the harsh reality is that the consumers are still victims of unscrupulous and exploitative practices. Therefore it is extremely important to establish robust, fair and effective consumer protection legislation to safeguard consumer's interests. This essay is an attempt to analyze the existing Consumer Protection Act, 1986 and the proposed Consumer Protection Bill, 2015 with regard to the notions of Liability.

INTRODUCTION

The age-old adage of '**Consumer Sovereignty**' or 'Consumer is the King' has undergone dramatic change. In today's globalized world, the rapid advancements in technologies especially information technologies, have revolutionized the manufacturing and service sectors. The mercurial rise of e-commerce is an illustrative example of this phenomenon. Buying and selling of products have never been so easy. Before the turn of 21st century, open markets or 'haats' were the order of the day. The producers of various commodities organized at a place and interested buyers after examining the products and assuring themselves of the quality bought the supplies. This exemplifies the physical exchange of commodities that used to take place earlier. Under this arrangement, it was the duty of the buyer to examine the goods for any fault or defect before purchase. The seller was not to be held liable for any damage caused due to any such defect or fault discovered subsequent to the purchase. The legal maxim of '**Caveat Emptor**' which means '*let the buyer be aware*' is premised on this idea. It absolved the seller from the obligation to disclose any information related to the quality of the product.

This **notion of liability** underwent a sea change with rising consumer protection campaigns. There was a realization that the manufacturers and producers of goods employ unfair practices to exploit the consumers. The consumer protection movements in the 1970's and 80's sought

to protect the consumers from such exploitation and safeguard their interests. Activists demanded stronger legislations aimed at securing and strengthening the rights of the consumers in the markets. It is indeed beneficial for both the government and the businesses that consumers enjoy 'free choice'.

The enactment of Consumer Protection Act, 1986 was a shot in the arm of legal machinery. At that time it presented a highly progressive piece of Social Welfare Legislation. It was aimed to provide effective and efficient statutory protection to consumers against exploitation and unfair dealings. Rather than being a punitive or preventive law, CPA, 1986 is compensatory in nature. In the International Conference on Consumer Protection held in Malaysia in 1997, the Indian Consumer Protection Act was described as one "which has set in motion a revolution in the field of consumer rights, the parallel of which has not been seen anywhere else in the world"¹

The Act enshrines certain rights to the consumer. They include the following

- The right to be protected against the marketing of goods which are hazardous to life and property;
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to protect the consumer against unfair trade practices;
- The right to be assured, wherever possible access to variety of goods at competitive prices;
- The right to be heard;
- The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumer; and
- The right to consumer education.²

The Act has been operational for almost 30 years now and whirlwind changes in the market structure revealed many inconsistencies that could not be dealt with adequately under the established provisions. Consequently, the Act was amended thrice but some explicit gaps still persist. The Act provided for a three-tier redressal mechanism at the District, State and National level. However, over the years various reports and studies have highlighted the lack of expeditious disposal of complaints. Consumer forums are over-burdened and under-funded. Some of them even lack requisite infrastructural and clerical support.

¹ S.S Singh & Sapna Chadah , *Consumer Protection in India: Some Reflections* in INDIAN INSTITUTE OF PUBLIC ADMINISTRATION (published under aegis of consultancy assignment)

² See *id*

One of the major and fundamental drawbacks of the act is that it fails to provide appropriate remedy in disputes that arise from deficiency in services or absence of services especially e-commerce based industries. This renders the act almost redundant in modern times. It is no exaggeration to say that the society is increasingly becoming service-oriented. The emergence of e-commerce services has deconstructed the market paradigm and transformed it completely. Despite the numerous amendments made to the original Act, it could not fill the lacunae which exist in the current consumer protection legal framework.

The recently proposed Consumer Protection Bill, 2015 as introduced in the Lok Sabha is an attempt to provide a robust and foolproof mechanism for consumer protection.

The manufacturers and service providers, in order to achieve their main objective i.e. Profit maximization; try to deceive the consumer in every possible way. Defective products and deficient services are sold with the belief that the consumer is unaware of standards of quality and quantity of products and services to be maintained by the suppliers. Charging of excess prices, providing goods of inferior quality or lesser quantity than actually demanded are common practices to exploit the consumer. Therefore, the legal rules concerning the liability of manufacturers and service providers in cases of consumer exploitation and the course of action available to the consumer against them should be known.

Consumer Protection Act, 1986 does not define the liability of the manufacturer in cases of default in his product and if he is directly accountable to the consumer for his negligence. The new Consumer Protection Bill, 2015 covers the crucial aspect of Product Liability of a manufacturer and the situations in which the consumer can hold him accountable.

Who is a consumer?

According to the Act, "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 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

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 of any commercial purpose)³

The Consumer Protection Act 1986 and Bill 2015 do not seek to protect every person under the literal meaning of the term ‘consumer’. The protection is meant only for the person who fits in the aforementioned definition. Any person who buys such product or avails such service for any commercial purpose cannot be called a consumer even if he suffers injury because of the product and has no remedy under this Act. He can only file a civil suit against the seller/manufacturer.

What do we mean by consumer protection? How is a consumer “protected”?

In any transaction involving sale of goods and services, consumer/buyer is the weaker party and can be easily exploited by the seller (stronger party). So in order to prevent such exploitation, the Act has vested some rights in a consumer which empower him and protect him against the malpractices of the seller. Consumer protection laws are designed to ensure free trade practices and proper product liability in case of any defect or deficiency on the part of the seller. It makes sure that the manufacturer uses proper care and caution in making the goods and if the nature of the goods is such that it may put the consumer in any risk, such risks and precautions should be notified to the buyer in advance. If the seller fails to do so and the consumer suffers any injury, the Act gives the consumer an opportunity to seek compensation from the seller and put him in the original position as if no damage were caused. This is what we mean by consumer protection i.e. guarding him against the misconduct and negligence of the seller.

Changes with new laws and policies

The Bill seeks to create a Central Authority to be known as the **Central Consumer Protection Authority** to promote, protect and enforce the rights of consumers.⁴ It will also have the power to initiate class suit against defaulting companies to fast-track the redress of consumer grievances, to tackle unfair trade practices and to hold the manufacturer liable for his defective product. The Bill provides for a comprehensive framework for protection of consumer interest and will replace the Act. The object of the Central Authority along with protection of rights of

³ Consumer Protection Bill, 2015 Section 2(8)

⁴ Consumer Protection Bill, 2015

the consumer and ensuring free trade practices, shall also be to ensure that no advertisement is made of any goods or services which is misleading or deceiving or contravenes the provisions of this Bill and rules and regulations made under it.⁵ The Bill also provides for setting up of a 'circuit bench' to facilitate quicker disposal of complaints and there is an enabling provisions for consumers to file complaints electronically and file complaints in consumer courts that have jurisdiction over the place of residence of the complainant.

The Bill also introduces mediation called **Consumer Mediation Cell** as a mode of consumer dispute resolution. Consumer Mediation Cells will be established and attached to the redressal commissions at the district, state and national levels. The respective redressal commission shall appoint a mediator for the parties in complaint or proceedings. When an agreement is reached at by the parties, the respective commission shall reduce it to writing and then dispose of the matter. However if an agreement is not reached at, it will be dealt with by the respective commission. This is an alternative available to the parties in order to obtain a faster decision. It also reduces the burden of the District, State and National commission by channeling some of the cases to another forum.

Consumer Protection Bill, 2015 is a milestone with regards to the inclusion of product liability under the purview of consumer protection in Indian context. Chapter VI of the Bill as proposed envisages the scope of product liability, its effects on other laws and exceptions under liability action.

The origin and evolution of the **notion of product liability** can be traced through revolutions that led to its development. The first revolution in product liability created strict liability for defective products. If we were to fix a date on which it began it would be 1916, when the New York Court of Appeals handed down an opinion in the case of *Macpherson v. Buick Motor Co.*⁶ The plaintiff in that case was severely injured when one of the wooden wheels on his new Buick automobile collapsed. Injured consumers had previously been barred from suing manufacturers by the rule of privity, which held that manufacturers owed no duty-under either contract or negligence law-to anyone other than the immediate purchaser. However, the ruling in this case attacked the very notion of privity rule. It was held that the manufacturer owed this

⁵ *ibid.*

⁶ 111 N.E. 1050 (N.Y. 1916)

duty not only to the immediate purchaser but also to anyone who could be reasonably expected to use the product-or, as Cardozo put it, "where danger is to be foreseen, a liability will follow."⁷

The second revolution that marked the development in the field of product liability was strict liability for non defective products with unreasonably dangerous features. ***Ford Pinto*** case is a highlight. In this case Pinto was not defective or faulty however the damage was caused due to third party intervention. It is a large leap from the proposition that manufacturers should be liable for injuries caused by product failure to the proposition that manufacturers should be liable because their products did not protect users from the users' own, or some third party's negligence.⁸ This and many other cases involve use of adequate products with unreasonably dangerous characteristics.

The discussion on its expansion enables us to comprehend the product liability clauses as proposed in the Bill and appreciate its necessity. In *Collector of Central Excise Duty v. Protein Products of India Ltd.*⁹, the Supreme Court of India has defined the term 'product' as "anything produced or obtained as a result of some operation or work." A product is any item offered for sale. It also includes any form of service offered for sale. Section (2) of the Bill defines Product Liability as the responsibility of a manufacturer or vendor of goods or service provider to compensate for injury or damage caused to a consumer by defective product sold to a consumer or deficiency in services. If defects in the manufacture, construction, design, testing, service marketing etc. of a product results in any personal injury or property damage to a consumer, the manufacturer is liable in a product liability action. While products are generally thought of as tangible personal property, product liability also covers intangible property like gas, natural property like pets, real estate like houses and buildings, and writings like navigational charts. The Bill also seeks to provide criminal action to the claimant for any kind of adulteration found in the goods bought, subject to conditions mentioned in the Bill. The seller is liable if the goods do not meet the standard required by the Bill, even though he has taken all possible and reasonable care and is in no way to blame for defect.

