

ABOUT THE CHAIR ON CONSUMER LAW AND PRACTICE

In the Indian history for the first time the Chair on Consumer Law and Practice (CLAP) has been established in August 2008, by the Ministry of Consumer Affairs, Food & Public Distribution Department of Consumer Affairs, Government of India, New Delhi at National Law School of India University, Bangalore to promote research, teaching and training in Consumer Law and Practice.

Prof.(Dr.) Ashok R. Patil is heading and administering as Chair Professor since the date of establishment. His contribution to the field of Consumer Law has got him the recognition at National level and he has been conferred with the “Legal Education Innovation Award-2013”. He has been unanimously selected as member of the Executive Committee of prestigious “International Association on Consumer Law”.

The Chair on Consumer Law and Practice is acting as a “Think Thank” for the Research and Policy related issues on Consumer Law and Practice. The Chair has also developed curriculum on Consumer Welfare Laws as a distinct subject of study both at Under Graduate & Post Graduate levels and is imparting to the students in law at NLSIU.

The Chair has been publishing a bi-annual Newsletter viz., 'March on Consumer Law and Practice' containing a brief report on the activities of the Chair, Legal developments in the field of Consumer Affairs, summary of leading judicial decisions of the Supreme Court, High Courts as well as the National Commission and State Commissions. The newsletter is also published in the electronic format and is been uploaded on the website (<http://clap.nls.ac.in>) periodically to facilitate access to this information free of cost. The Chair is also performing the functions such as providing expert inputs for formulating of policy/programs/schemes of the Department of Consumer Affairs, Government of India; identifying and disseminating best practices in the field of Consumer Protection Laws and Practice; publishing books, monographs, pamphlets, research studies to fill up existing knowledge gap. Periodically the chair has been organizing seminars/workshops/conferences, short term training programs for the law teachers, NGOs and other stake holders of the society on consumer related issues at National/Regional levels.

The Chair has started a one year course on 'Post Graduate Diploma in Consumer Law & Practice' (PGDCLP) through Distance Education mode. The PGDCLP course is aimed at sensitizing people about the Consumer Rights. This course provides opportunity for candidates to receive advanced instructions in the relationship and interplay between existing consumers' relating to legislation and changing scenario. The diploma is specially designed to meet the needs of those whose education has been in the field other than law and who would like to supplement their database with in-depth knowledge of consumer laws.

The activity of the Consumer Chair has been recognized at the International level by conferring the membership of prestigious 'Consumer International' (CI) in 2013 to strive at higher goals at the International level.

25 Years of Consumer Protection Act : Challenges and the Way Forward

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25 Years of Consumer Protection Act: Challenges and the Way Forward

EDITOR
PROF. (DR.) ASHOK R. PATIL
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2014

**25 YEARS OF CONSUMER
PROTECTION ACT:
CHALLENGES AND THE WAY FORWARD**



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Vice Chancellor

FOREWORD

This book is published by the Chair on Consumer Law and Practice of National Law School of India University, Bangalore. The book contains selected papers which were presented at National Seminar on "25 Years of Consumer Protection in India: Challenges and the Way Forward" that was organized on September 22nd & 23rd, 2012 at the International Training Centre of National Law School of India University, Bangalore. The themes include Impact of Misleading Advertisements on Consumers and Solutions, E- Consumer Protection and Solutions & Implementation of Consumer Welfare Legislations: Reasons for Failure and Solutions.

The increase of globalization and the resulting integration between the domestic and international markets has changed the landscape of consumer interaction in terms of products, services, tastes and preferences. The consumer needs both awareness and protection and this can only be ensured by the effective implementation of existing legislations supplemented by new legislations as required. Further, identification of future challenges is necessary, so that there can be a planned and strategic approach rather than a knee jerk reaction to newer issues and problems in the field of effective understanding and implementation of consumer rights. Thus it becomes paramount to evaluate current challenges under the Consumer Protection Act, 1986 to understand the inconveniences faced by the consumer and thus press for the required policy and legislative changes to ensure that the consumer is both aware and empowered.