How do we decide product liability?

⁷ See *id*

⁸ Carl T Bogus, *The Third Revolution in Product Liability*, CHICAGO KENT LAW REVIEW, October 1996

⁹ 1989 AIR 627

Any personal injury by deficiency in the goods sold to a consumer makes the manufacturer/seller/marketer liable for it.

Traditionally, there was no product liability theory in India. In the absence of statutory or customary law applicable in a case, courts were guided by the principles of justice, equity and good conscience, and often English common law, especially the ratio contained in *Donoghue v Stevenson* which states that, where that other person owed the first person a reasonable 'duty of care' and harmed that person through their conduct in breach of that duty, he or she shall be liable for negligence irrespective of whether any contractual relationship exists or not. Like an insect inside the cold drink bottle¹⁰, unhygienic condition at manufacturing place and selling of expiry date products, and the ultimate result of all these events is the damage, suffered by the consumers.

Product liability is ensured by the Rights vested in a consumer by Act. The basic significance of this is that it safeguards the interest and rights of the consumer. According to such laws, the manufacturers or retailers are responsible to the consumers, for legal remedy to the consumers and settlement of dispute, if it arises. Burden of proof lies on the claimant and he has to prove that whatever injury he has suffered, is caused by defective product, which is produced by the manufacturer or supplied by the supplier. This is done to avoid exploitation of the seller along with exploitation of the buyer. In order to ensure justice and no misuse of the power vested in the hands of the buyer, he is required to prove his cause of action and only when the manufacturer fails to comply with standard of care promised or expected by law can he be considered liable and expected to compensate the buyer.

The supplier/manufacturer can only be held responsible for any defect which falls under the scope of 'defect' as under the Act. Otherwise it cannot be made the subject matter under the Act. When the buyer is unable to prove that the cause of action for which he seeks compensation arose due to a defect caused due to negligence of the manufacturer, then the complaint is rejected.

This condition is of significance and indeed tilts the balance against the consumers with regard to burden of proof. The Bill under the heading *Liability of manufacturer of a product*, lays down that the claimant shall be able to seek remedy successfully only by establishing liability

¹⁰ Donoghue v. Stevenson [1932] AC 562, [1932] UKHL 100

through *preponderance of evidence*.¹¹ The claimant will have to show that the manufacturer at the time was aware or should have been aware of any damage likely to be caused by the use of the product. Further, the customer will have to establish a causal relationship between the injury caused and the defect in the product. This alone will make him eligible to seek remedy under the new consumer protection law. It is further exacerbated by the slew of exceptions mentioned in the Bill. These exceptions exempt the seller as well as the manufacturer from any burden in case the product is tempered or modified. The manufacturer is not to be held liable in case of failure to give apposite warnings prior to the usage of the subject matter.

CONCLUSION

The proposed Bill no doubt increases the burden of proof on the consumer. An effective legislation is one that strikes a perfect balance between both the parties. Since any legal enactment related to Consumer Protection invariably involves groups with unequal bargaining power, it is all the more necessary that due diligence is paid to ensure that any law does not impose unreasonable restriction on the healthy market competition. It should ultimately stand the test of equity, justice and good conscience.

¹¹ Consumer Protection Bill, 2015

New Consumer Laws And Policies – Notions Of Liability Redefined?

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ABSTRACT

The Consumer Protection Act, 1986 is one of the historical socio-economic legislation aimed at public welfare and consumer protection. But, in the era of industrialization, modernisation and globalisation; it is inefficacious to deal with the contemporary issues. Here, the author analyses new consumer law and policies proposed under new Consumer Bill, 2015 and 12th planning commission by scrutinizing the flaws in former consumer protection laws that lead to emergence of new policy. Ensuring protection of interests and rights of consumers should be the motive of new Bill and lastly, author recommended several ameliorations needed for making the Bill more convincing.

INTRODUCTION

Recently consumer affair ministry made the headlines by filing the case against Nestle India for using unfair trade practices, false labelling and misleading advertisements. It was for the first time that ministry dragged a company to National Consumer Dispute Redressal Commission (NCDRC) under Consumer Protection Act Of 1986 (COPRA). Earlier Food Safety and Standard Authority of India (FSSAI) had lifted ban on Maggi, a product of nestle India. Bombay High Court in its recent judgement abolished the ban on Maggi which was earlier imposed due to the case¹ filed by FSSAI against nestle India. The ban was imposed due to excess of lead present in it which was causing damage to kidney.

The Ministry has approached Bombay H.C for ensuring “right to safety” of consumers, enshrined under Section 6(a) of COPRA 1986, which states that “the consumer has the right to be protected against the marketing of goods and services that are hazardous to life and property”. Here the word “consumer” is the centre of attraction. It covers a very wide range of explanation. A consumer is someone who buys the goods and services for his personal use and ownership instead of using it for the purpose of resale or manufacturing, as mentioned in COPRA 1986 section 2(d) (i).²

¹ *M/S Nestle India Limited Vs. FSSAI*, AIR 2015 WPL 1688

² “consumer” means any person who,—

Why to Protect Consumers- historical perspective.

Article 21 of the Constitution of India provides “Right to Life and personal liberty to all persons’. The Supreme Court of India brought healthcare within the ambit of word ‘life’ and declared it as basic human right available to every citizen of India , whether he is a consumer or a normal human being..

Soon after independence, India realised the need for development. To get into a stable position, it started giving license to new and big firms to invest and trade in India, in order to generate foreign currency while it stopped giving license to smaller firms. As a result, due to lack of competition, bigger firms started to monopolize the Indian market. Government of India understood the intentions of foreign companies and in order to safeguard the consumers from exploitation, it proposed Monopolies and Restrictive Trade Practices Act (MRTP), 1969. Also, according to article 38(1)³ of the Constitution of India “state has responsibility to prevent its citizen from any type of monopoly or unscrupulous trade practice used by erring sellers”. And hence it proposed MRTP, 1969 to keep an eye on unfair trade practices of foreign traders. The main features of this Act were:

1. ensuring that economic power doesn't fall in the hands of few
2. provide control over the monopolies
3. Prohibits monopolistic and restrictive trade practices.

This Act extends to the whole of country except Jammu and Kashmir. To prevent restrictive trade practices a commission was setup which inquires upon receiving any complain from any consumer forum, consumer or trade associations, upon the knowledge or information about unfair practices and on receiving any order from State or Central government.

The following are the remedies available under this Act:

Temporary Injunction

During inquiry whenever the commission finds that a person is using erring practices which are prejudicial to public interest or a class of traders, the commission may grant a temporary

(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.

³. State to secure a social order for the promotion of welfare of the people

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

injunction restraining the person from continuing such practices until further orders of the commission

Compensation

Where these malpractices of sellers has caused damage to any government, trader or consumer, an application can be made to the commission demanding possible compensation and the commission may award appropriate compensation . In case where beneficiaries are more, the complaint can be filed by one person on behalf of others and may demand compensation from the commission.

But the jurisdiction of commission was inappropriate in cases of mere breach of contract as held in *Saurabh Prakash v. DLF Univ. Ltd* (AIR (2006) appeal no. 5180⁴).

In order to develop India and make India a competitive economy, there was a need to promote competition in domestic market and advancement in technology. For development India needed support of foreign companies but, if the government allowed foreign companies to invest in India, there was a risk that they will monopolize the market and a situation similar to the British India would strike again and if they restricted them, then the rate of development would be reduced. So Indian government was in a dilemma; whether to give license to foreign companies or not, and faced difficulty in setting the limits and rules for their investment. In order to cope up with all these problems government of India introduced COPRA, 1986.

Now the question arises why we need a Consumer Protection Act? The answer is that, in order to protect consumer from unscrupulous suppliers using unfair means of trade practices, false advertisements, adulteration of food etc. there was need of COPRA Act. Also, there is a need to specify the term ‘consumer’ and who all will fall under the ambit of this word. Term “free service” had always been a cause of worry for the Indian government but in *Sailesh Munjal and Anr Vs. All India Institute of Medical Science and Others opposite parties*.⁵ this query was solved. This Act was enacted to provide the simpler and quicker access to the redressal of consumer grievances.

⁴RatioDecidendi

Power of the Monopolies and Restrictive Trade Practices Commission to award compensation is restricted to cases where loss or damage has been caused as a result of monopolistic or restrictive or unfair trade practice and it has no jurisdiction where damage is claimed for mere breach of contract.

⁵ Court divided the free services in three categories

- (i) where services are rendered free of charge to everybody availing of the said services ;
- (ii) where charges are required to be paid by everybody availing of the services ; and
- (iii) where charges are required to be paid by persons availing of services but certain categories of persons who cannot afford to pay are rendered service free of charges.

A consumer can approach various redressal forums to file a complaint against any seller using erring practices without paying any charge and can demand possible compensation for the hardships suffered by him. Also it is not mandatory to engage any lawyer to present the case⁶. In case, a seller or trader does not follow the orders made by any council, he can be punished with minimum one month imprisonment which can extend up to 3 years or a fine not less than ₹2000 which may extend up to ₹10,000 or both. Upto this minute central government had organised various programs for attracting foreign companies to invest in India. One of such program is 'Make In India'.

**Expansion of term “Unfair Trade Practices”, a boost to PM Narendra Modi vision
‘Make in India’.**

The Prime Minister of India Narendra Modi has launched a mission 'Make in India' for attracting foreign companies to invest in India for providing a boost to national economy, job creation and make India a self-reliant country. In order to achieve this mission consumer satisfaction is needed. Consumers will be satisfied only if there are no unfair trade practices. Expansion of term 'unfair trade practices' is given under Consumer Protection (amendment)⁷ Bill 2011.

In 2011, Consumer Protection amendment Bill was introduced in the Lok Sabha by Mr K. V. Thomas. Main focus of the Bill was on unfair trade practices. COPRA 1986 is the sole authority which describes 'unfair trade practices'. But it has certain loopholes. The amendment Bill adds three clauses to define unfair trade practices

1. Failure to provide a Bill or cash memo or receipt to consumer.
2. Failure to take the goods by the seller within the period of thirty days after the receipt of goods by the customer.
3. Revelation of consumer's personal information.
4. If the trader restricts the right to return of goods by imposing any condition within the ambit of 30 days.⁸

This Act was presented before the Lok Sabha but later on lapsed, due to political conflicts. "The consumer is a paramount" is nothing more than folklore in present scenario. Technological advancements though enhanced the quality, quantity, productivity, availability

⁶JUSTICE M.B SHAH, CONSUMER PROTECTION LAW, 1480, 4, (2006).

⁷Consumer protection amendment Act ,2011

⁸*Akhil Bharitya Upbhoktha Congress vs. Aggarwal Jewellers*, Revision petition no. 3020 of 2003, National Consumer Disputes Redressal Commission.

and safety of goods and services, the consumers are still victims of fraudulent and corrupt practices of stockists like adulteration of food, inimical drugs, vengeful plans, high prices, poor quality and many more. Also, the State has primary responsibility to protect interests and rights of consumers through expedient laws and policies.

Recently cabinet mission approved consumer Bill 2015⁹ which will replace 29 year old Consumer Protection Act, 1986, postulates setting up a regulatory authority, CCPA (CENTRAL CONSUMER PROTECTION AUTHORITY) for the fast reprisal of consumer grievances and initiate class suit against defaulting companies including E-tailors. This proposed law captures attention as there is growing concern over safety of consumer products for a little while. Maggi controversy is one such example.

When the sellers are using unfair trade practices causing harm to the consumers, the authority will intercede to protect the consumers and initiate a class action against the sellers and may instruct to recall, return and refund of the product. Other than this the Bill also has provision for “product liability” in case the product causes death, personal injury or property damage and will initiate a proper action against erring manufactures or service providers.

The Bill proposes “mediation” as an alternative dispute resolution mechanism for speedy disposal of court cases. It will be under the umbrella of consumer court.

In the present era of modernisation, development in sphere of internet connectivity poses a problem of cyber security. False or misleading advertisement, telemarketing, multi-level marketing, direct selling and e-tailing poses new challenges to Consumer Protection and so there is a need to bring a new Bill for protecting the consumer.

The Bill also contains provision for setting up of a ‘circuit bench’¹⁰ for expeditious redressal of consumer complaints. Now, consumers can file complains electronically and file the complaints in consumer courts that have jurisdiction over the place of their residence.

To ameliorate the situation the commission may impose heavy penalty or life imprisonment against the defaulting companies or associations. In case of misleading advertisements, it may impose a fine of ₹10 lakhs with the withdrawal of advertisement. 12th five year plan proposes new policies to deal with the existing problems of consumer protection.

New Consumer Policies

⁹Akhileshwar Pathak, Column: Consumer Protection Bill, 2015: countering unfair contracts (august 22, 2015, 12:33 a.m), [http:// www.financialexpress.com/article/fe-columnist/column-consumer-protection-bill-2015-countering-unfair-contracts/123568/](http://www.financialexpress.com/article/fe-columnist/column-consumer-protection-bill-2015-countering-unfair-contracts/123568/)

¹⁰ Consumer Protection Bill, 2015.

- a) Department of consumer affairs, government of India has constituted six subgroups on consumer protection. The subgroups on consumer protection and redressal, ADR, and consumer counselling is to look at the policies of state and central government and to strengthen the redressal mechanism of consumer grievances by establishing a state helpline centre.
- b) **Computerisation and computer networking of consumer fora (CONFONET)** for uploading case list and consumer forum judgements.
- c) **Setting up of national trade practices and regulation authority (NTPRA)** to curb irregularities in unfair trade practices and to avoid overlapping jurisdiction of regulatory authorities.
- d) **Setting up of state and national consumer helpline** Earlier the services was available in English and Hindi only but now state level helplines are initiated that can provide services in regional language other than Hindi and English .
- e) **Setting up of online dispute redressal forum (ODR).** Ministry had taken initiative to provide web based consumer awareness program by identifying consumer problems and their redressal using information technology tools.
- f) **Setting up consumer advice centre (CAC)** It aims at providing up to date and reliable information to consumers. The consumer can directly approach CAC for consultation purposes or for informational purpose. It will help the consumer to deal with complex market conditions
- g) **Establishing the mediation advisory centre (MAC)** It will help to solve the endless cases in consumer forum as well as the new cases coming in directly through the registrar.
- h) Multimedia campaigns like JAGO GRAHAK JAGO aim at spreading awareness among the consumer about the consumer rights and redressal of their grievances.
- i) Initiative was taken by the government for setting up ‘centre of excellences’ in institution like IITs and IIMs for establishing new centres for research/studying related to consumer protection¹¹.
- j) **Consumer education** Consumers in rural areas are less aware than consumers in urban areas. So there is a need create awareness among them. It can be done with the

¹¹Rajiv Agrawal, Report of The Working Group Consumer Protection Twelfth Five Year Plan (2012-2017), http://planningcommission.gov.in/aboutus/committee/wrkgrp12/wg_cp2.pdf

help of self-help groups, women associations, and student-teacher community etc. to reach out of the people in rural areas.

- k) **Bankruptcy Bill 2015** The ministry has also proposed “bankruptcy Bill” which will provide framework for time bound resolution of corporate bankruptcy, ensuring that the stakeholders interest are protected and the assets are put to use quickly. This Bill will create Insolvency and Bankruptcy Board of India to regulate insolvency professional, agencies and information utilities. The Bill also provides time limit of nine months for completion of insolvency resolution process.

Suggestions:

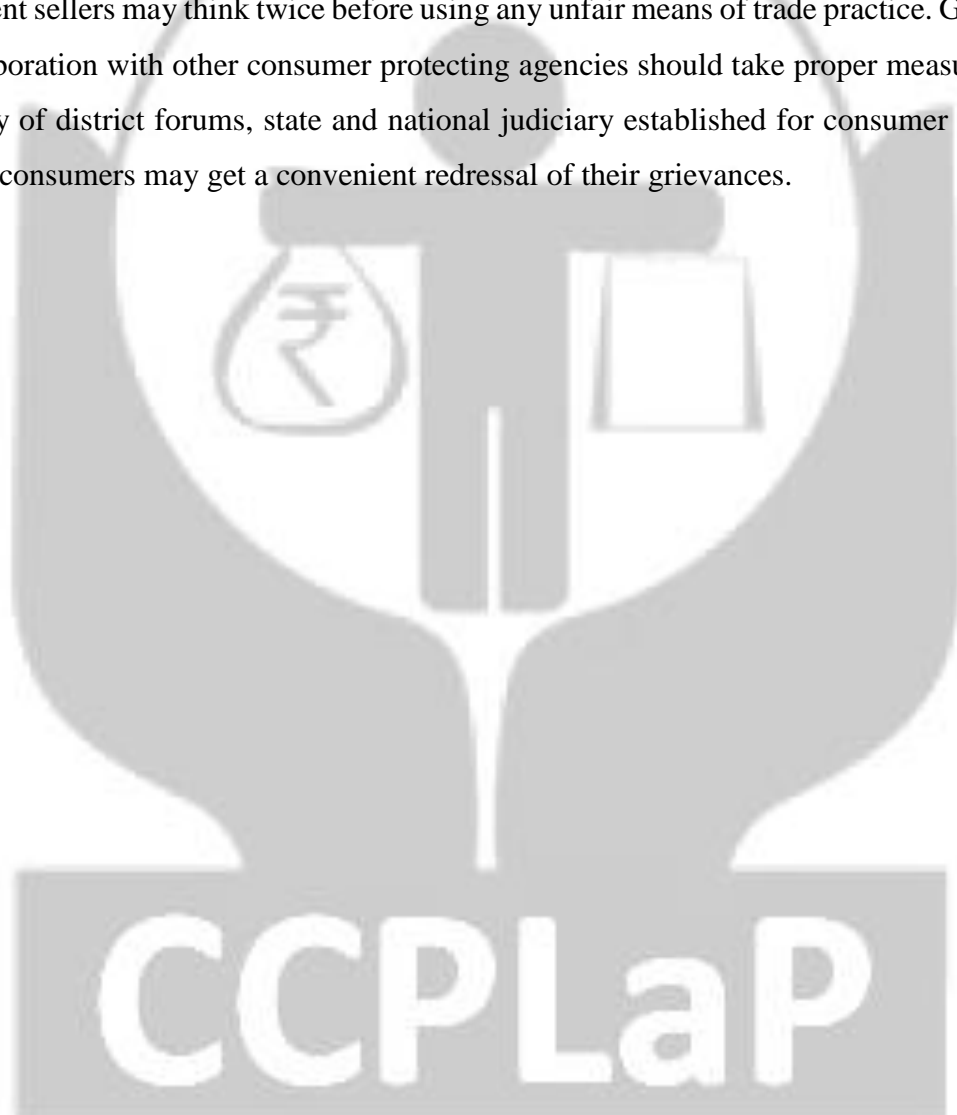
Though the Minister has proposed new consumer protection Bill, it failed to look after some issues that need amelioration:

- Right to return is a right given to consumers under COPRA 1986. Some sellers tries to take unusual benefits by imposing certain conditions in it. There is a need for a Central Regulatory authority to keep a check on such types of unfair trade practices.
- The government should give financial support to registered consumer associations for better consumer movements.
- Enforcement of statutory provisions for ensuring the availability of essential commodities at reasonable price.
- The Act should contain provision to empower consumer associations to publish the names of faulty traders and manufacturers.
- Compensation must be clearly defined in the act. Compensation must be awarded according to the gravity of the offence and ill effects on the consumers.
- Amendments in consumer protection Act failed to specify the term “dominance position of industries”. So there is a need to specify the dominance position of industries, in order to restrict them from misusing their dominant position.