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An effective, efficient and fair implementation of the Consumer Protection Act is one of the conditions precedent for promoting the culture of good governance and thereby ensuring better promotion and protection of the rights of consumers. The Consumer Protection Act has succeeded in bringing about fair play in the supply of goods and services, and the consumer courts have played an important role in this. Though implementation of the Consumer Protection Act can be viewed as a success, there are still serious shortfalls in achieving consumer welfare which need to be addressed. These include delay in disposal of cases resulting in pendency, lack of proper infrastructure, involvement of advocates which unnecessarily complicates the proceedings, and moreover the proceedings are becoming too technical for the general consumer to understand, members lack required knowledge and skills to discharge their responsibilities. Hence there is an urgent need to address these problems through appropriate policy interventions.

This book is intended to be used as a reference for students, teachers, members of Consumer Forum and other professional practicing in the field of consumer protection. We are also thankful to all those who contributed their research papers for the seminar. We hope that this collection of articles will serve as a valuable resource tool for research and study, and assist in promotion and protection of consumer rights.

Prof. (Dr.) R. Venkata Rao
Vice - Chancellor



Prof. (Dr.) ASHOK R. PATIL
Professor of Law
Chair on Consumer Law & Practice
[Ministry of Consumer Affairs, Govt. of India]

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PREFACE

In the backdrop of *United Nation Guidelines on Consumer Protection* completing 25 years in 2010 and starting a process of review, Indian COPRA completing 25 years in 2011, and 2012 marking the 50th year of John F. Kennedy's famous speech in American Congress, the Chair on Consumer Law & Practice has organised a National seminar on "25 Years of Consumer Protection in India: Challenges and the Way Forward" on September 22nd & 23rd, 2012 at the International Training Centre of National Law School of India University, Bangalore. The Seminar was jointly organized by the Chair on Consumer Law & Practice, National Law School of India University and Ministry of Consumer Affairs, Food and Public Distribution, Department of Consumer Affairs, Government of India, New Delhi. It was with the presence of consumer activists, academicians, professionals & students to debate on critical issues relating to the consumers and the challenges faced how to take the consumer movement forward. The consumer experts from various parts of the country attended the seminar. I am thankful to all those who contributed their research papers for the seminar. We regret that we could not publish all the papers in this book due to some constraints.

The Consumer Protection Act, 1986 (COPRA) is a milestone in the history of socio-economic legislation in India. The COPRA is an effective, efficient and fair implementation of the Consumer Protection Act is one of the conditions precedent for promoting the culture of good governance and thereby ensuring better promotion and protection of the rights of consumers. After twenty five years of the enactment of the Act, and three amendments in the year 1991, 1993, 2002, the Act has achieved a considerable amount of success. The Act to a large extent has given a boost to the consumer movement in the country and also provided a mechanism to the consumers to redress their grievances, which has been availed by lakhs of people. The three tier redressal machinery has been able to give relief to a number of aggrieved consumers. However, at the same time there are certain grey areas in the implementation of the Act which need to be addressed. Further with the technological advancements and emergence of e-commerce the consumers are facing new challenges.

I am grateful to the Chief Guest of the National Seminar Hon'ble (Mr.) Justice Ashok Bhan President, National Consumer Dispute Redressal Commissions, New Delhi and Hon'ble (Mr.) Justice K. Ramanna of the Karnataka State Consumer Dispute Redressal Commission, Bangalore as Guest of Honour for Inaugurating the Seminar. I am also thankful to Prof. (Dr.) R. Venkata Rao, Vice-Chancellor, National Law School of India University & Prof.(Dr.) V. Nagaraj, Registrar, National Law School of India University for their full support. I am also thankful to Miss. Anita Patil, Research Assistant and students of NLSIU who have made it successful.

Prof.(Dr.) Ashok R.Patil

JUSTICE ASHOK BHAN
Former Judge, Supreme Court of India

President
National Consumer Disputes
Redressal Commission



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MESSAGE

I am pleased to know that Chair on Consumer Law and Practice, National Law School of India University, Bangalore is coming out with the publication of a book titled, " 25 Years of Consumer Protection Act: Challenges and the Way Forward" which is a compilation of selected papers presented in National Seminar on 22nd & 23rd September 2012.