CONCLUSION:

The consumer protection Act is of special importance to all of us because we all are consumers in one way or other. Even manufacturer or service provider itself is a consumer of some goods or services. In the era of development, the government had done several amendments in the Act to deal with new consumer issues but it failed to untangle the issues that existed since day one of the enactment of COPRA . Several existing problems needs redressal like, clarifying the term ‘dominance position of the industries’ , limits imposed by sellers against our ‘right to return’ , specifying the counter stone of awarding compensation to the consumers. Recently,

government had proposed Consumer Protection Bill 2015, for elucidating these problems .Several new policies are embedded in this Bill like, establishment of ODR forums, consumer advisory centres, installing centre of excellence in various IITs and IIMs for researching/studying on the issues related to consumer protection etc., Mere proposal of sundry polices is not a solution, these policies needs to be properly implemented for reaching the aim of Consumer Protection Bill, 2015. Beside this, the active participation by NGOs, the print and electronic media, district and state forums can prevent consumers from exploitation and will create awareness among the consumers, so that they can protect their own interests. Also the laws should be stricter and harsh punishment should be given to the erring sellers so that the fraudulent sellers may think twice before using any unfair means of trade practice. Government in collaboration with other consumer protecting agencies should take proper measures for the publicity of district forums, state and national judiciary established for consumer welfare, so that the consumers may get a convenient redressal of their grievances.



The Amended Consumer Protection Act: Whether Efficient or Inefficient

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ABSTRACT

Consumers live in an era of unawareness. They do not have any knowledge about the market and hence they get betrayed, deceived etc. The Lok Sabha had passed a Bill to ensure safety to the consumers and to make them feel that they have sufficient amount of back up if they are being tricked in the market. Researcher would like to analyze the positive as well as the negative aspects of the new consumer protection Act, 2015. Also, researcher would focus on the debate of whether there is need to bring separate act to spy on the e-commerce activities.

INTRODUCTION

Since 2011 there has been an increase of 213 million internet users till 2014¹ and evidently there has been an increase in the involvement of people in e-consumerism. But with the increase in the e-commerce activities, comes an increase in the casualties that a consumer faces due to various cybercrimes, frauds, breach of privacy etc. The main motive of amending the Consumer Protection Act was the heavy flood of consumer complaints on online transactions and no sudden relief on any issues of the e-commerce activities. This had brought an attention of the Ministry of Consumer Affairs and made them propose a new Consumer Protection Bill. The decision comes against the backdrop of emergence of complex products and services in the era of growing e-commerce business in India that has rendered consumers vulnerable to new forms of unfair trade and unethical business practices. In this paper, researcher would focus on the potency of the Act. Further, it will portray a picture whether the Act is useful in combating with the consumers online issues and provide a safe platform to deal in online activities. Also, the essay would throw some light on the issue, whether the amended act can safeguard the interest of the consumers or whether consumers need a separate Act to solve the issues of the e-commerce activities.

¹ Available at: www.statista.com, <http://www.statista.com/statistics/273018/number-of-internet-users-worldwide/>, last visited December 24, 2015

AN OVERVIEW OF THE AMENDED CONSUMER PROTECTION ACT

A consumer is one who expects a fair deal and protection when he is purchasing or availing any particular type of services. Earlier, Consumer Protection Act was amended thrice but still there were some lacunas and nuances that were troubling consumers transacting in the market. For that matter, Minister of Consumer Affairs headed by Ram Vilas Paswan proposed a Bill in the session of Lok Sabha. The reason behind the proposition of the bill was that the authorities had received complaints about various reputed industries which had disappointed consumers in various issues. Mr. Paswan said "The government had received 12 complaints against e-commerce companies such as flipkart and newlook retails in the past three years over alleged money laundering, fraudulent transactions and unfair trade practices among others."² The statement made by the Minister forced the government to pass an amended legislation for the Consumer Protection Act. The amended Act was to safeguard consumers from exploitation from the big companies because these companies would generally find loopholes in an Act and then use those loopholes to exploit consumers and earn unfair bread from it.

The key features of the new Bill include a separate agency for addressing and protecting the consumers. This new agency is termed as the "Central Consumer Protection Authority"(CCPA). Under this agency, the authorities can intervene whenever necessary to protect consumer from being deceived from any unfair trade practices. Also, there is a provision of immediate recall, refund or return of products.³ The Bill also includes "product liability" under which if product/services causes personal injury then the authorities can take direct action against the manufacturers for defaulting in the products or the services.⁴ Generally people do not file case or go to court due to hefty procedures and consumption of time. For that matter, legislature has given a provision for speedy disposal where the act contains a provision called "mediation" which will work as an alternative dispute resolution mechanism.

The main objective of the new Act is to make consumers comfortable in the market and to create a sense of fear for the sellers. The Act also provides for the life imprisonment in certain

² Anonymous, *Government gets complaints against e-commerce firms*, Available at: <http://profit.ndtv.com/news/corporates/article-govt-recieves-complaints-against-e-commerce-firms-1252522>, last visited on December 24, 2015

³ Anonymous, *Cabinet approves new consumer protection bill that seeks to replace 25 year old law*, F.BUSINESS, Available at: <http://www.firstpost.com/business/cabinet-approves-new-consumer-protection-bill-seeks-replace-29-year-old-law-2370466.html>, last visited on December 24, 2015.

⁴ Ibid

courses of action. Also, it has simplified procedures for grievances in the consumer fora. The introduction of "Circuit Bench" for speedy trials will impact as quicker disposal of the grievances so that the consumers do not hesitate in coming to courts with their complaints. The new bill is expected to provide some positive results in the society as it contains fair and justifiable contents to make consumers feel more comfortable and happy

. WORTHINESS OF THE AMENDED ACT

An Act is applaudable only if it is being properly implemented and if it corroborates in accomplishing desired objectives of the Act. The e-commerce activities were having surveillance through different laws such as Companies Act, Sales and Goods Act, Shops and Establishment Act etc., but there was an emerging need to protect the interest of the consumers also. Hence, government came with the amendment of the Consumer Protection Act, 1986. The new act includes some features which are necessary to ensure safety to the consumers. Let's discuss these features and its effectiveness in detail.

The new Act includes "product liability" where in consumer is eligible for compensation for the grievous injury caused. The jurisprudence behind the strict product liability has been evolving since long time, but what the courts have adopted is a pro-consumer approach.⁵ The very basic fact of product liability claims is that such claims are not mentioned in any of the statute. Hence, product liability claims are to be considered as an emerging concept which is mixture of certain Indian statutes/laws. The best example to define product liability is the "Maggi controversy". The excessive use of lead can cause personal harm to the consumer. Earlier the provision for these was mentioned in the section 27 and 28 of FSSAI act.⁶ These sections were only meant for higher authorities and consumer had no role to play. In the case of Maggi, only FSSAI authorities could challenge and take action against the company. The amendment in the consumer protection act is the substitute for sections 27 and 28 of the FSSAI Act (Refer FSSAI, 2006).⁷ Now the same powers are vested in the hands of the concerned authorities so that consumers do have some rights against the sellers. Consumers can claim

⁵ Pandey Rahul, *India: An Analysis of Strict Product Liability*, Available at: <http://www.mondaq.com/india/x/445496/Product+Liability+Safety/An+Analysis+Of+Strict+Product+Liability>, last visited at 25th december, 2015

⁶ Kumar Abhishek, *India: Maggie:- 2 Minutes Noodle Controversy And The Legal Issues Involved*, Available at: <http://www.mondaq.com/india/x/413010/food+drugs+law/Maggie+2+Minutes+Noodle+Controversy+And+The+Legal+Issues+Involved>, last visited on 25th December, 2015

⁷ Food Safety and Standards Act, 2006, pg.27-28, Available at: <http://www.fssai.gov.in/portals/0/pdf/food-act.pdf>, last visited on 25th December, 2015

compensation personally for any harm caused to him under the head of product liability.

Let's understand the amended Act with some cases. Last year many consumers filed complaints against Flipkart for its "big billion day sale". The Flipkart big billion day of Oct.06, 2014 which aimed at making the turnover of 1 billion, wasn't successful, rather it turned into a big billion scam. Flipkart instead of satisfying the customers, met with angry customers. Though it offered discounts ranging from 30%-90%, it didn't satisfy the customers because they felt deceived and claimed flipkarts' policy as a fraud. Various comments were twitted by different consumers stating Flipkart as a FLOPkart, FRAUDkart, etc⁸. Here the amended Act provides for the establishment of the special authority known as Central Consumer Protection Authority (CCPA). Now, if CCPA would have been there then the authority could have easily intervened in the market which could have saved loads of customers from fraud. Also, it could have saved time for the customers those who had filed cases in the consumer courts. The money lost could have been refunded immediately and an immediate action could have been taken against the company. In this case, the amended Act would have been very effective and essential.

In this busy world, consumers do not want to waste their time in the courts with their complaints. Considering this fact, the Ministry had proposed two solutions to save the time of the consumer. Firstly, the Ministry asked to develop a "mediation" which could solve the matter through the mediators and the other is "Circuit Bench" which is similar as to the mediation. These mediators would be professionals and experts who would act as an arbitrator between the parties to solve the issues before going to the courts. The Ministry of Consumer Affairs made the following statement:

*"It has been observed that because of the large number of cases in consumer courts, the delivery of justice is painstakingly slow, which sometime goes on for years, killing the very essence of the Consumer Protection Act - to deliver swift justice. Therefore, we are proposing a crucial change which will help in appointing arbitrators for ensuring out of court settlement of the case."*⁹

The very purpose of the amendment was to ensure fast delivery of justice. Also, the ministry

⁸ Prashant, 'On The Transformation Of Flipkart's #BigBillionDay To The Big Scam day Sale', October 06,2014, Available at: <http://lighthouseinsights.in/flipkart-big-billion-day-sale.html/>, last visited on 25th December, 2015

⁹Mukherjee Sanjeeb, *Consumer Protection Act to be Amended to Ease Mediation*, Business Standard, Available at: http://www.business-standard.com/article/economy-policy/consumer-protection-act-to-be-amended-to-ease-mediation-114073000042_1.html, last visited on 26th December, 2015

wanted to ensure that the consumers do not run from pillar to post to file a basic complaint. This facility in the amended Act would provide freedom to Gram Sabhas and Panchayats as they have some authority from the government to settle the issues outside the ambit of the courts. In the course of mediation, the mediator will propose a solution to the parties. They will facilitate discussion between the parties, assist to identify issues, reduce misunderstandings, clarify priorities, explore areas of compromise and generate more options to solve the dispute and emphasize it is the parties' own responsibility for making decisions that affect them.¹⁰ On this amendment, renowned consumer rights activist and founder of the online consumer foundation, which pioneered the "Jaago Grahak Jaago" campaign, Mr. Bijon Misra said

“The amendments also empower an aggrieved consumer to file a complaint at his nearest point of judgment, irrespective of the fact where the office of the company is located. The state-run arbitration or mediation mechanism will come handy in cases between real estate builders and buyers as well as others as the internal mechanism in companies is not trusted by the consumers”.¹¹

It is quite clear that the amendment brought by the Ministry is effective and will play significant role in satisfying consumers. The new inclusion in the Act can be welcomed positively so that the implementation of the same can be identified and put forth in the market. It will put the consumer in the safe zone so as to safeguard their interest and put the sellers on the verge of fair deal in the market.

CRITICISM OF THE ACT

Nothing is perfect in this world. As truly said, the new Consumer Protection Act, 2015 shows some signs of flaws in it. The Act provides with multiple benefits to the consumers but at the same time it shows discrepancies and loopholes which depict the inefficacy of the amended Act. The procedure of the Act is more convoluted and cumbersome. Whenever a Bill is passed in the parliament, the prima facie object of the executive committee is the proper implementation of the subject matter passed. It's like saying is more easy than showing. Let's see some criticisms about the act that will hinder the expected end result of the amended Act.

- The Act has entrusted the job of grievance in the hands of the new body, that is, CCPA.

¹⁰ ibid.

¹¹ ibid.

In this authority structure there is no place for the consumer organizations as well as for the activists. The absurdity is all the more obvious when one considers that at the State and Central levels, fully paid government officials are expected to discharge the functions of the Central Authority, while at the District level, where the problems are supposed to emanate and be addressed, an already overburdened District Collector is supposed to do it as a part of his routine.¹² The lack of skilled human resources and the very nature of work undertaken by the higher authorities will make the work complicated and time consuming. This will give rise to other issues which are not pertaining to the objectives of the Act.

- The amended Act states that the billed value of goods and services will determine in which court the jurisdiction lie. Logically, the total value of goods plus the compensation demanded sum up the total value of the complaint. Hence, excluding the compensation part from the complaint will create a sense of irrationality in deciding the total value of the complaint.
- Mediation is not something new that has been brought up by the ministry. Voluntary Consumer Organizations had already been running several ADR Centres (Alternative Dispute Resolution) to settle and handle hundreds of complaints. Introduction of a provision to promote mediation is likely to frustrate the ends of justice and harass the consumer litigant on account of further delays and injustice.¹³
- The Ministry had only one perspective while amending the Act. There can be multiple perspectives of looking at the Bill. One of the consumer activists, Jehangir Gai of Mumbai said "The proposed authority will have parallel powers and will overlap with that of the judiciary, which is not desirable. It will be a clear encroachment on the powers of consumer courts."¹⁴ Now, this overlapping of activities will surely create chaos in in-house workings. The object of the act is to solve the issues as fast as possible

¹² Vaidyanathan B., *Problems With Consumer Protection Act*, money life. Available at: <http://www.moneylife.in/article/new-consumer-protection-act/38830.html>, last visited on 26th December, 2015

¹³ *ibid.*

¹⁴ Kumar Sourabh, *Why consumer protection bill may fail to address consumer grievances*, Live Mint, Available at: <http://www.livemint.com/Politics/3UrD5T7zoq1E1Wk3S6efEO/Why-consumer-protection-bill-may-fail-to-address-consumer-gr.html>, last isited on 27th December, 2015

but due to ambiguity, the object is miles away from the current position.

Criticism is a major part of any activity. It is so because everything has certain loopholes which are to be figured out and solved. The planning and drafting should be based on proper research and the requirements that are needed for effective implementation. The more complicated the law, the more difficult is its implementation. By expanding the scope and reach of the Consumer Protection Act through the current amendments, the government's intentions may be noble but the devil lies in the implementation of the Act.

Or else, like in many other laws in India;

“There are Acts and Acts and Acts... but nobody acts.”¹⁵

NEED FOR A SEPARATE ACT FOR E-COMMERCE

E-commerce fundamentally refers to buying and selling of goods and services through an electronic medium. With the advent of internet and communication technologies, and easy accessibility to it, there has been a great upsurge in the online activities, and has brought comfort to the consumers, but e-commerce on the other side mothers the issues like breach of privacy, threat to security, deceiving terms and conditions, frauds, etc. There is an immense need of a separate Act which would strike off the online consumer complaints from the consumer courts. There should be a different platform for the consumers to resolve their issues. The very objective of this Act should be to deal only with online activities and the complaints that will be received online.

A study was conducted by the IIM-Ahmedabad stressing upon the need of a separate law for the e-commerce activities. The study briefly said, *“To effectively protect a consumer buying goods or services through e-commerce would need a separate law, as other countries have.”¹⁶*

¹⁵ Dr. Kamath S. Manohar, *Changes in Consumer Protection Act: Devil is in implementation*, Deccan Herald, Available at: <http://www.deccanherald.com/content/456083/changes-consumer-protection-act-devil.html#top>, last visited on 27th December, 2015

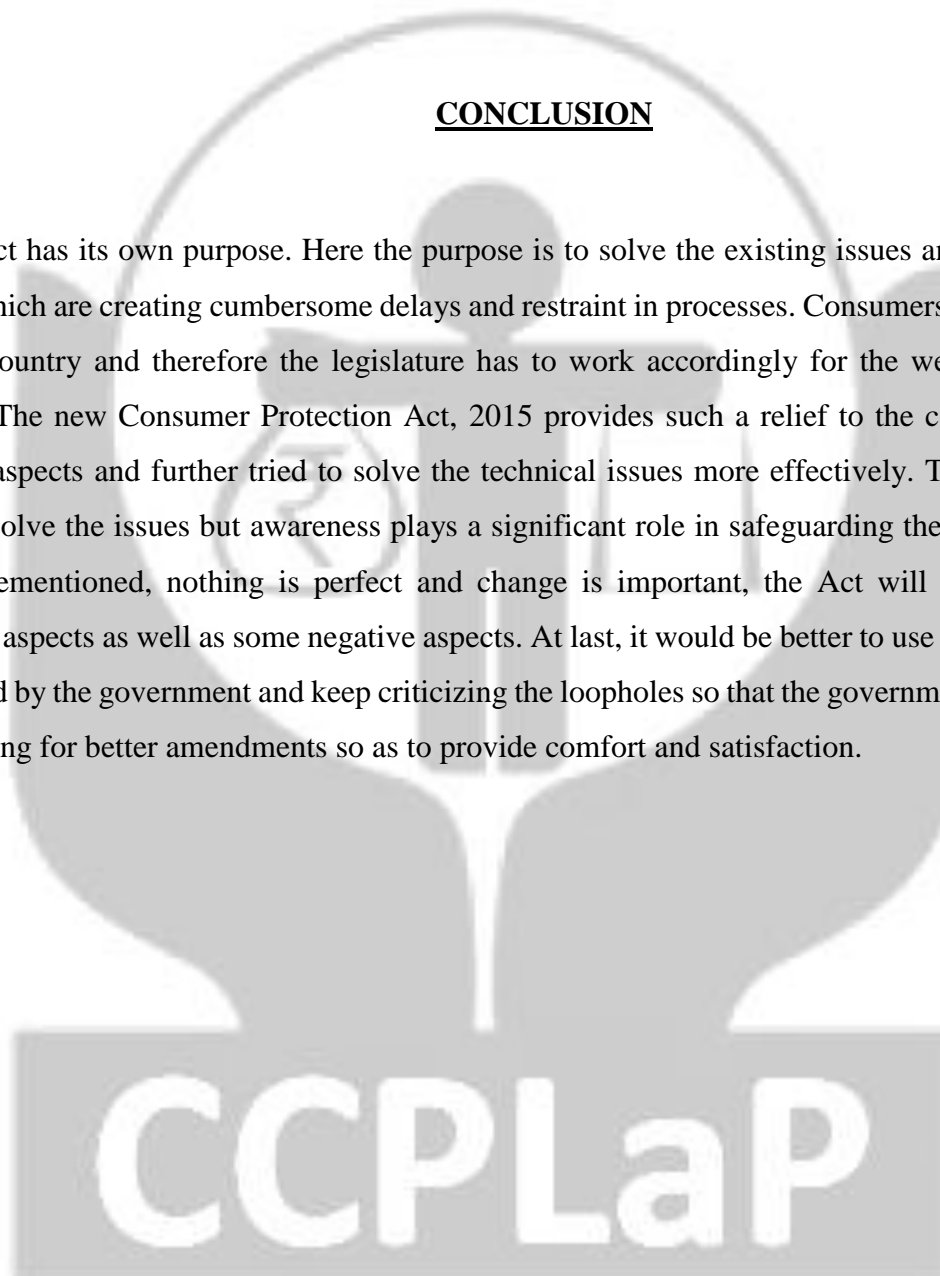
¹⁶ Anonymous, *Law on e-commerce needed to protect online consumers: IIM study*, The Indian Express, Available at: <http://indianexpress.com/article/business/business-others/law-on-e-commerce-needed-to-protect-online-consumers-iim-study/>, last visited on 27th December, 2015