Consumer Protection Act of India is one of the most progressive and comprehensive piece of legislations. Unlike existing laws which are punitive and preventive in nature, the provisions of this Act are compensatory in nature and intend to provide simple, speedy and inexpensive redressal of the consumer grievances, relief of a specific nature and award of compensation wherever appropriate to the consumers. This Act was enacted before the opening of the Indian economy in the year 1991. Globalization of an economy has positive as well as negative implications. The process of development coupled with increasing liberalization and globalization across the country has enabled consumers to appreciate their increasingly important role in society and governance. Today the world has transformed into 'global village' not only due to the advancement of trade and commerce but more due to technological advancement. It is very difficult for any Nation to produce everything to satisfy its customer citizens. The process of globalization and free trade is serving a noble cause for all the probable consumers by satisfying their otherwise unaddressed desires. Globalization is almost inevitable and perhaps desirable from the consumers' point of view. In fact it enforces consumer's 'right to choice', as envisaged by UNO in its guidelines for consumer welfare.

I am certain that exercised such as the seminar conducted and the book published by Chair on Consumer Law and Practice, National Law School of India University, Bangalore will go along way in helping the cause.

I wish the editor Prof. (Dr.) Ashok R. Patil, Chair Professor, Chair on Consumer Law and Practice and the editorial board all the success for upcoming publication.


(ASHOK BHAN)

“ಕನ್ನಡ ಅನುಷ್ಠಾನ ವರ್ಷ-೨೦೦೯”



JUSTICE K. RAMANNA
JUDGE, HIGH COURT OF KARNATAKA (RETD)
PRESIDENT, KARNATAKA STATE CONSUMER
DISPUTES REDRESSAL COMMISSION
BASAVABHAVAN, BANGALORE - 560001
PHONE : 22260590

Date : 30/11/2012

MESSAGE

It is with sublime pleasure that I am writing this message for the book titled as “25 years of Protection Act : Challenges and the way Forward” on the eve of Silver Jubilee year of the implementation of the Consumer Protection Act 1986. The book contains some of the selected research papers submitted and presented at National Seminar on “25 years of Consumer Protection Act : Challenges and the Way Forward” organized by Chair on Consumer Law & Practice and Ministry of Consumer Affairs, Govt. of India, New Delhi on 22nd & 23rd September - 2012 at National Law School of India University, Bangalore.

Consumer rights in India and the modern world owe their origin to the consumer revolution of the pre-60s in the United States of America. It was John F, Kennedy. Who firmly believed that for the growth of the Nation and for the development, the people at large who drive the economy and who are the consumers of the products and services need to be protected by legislation to protect their rights. After his historic speech on 15th March 1962, the consumer protection bill was passed in the US and ever since many countries celebrates this day as Consumers Day. In India, 25 years ago our Parliament passed the Consumer Protection Act 1986 and December 24th is celebrated as National

“ಕನ್ನಡ ಅನುಷ್ಠಾನ ವರ್ಷ-೨೦೦೯”



JUSTICE K. RAMANNA
JUDGE, HIGH COURT OF KARNATAKA (RETD)
PRESIDENT, KARNATAKA STATE CONSUMER
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Consumer Day. We can even say that the real freedom to consumers was on this day and ever since there has been a tremendous improvement in the common man getting better value for his money and proper redressal for his genuine complaints on fake, faulty or poor goods & services.

I am confident that this book will enlighten the people and help them in protecting their consumer rights. The present edition carries rich blend of a variety of legal topics. I am confident that in years to come, Chair on Consumer Law & Practice, NLSIU will not only achieve but also sustain its vision to contribute to the development of Consumer Law in India.

I wish the editor Prof. (Dr.) Ashok R. Patil, Chair Professor, Chair on Consumer Law and Practice and editorial board all the success for upcoming publication.


Justice K. Ramanna

पंकज अग्रवाल
सचिव
Pankaj Agrawala
Secretary



भारत सरकार
उपभोक्ता मामले, खाद्य एवं सार्वजनिक वितरण मंत्रालय
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MESSAGE

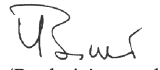
I am glad to know that Chair on Consumer Law and Practice, National Law School of India University, Bangalore is going to publish a book titled “25 Years of Consumer Protection Act : Challenges and the Way Forward” which is a compilation of selected papers and presented at the National Seminar on “25 Years of Consumer Protection Act : Challenges and the Way Forward” on 22nd & 23rd September 2012 at National Law School of India University, Bangalore.