It is quite observable that our day to day activities are dependent on internet sources. Hence, people need protection, when they are dealing online.

In e-commerce, buyers and sellers are distant and hence there is less intensity of reliability. A consumer who is not aware of the market can be deceived in many ways. Therefore, there is a clear requirement of a separate Act so that consumers have a ground of relief when they are transacting online.

CONCLUSION

Every act has its own purpose. Here the purpose is to solve the existing issues and to fill the holes which are creating cumbersome delays and restraint in processes. Consumers are citizens of the country and therefore the legislature has to work accordingly for the welfare of the public. The new Consumer Protection Act, 2015 provides such a relief to the consumers in certain aspects and further tried to solve the technical issues more effectively. The act itself cannot solve the issues but awareness plays a significant role in safeguarding the consumers. As aforementioned, nothing is perfect and change is important, the Act will throw some positive aspects as well as some negative aspects. At last, it would be better to use the facilities provided by the government and keep criticizing the loopholes so that the government can keep on looking for better amendments so as to provide comfort and satisfaction.



E-Commerce and Consumer Protection Law: A Tale of Two Strangers

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ABSTRACT

E – Retailing in India has increased multi-fold along with consumer grievances associated with it. Consumer is the King. He/she decides a company's future and hence, the satisfaction of every consumer is a seller's or a businessman's particular job. To do justice to the same, the grievances should be dealt with and hence the Central Government's effort toward the Consumer Protection Bill, 2015 aims at this goal. The same has been drafted keeping in mind the lack of mistrust between the virtual seller and the consumer and the rising number of resultant fraud cases.

INTRODUCTION

India, a consumption-driven economy for the last many decades has been emphasizing on reforming the Indian market into a strong potential market in the global strata. The history of consumer protection laws is the story of specific formal legal responses to crises and emergencies that generate public outrage and require a public response. This generic explanation has led to protection of consumers from unsafe products, fraud, deceptive advertising and unfair business practices through a mixture of national, state and local governmental laws and the existence of many private rights of actions. These rights not only protect the consumers but also provide them with knowledge so as to protect themselves. The consumer protection movement is a part of global recognition and concerns that consumers are a weak party in buying goods and services as compared to the manufacturers and traders producing and selling them. The Consumer Protection Authority was created on the lines of the Federal Trade Commission (FTC) of the US.

In India, the e-commerce and online shopping market is gaining tremendous popularity. Online shopping websites offer services throughout the country. The new Consumer Protection Bill of

2015 attempts to include e-commerce transactions under the ambit of the Consumer Protection Act. Currently, a consumer can initiate legal action against a seller only in the place where transaction takes place, while the proposed amendment allows 'territory free' legal action against any goods or service provider. In India, the Consumer Protection Act (CPA), 1986 governs the relations between consumers and service providers. A separate consumer protection law that pertains to and regulates online transactions does not exist in India. Under the CPA, liability arises only when there is "deficiency in services" or "defect in goods" or occurrence of "unfair trade practice". The CPA specifically excludes the rendering of any service that is free of charge from its ambit.

WHY IS E-COMMERCE THE PRIMARY TARGET?

AR Lodder¹ defined e-commerce as "*commercial activities concerning goods and services as well as any business, where participants are not necessarily at the same physical location and therefore do apply telecommunication means*". The Consumer Affairs Minister of India, Sri Ram Vilas Paswan, has this to quote about the problem faced by consumers, "First, they are lured by misleading advertisements. Subsequently, when they buy an item online, either they don't get it in time or the product they get is sub-standard. There is no relief after you buy an item."

The internet and mobile telephony is rapidly changing the business practices of retailing goods and services and the experiences of the consumers. The introduction of electronic medium in retailing has been represented by terms like online sales, e-commerce, e-sales and e-retail.² From a nascent start with sale of books online, e-retailing now covers a wide array of goods and services.

The internet has provided consumers with a powerful tool for searching and buying goods and services. Benefits include increase in competition and reduction in prices, wider choice in product services, and also the convenience of shopping goods and services from vendors

¹ Lodder, "Legal Aspects of Electronics Commerce". (March 02, 2015)
<www.rechten.vu.nl/lodder/enlist/ec.pdf>

² Akhileshwar Pathak, "E-Retailing and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directives" <<http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/16680545482015-10-02.pdf>>

stationed around the world, from anywhere and also at any time. The new 'digital economy' together with the globalization is having a major impact on the global economy. Today e-commerce has become an important part of one's everyday life. And access to such e-retailing websites is not a privilege anymore.

E-retailing or e-commerce is advantageous to consumers and hence it is growing at an unprecedented pace. However, it also has disadvantages for the consumer as practically, the consumer more or less is dealing only with a computer or a mobile phone screen. On the other hand, going to a physical store, the consumer makes sure that the product is checked before his naked eyes before purchase. Despite attending to every detail of the product while purchasing from the physical store, things can still go wrong for the consumer. Therefore, the probability of a similar instance happening in e-retailing is multi-fold.

There is a plethora of prevalent e-retailing malpractices. Firstly, the e-retailer could be fictitious and may appropriate the money of the customer. Secondly, the e-retailer may misrepresent the goods and services and further indulge in half-truths to allure the buyer to do a transaction. Thirdly, the consumer might end up receiving old, fake or poor quality goods. In such circumstances, the only option available to a consumer is to contact the seller via a customer care number or an e-mail address. The seller may or may not be willing to help the buyer fearing a hoax complaint. For example, there have been instances of buyers cheating the e-retailers by returning fake products, keeping the initially sent original ones and receiving the refund for the same as well. Thus, the rapidly expanding field requires not only protection of the consumer but also a healthy and sustained growth of e-retailing itself.

HIGHLIGHTS OF THE BILL

The Bill introduced in 2015 has made quite a few amendments in the existing Consumer Protection Act of 1986. One of the most important features of the Bill is the establishment of an executive agency 'Central Consumer Protection Authority' (CCPA) which will protect and enforce the rights of the consumers. The aim is that the said authority shall intervene when necessary to prevent consumer detriment arising from unfair trade practices and to initiate class action including enforcing recall, refund and return of the products in question. One of the radical changes brought about include stringent penalty including life imprisonment in certain cases. Further there is provision for a "circuit bench" to facilitate quicker disposal of complaints and there is an enabling provision for consumers to file complaints electronically and also file them in consumer courts that have the concerned jurisdiction over the place of

residence of the complainant.³ The amendments also include the process of 'mediation' under the new Section 2(1)(a) which refers to the process by which a mediator appointed by the National Forum or a State Forum or a District Forum, as the case may be, mediates the dispute between the parties to the complaint/ appeal made by application of the provisions as specified under Chapter IV of the Act and in particular by facilitating discussion between parties directly or by communicating with each other through the mediator or by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute; and emphasizing that it is the parties' own responsibility to make decisions affecting them. The amendments to the Act include a new chapter on the 'product liability' which deals with provisions related to actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product. Further, the proposed amendment is set to introduce product liability charges even in cases like train or flight delays. Instead of simply refunding the amount paid, the service providers would be liable for punitive action, fine and compensation.

Apart from above proposed amendments, there are further noteworthy proposed amendments which suit the requirement of today's advanced and cyber - oriented market. For instance, the scope of the definition of the term "complaint" is widened to include an additional condition stating a complaint means any allegation in writing made by a complainant that he has suffered a loss due to an unfair contract entered into by him.

The proposed provisions are intended to protect consumers placed in an unequal bargaining capacity. The Act specifies that a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any service, adopts any unfair method or unfair or deceptive practice which includes permitting the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are intended to be offered for sale or supply at the bargain price, or for a period that is, for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement. In order to make the existing

³ Available at < <http://www.prsindia.org/billtrack/the-consumer-protection-bill-2015-3965/>>

provisions related to advertisement more effective, the proposed amendments have defined the term "Advertisement" as any audio or visual publicity, representation or pronouncement made by means of any light, sound, smoke, gas, print, electronic media, internet or website and includes those through any notice, circular, label, wrapper, invoice or other documents.

OTHER PERSPECTIVES

The United States courts have developed the "minimum contacts" theory whereby the courts may exercise personal jurisdiction over persons who have sufficient minimum contacts with the forum states. "Minimum contacts" may consist of physical presence, financial gain, stream of commerce and election of the appropriate court via contract.⁴

There are leading international organizations which work to provide protection to consumers in e-commerce spectrum. Such organizations include, the Organization for Economic Co-operation and Development (OECD), the International Chamber of Commerce (ICC) and the International Consumer protection and Enforcement Network (ICPEN) that have proposed regulations in this regard. Some of these guidelines are:-

Organization for Economic Co-operation and Development: - E-commerce consumers should be no less protected when shopping online than when they buy from local stores or order from a catalogue. Payment systems need to be easy to use and secure. The OECD has been at the forefront of international privacy work for decades. More than 20 years ago, the OECD developed Guidelines Governing the Protection of Privacy in e-commerce. Even today, the OECD Privacy Guidelines are considered to be a "flagship" OECD document and serve member countries as the basis for current international work on privacy in the online environment.⁵

International Chamber of Commerce – To safeguard optimal freedom of expression of advertisers and makers and to meet reasonable consumer privacy expectation.

⁴ *International Shoe Co. v Washington* (1945); "A Separate jurisdiction for Cyberspace?" Juliet M. Oberding, Terja Norderwerhaet available at < <http://onlinelibrary.wiley.com/doi/10.1111/j.1083> >.

⁵ Available at

<<http://www.oecd.org/sti/consumer/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm>>.

International Consumer Protection and Enforcement Network (ICPEN): sharing information about cross – border commercial activities that may affect consumer welfare; encourage global co-operation among law enforcement agencies.⁶

The E-commerce Consumer Protection Group (e – commerce group) is composed of leading companies in online and e – commerce industries. Consumer protection guidelines have been developed by the group which would help establish and give effect to a global framework that reduces the need for compliance with a multitude of laws.

CONCLUSION

Consumer rights and a level and fair playing field for the businesses are two sides of the same coin. The Central Government addresses this in the re-enactment of the consumer protection law, the Consumer Protection Bill, 2015. Technology will always develop ahead of the creation of law. Hence, to bridge the gap, help must be taken from technology itself. Consumer protection regulation would be unnecessary in a world of perfect information. It would also be unnecessary if markets for information worked perfectly. The new consumer protection policy, meaning thereby, the Consumer Protection Bill, 2015 is based on similar ideology inculcating the need for protection of consumers in the age where e-commerce websites call the shots.

The rationale behind bringing a new Bill are misleading advertisements, tele - marketing, multi-level marketing, direct selling and e – tailing that pose new challenges to protection of consumers. Hence, there is a need to restructure and modernize the act to incorporate such new aspects in the system. The Bill shall include provisions dealing deeply and specifically with e – commerce consumer and retailer so as to provide for a clear decision in the otherwise unattended matter. There have been quite a few cases relating to the said issue over the past few years since the advent of the e – retailing websites and though the same have been incorporated through CPA, 1986, there was a need for a separate identity of a reality which has become a part of routine life, that being, consumer grievances while shopping online on the e – retail websites prevalent in the country despite them having separate terms and conditions and procedure of themselves to solve disputes arising thereof. That being said, henceforth consumer grievances in this particular sector shall be dealt with in a distinct and methodical manner as intended by the Central Government on passing the Bill in question. Hence, even though the concept of e – retailing and protection of consumers were alien to each

⁶ Available at <<http://www.icpean.org>>.

other, the same have been integrated to benefit the consumers so as to direct towards the right platform in case of a grievance.



New Consumer Protection Laws And Policy - Notions Of Liability Redefined?

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ABSTRACT

In the era of today's digitalised world every object has become so sophisticated. Such is also the current scenario of market structure in India. With rapid development of e-commerce, advertisements of products through telemarketing, multi-level marketing, direct selling and e-tailing firms, the consumers in India are facing new complexities. Viewing this situation, the Government of India has passed the new Consumer Protection Bill in the year 2015. This bill seeks to replace the twenty nine year old Act of 1986.

This essay therefore seeks to study the new Consumer Protection Bill of 2015, the recognition of new challenges and liabilities defined under the Bill.

INTRODUCTION

The consumer has always been at the receiving end in most countries of the world, especially in developing nations like India. Post- independence, the condition of Indian consumers was vulnerable to the market exploitation and without any recognition of their rights, they had no proper forum to redress their grievances, hence their rights were violated. The consumers in India were simply forced to live with substandard goods and services provided to them. They were severely exploited in the hands of manufacturers and sellers who usually persuaded them to buy products of inferior quality. In fact it can be said that the situation of a consumer was more or less like a marginal group in the dominant market structure built by sellers.

On account of such exploitation, a strong public opinion was built over the past decades demanding protection to consumers. In other words, there began a strong consumer movement for the purpose of enactment of a law recognizing the rights of consumers suiting the prevalent economic era for maximising consumer welfare and preventing their exploitation in the market. As a result the Indian consumer movement got an impetus with the enactment of the Consumer Protection Act, 1986. The Act contained provisions for consumer representation and simple,

speedy, inexpensive and informal justice to consumers, by means of establishing a separate redressal mechanism.

However in the year 1991, the economic reforms initiated, through liberalisation, privatisation and globalisation, have brought about momentous changes in the structure of markets, in addition to transforming the employment scenario, income generation and the consumption patterns. As a result, even the need of the consumers got multiplied. Viewing this situation, the Government thought of amending the consumer protection laws in 1991 to cope with the new problems in the changing market structure. With the due course of time the Consumer Protection Act was again amended twice in the year 1993 and 2002 to include new elements in its ambit to protect the interest of the consumers.

However, in spite of such developments in the consumer protection law in India, the consumers in India are still facing exploitations and are still sold defective products and unhealthy food. The recent maggi controversy is one of the examples in this regard. Also, with the rapid development of e-commerce and arrival of new complex products in the market the consumers are more prone to unethical and unfair trade practices like misleading advertisements by tele-marketing, multi-level marketing, direct selling and e-tailing firms.

Therefore, while analyzing the situation of consumers in contemporary times, the Government of India passed and approved a new Consumer Protection Bill in the year 2015 which seeks to replace the 29 year old Act of 1986. The primary objective of the bill is to broaden the scope of consumer protection law with the modernised market.

However the question still remains on how the bill will operate and what effect will it have on the consumer and their welfare today? This essay therefore seeks to study the new Consumer Protection Bill, recognition of new challenges addressed under the bill and liabilities for those who violate consumer rights.

BACKGROUND OF CONSUMER PROTECTION LAW IN INDIA

The need for and importance of consumer protection has been realized in India for a very long time. The consumer protection regime is said to have begun in the Indian civilization in 3200

BC. During this period, it is said that the rulers of the respective kingdoms had begun to realise the necessity of ethical practices in market and the welfare of their subjects¹.

Also in ancient India, in *Vedas, Manusmriti and Kautilya's Arthashastra*, all described the matters related to consumer welfare and administration to protect the rights of consumers to be as the primary duty of the king.

Further, in Medieval India “consumer protection” was the subject which was considered to be of utmost concern among the rulers. During the reign of Alauddin Khilji,² strict controls were established in the market place³.

During the British period a number of enactments such as 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 Agriculture Procedure (Grading and Marketing Act) of 1937 had been enacted⁴.

Post-independence with the beginning of economic reforms in India, there was a necessity felt to enact specific legislation to guarantee legal rights to consumers. So, keeping this in mind the government of India enacted Consumer Protection Act 1986. The act has been amended thrice till the year 2015 to undertake new problems faced by consumers with contemporary times. However some lacunae still existed in the existing act and the consumers were still found to be the victims of unfair trade practices⁵.

Therefore to prevent further exploitation of the consumer, the Government of India passed a New Consumer protection Bill in July 2015.

CONSUMER PROTECTION ACT, 1986: AN ANALYSIS OF THE OLDER ACT

The General Assembly of the United Nations Unanimously adopted a set of general guidelines for the Consumer protection on 9th April, 1985. The adoption of these guidelines was the culmination of much earlier work and negotiation, by the International Organisation of Consumer Union (IOCU). In India, the established voluntary organisations along with the pressure groups were unanimous and unequivocal in their demand for a full-fledged piece of

¹ Rajendra Prasad, *Historical Evolution of Consumer Protection and Law in India: A Bird's eye view*, Journal of Texas Consumer Law, 132-135 (2008)

² *Ibid*, Also see S.R.Bakshi, *Advanced History of Medieval India* 287 (Vol. 1, 2003).

³ *Ibid*

⁴ A. C. Fernando, *Business Ethics: An Indian Perspective* 3.6-3.7 (Pearson Education India, 2010)

⁵ Shreyan Acharya, *A change for good*, IP University, <http://theresolveguru.com/A-Change-for-good> (Last updated 27th, 2015)

legislation concerning the consumer protection. The emerging concern for consumer protection and better quality of life thus culminated in the enactment of the Consumer Protection Act, 1986 by the parliament⁶.

Following the UN guidelines the consumer protection was enacted to ensure and protect eight rights of consumer. They are:

- Right to basic needs
- Right to safety
- Right to choice
- Right to redress
- Right to information
- Right to consumer education

The purpose of the act was to prevent unfair trade practices and promote healthy competition in market thereby protecting the interests of consumers. The act covers under its scope all goods and services. It covers all the sectors i.e. private, public and co-operative. E commerce transactions were not included under the Act. The provisions of the act are of compensatory in nature⁷. The Act also provides for consumer protection councils at the National, state and district levels. . The main objective of these councils is to promote and protect rights of consumers⁸. The Act also provides for the setting up of three tier consumer disputes redressal agencies. These agencies are established at District, State and National level. They are known as district forums, state forums and national forums respectively⁹.

An aggrieved consumer can approach a forum depending on the value of goods and claim for compensation. The pecuniary jurisdiction of district forum is to entertain complaints where the value of the goods or services or the compensation claimed does not exceeds 20 lakhs¹⁰. The state forum can undertake cases exceeding the pecuniary value of 20 lakhs which should not

^{6 6} Consumer Protection Act, (1986), Murali Prasad Panta, Business, Consumer and the Government: An Economic and Legal Perspectives (Mital Publications, 2001)

⁷ Consumer Protection Act, (1986), Also see Manish Kumar, Consumer Protection Law in India, <http://www.legalservicesindia.com/article/article/consumer-protection-law-in-india-1739-1.html> (Last updated 27th, 2015)

⁸ Manish Kumar, Consumer Protection Law in India, <http://www.legalservicesindia.com/article/article/consumer-protection-law-in-india-1739-1.html> (Last updated 27th, 2015)

⁹ Consumer Protection Act, (1986), Murali Prasad Panta, Business, Consumer and the Government: An Economic and Legal Perspectives (Mital Publications, 2001)

¹⁰ Section 11, Consumer Protection Act, (1986)

exceed the pecuniary limit of one crore¹¹. While the national forum have the jurisdiction of cases to entertain cases which exceed the pecuniary limit of one crores¹².

The act also gives consumers with the right to appeal against the orders passed by district forum to State Forums¹³ and appeal against orders of state forum to National forum¹⁴. A consumer can also appeal to the Supreme Court against the orders of the National Commission¹⁵.

CONSUMER PROTECTION BILL, 2015: CHANGES AND MODIFICATION

Although the Consumer protection Act, 1986 have proved to be a weapon in the hands of Indian consumers, yet it have some lacunae due to which Indian consumers are still the victims of unethical and unfair trade practices. Moreover with advanced technology and the emergence of e-commerce transactions new sort of challenges have arrived before the legislatures.

To tackle such challenges the Government of India passed the New Consumer Protection Bill, 2015. There are some substantial changes in the act keeping in mind the contemporary society and the way in which daily consumer related transactions are being done.

CHANGES MADE BY THE CONSUMER PROTECTION BILL OF 2015

The new Consumer Protection Bill, 2015 has proposed following changes and seeks to modify the Act of 1986 in following areas:

- **Changes in the definition of a consumer**

Under the bill the consumer is defined as any person who buys a good or hires a service for a consideration. This includes the user of such good or service, but not one who obtains the good for resale or commercial purposes. It covers transactions through all modes including offline, online through electronic means, teleshopping, or multi level marketing¹⁶.

- **Introduction of E-Commerce transactions under the Act**

Since most of the transaction take place are online, so the act has also included unfair trade practices in its ambit¹⁷. This provision would enable the consumers to file a complaint against

¹¹ Section 17

¹² Section 21

¹³ Section 15

¹⁴ Section 19

¹⁵ Section 23

¹⁶ Section 2(1) d

¹⁷ Section 2(1) d, Explanation 2, Section 2(1) (r)

those sellers who sell their product through e-commerce and telemarketing and have adopted unfair trade practices to sell their products, which are found to be defective and of inferior quality to the consumers.

- **Establishment of a Central Consumer Protection Authority**

Chapter-III of the bill provides about the establishment of an executive agency by Central government. This executive agency is known as the “Central Consumer Protection Authority. This rationale behind adding this provision is to enable the prevention of exploitation of consumers through unfair trade practices, misleading advertisements and to promote, protect and enforce the rights of the consumers provided under the act¹⁸.

The authority has powers to enquire about the complaint from government, judiciary and intervene in any proceedings of consumer rights violation with the permission of the court, thereby promoting consumer rights and interests in the society.¹⁹

- **Modification in the filing of complaint**

For the speedy disposal of the consumer complaints, a consumer can file his complaint to the designated officer of Central Consumer Protection Agency or its regional offices through email.²⁰

Also a complaint could be filed in the respective forums in respect of any restrictive trade practices or unfair trade practices. Such complaints could be filed by way of electronic mode²¹.

- **Circuit benches for quicker disposal of complaints under the Bill**

The Bill has stated that a district Forum which usually performs its function in the respective district headquarters shall also perform functions in other places thereby appointing circuit benches for the speedy disposal of cases.²²

- **Modification in Pecuniary jurisdiction of respective forums**

¹⁸ The Consumer Protection Bill (2015)

¹⁹ Section 12

²⁰ Section 16

²¹ Section 25

For district forum, the quantum of pecuniary jurisdiction is enhanced to rupees fifty lakhs.²³ While for state forum pecuniary limit is till one crore²⁴ and the National Forum can address cases of more than value of one crore²⁵.

- **Inclusion of Mediation**

The Bill introduces a new chapter on mediation for the quicker disposal of consumer cases. The bill envisages the establishment of Mediation Cells to the redressal commissions at the district, state and national levels²⁶. The mediation will be under the supervision of consumer courts²⁷. The National forum or a State forum or a District forum, as the circumstances for settling the dispute may appoint a mediator to mediate between the parties in the complaint or proceedings prepare a panel of the mediators.²⁸ The mediation shall be terminated within a period of three months from the day when the parties first sat for settlement²⁹. If the parties reach a settlement then such settlement should be recorded and passed by the District forum³⁰.

Apart from these changes new definitions like “advertisement”, “harm” etc. are added keeping in mind the way in which transactions are done today.

LIABILITY UNDER THE CONSUMER PROTECTION BILL, 2015

Before the enactment of Bill of 2015 there was no provision of product liability. Still consumer forums have encouraged and shaped the product liability litigations. Earlier complaints were made by the aggrieved consumers against the trader, importer, manufacturer or seller practising “unfair trade practices” under the Act of 1986.

But the idea of product liability slowly started emerging. The application of product liability is evident in *Lohia machine* case where the seller had collected advance deposits for scooters from customers and then had defaulted in delivering the scooters. The Mumbai Consumer

²³ Section 15

²⁴ Section 17

²⁵ Section 21

²⁶ Section 65

²⁷ Dhruv Dikshit, *What are the new features of Consumer Protection Bill, 2015*, <http://blog.ipleaders.in/consumer-protection-bill-2015/> (Last UPDATED 28TH December, 2015)

²⁸ Section 58

²⁹ Section 66

³⁰ Section 71

Disputes Redressal Commission developed a term called 'other similarly circumstanced customers', and granted relief to not only the plaintiff, but to 422,000 other customers as well who were aggrieved in the similar matter³¹.

The government has always strived to alarm the consumers about defective and dangerous products through jago grahak Jago advertisements³². Yet concept and notion of product liability was not included in the Act.

Product liability is added under Consumer Protection Bill of 2015. The new bill has therefore redefined the liabilities of sellers or manufacturers. Under the Bill product liability can be initiated against many actions of the sellers and manufacturers. The Bill states as:

a product liability action includes all actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labelling of any product.

The Bill clearly states about the liability of manufacturers in case the consumer proves that the product was unreasonably dangerous, contains manufacturing defect, is defective in design; it failed to contain adequate instructions of correct use to avoid danger, it is dangerous because of its design, that the manufacturer was aware of the danger that caused the claimant's harm and he was aware of a feasible and practical alternative design that would have reduced the danger in using the product, the manufacturer had failed to warn about such danger to the claimant and the express warranty provided in the product is untrue.³³

In addition, the Bill also envisages the different liabilities of product seller. The bill states that a product seller would be liable if he exercised substantial control over the aspects of the design, testing, manufacture, packaging, or labelling of the product that caused the harm to the complainant, he altered or modified the product which is the reason for harm caused, made an express warranty which came to be untrue. Additionally, The product seller would be liable for his negligence if the claiming consumer proves that the product in question was solved by the product seller in question, that the product seller was negligent and didn't take reasonable care and on account of that harm was caused³⁴.

³¹Gowree Gokhale, Huzefa Tavawalla and Debargha Basu, *India*, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Product%20Liability%20_%20issues%20and%20concerns.pdf (last updated: 29th , 2015)

³² *Ibid*

³³ Section 73

³⁴ Section 75

However the Bill states that there are certain exemptions in which product seller or manufacturer would not be liable. A Product seller wouldn't be liable if the consumer has misused the product at the time of causation of injury or death. Also a consumer cannot file for the inadequate instruction given in the prescription drug when the manufacturer has already given adequate instructions to the physician. Moreover, a product liability action cannot be instituted and the manufacturer is not liable, if the product was used in a work place and instructions were provided to the respective employer. Also the claimant's claim wouldn't be accepted in case he was under the influence of intoxicating alcohol or drug.³⁵

The concept of product liability and penalty under the new Act is stringent as compared to the previous act of 1986. The New Bill increases the penalty *vis-a-vis* the previous act, Therefore any person or trader who fails to comply with an order of either of the forums would be liable for imprisonment from one month to three years, or with a fine from 10,000 rupees to 50,000 rupees³⁶.

CONCLUSION

It seems that the new bill has brought with it new scopes of protection in this digitalised world. The bill is expected to enhance the quality and safety of products and services. However at the same time it is necessary that the consumers must be educated and be made aware of their rights. Consumers in rural part of India are still under constant exploitation as they are unaware of their basic rights. Therefore the consumer rights can only be safeguarded with proper awareness and implementation of their rights. They should go hand in hand. In the absence of which, even the new consumer bill wouldn't help.

³⁵ Section 74

³⁶ Section 27



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