The Ministry of Consumer Affairs, Food and Public Distribution, Department of Consumer Affairs, Govt. of India, has been entrusted with responsibility of safeguarding the interests of the consumers in the country including present challenges such as Misleading Advertisements. E-Consumer Protection and Implementation of Consumer Welfare Legislation.

In view of growing purchasing powers of the Indian consumer and surge in media activities, consumer welfare has assumed a larger role in our lives. This department wants to raise public awareness of Consumer Rights and duties by mounting a publicity campaign under its “Jago Grahak Jago” series in association with other Department / Ministries. I am confident that this book will play an important role in intellectual discussion. The quality of contents would enable the book to serve as reference and also for policy matters of the Government.

I wish the editor Prof.(Dr.) Ashok .R. Patil, Chair Professor, Chair on Consumer Law and Practice, National Law School of India University all success. I also congratulate the editorial board for their successful efforts in bringing out this publication.




(Pankaj Agrawala)

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I

**INAUGURAL SPEECH OF HON'BLE
MR. JUSTICE ASHOK BHAN***

25 years of Consumer Protection Act: Challenges and the Way Forward.

On a Resolution passed by the United Nations in the year 1985 laying down certain guidelines for better protection of consumers, the Parliament of India enacted Consumer Protection Act in the year 1986 to provide a mechanism for cheaper and speedy redressal of the grievances of the consumers. It seeks to promote and protect the rights of the consumers against marketing of goods which are hazardous to life and property. It provides for right to be informed about the quality, quantity, potency, purity, standard, prices of the goods and unfair trade practices by the manufacturers and service providers. It seeks to provide the right to be assured wherever possible, access to a variety of goods at competitive prices and to be assured that consumer interest will receive due consideration by the appropriate forum.

* President, National Consumer Disputes Redressal Commission,
New Delhi

25 YEARS OF CONSUMER PROTECTION ACT : CHALLENGES AND THE WAY FORWARD

Consumer Protection Act of India is one of the most progressive and comprehensive pieces of legislation. Unlike existing laws which are punitive and preventive in nature, the provisions of this Act are compensatory in nature and intend to provide simple, speedy and inexpensive redressal of the consumer grievances, relief of a specific nature and award of compensation wherever appropriate to the consumers. This Act was enacted before the opening of the Indian economy in the year 1991. Time has now come to assess as to what has been achieved and what still needs to be done to meet the challenges in the era of globalization when international trade & commerce offers increasing number of new goods in the field of insurance, transport, electricity, housing, entertainment, finance, banking and e-commerce. Today the market is found influenced by false, misleading advertisements or representations, bargaining, gift offers, prizes, contests and hoardings for attracting public for products or services.

GLOBALIZATION AND CONSUMER

Consumers are now participants in a global market and possibly in a cyber-market. The globalization of markets makes it very difficult for the laws of Nations/States to control the excesses of businesses operating outside of their physically defined territories. Computer mediated communication networks afford new opportunities for transnational marketing that may ignore the restrictions afforded by National consumer protection laws. The globalization has integrated the Indian economy with the world. The Government of India has thrown open the doors to foreign investors. The constraints and obstacles to the entry of Multi-National Corporations (MNCs) in India have been removed. In a globalized world, global markets for goods & services, capital and labour are increasing. There is free flow of goods from one country to another country.

In such a situation, the Consumer Protection Act has its own importance because it has to meet the challenges of globalized economy, misleading advertisements and e-commerce/consumer.

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Globalization of an economy has positive as well as negative implications. The process of development coupled with increasing liberalization and globalization across the country has enabled consumers to appreciate their increasingly important role in society and governance. Today the world has transformed into 'global village' not only due to the advancement of trade and commerce but more due to technological advancement. It is very difficult for any Nation to produce everything to satisfy its customer citizens. The process of globalization and free trade is serving a noble cause for all the probable consumers by satisfying their otherwise unaddressed desires. Globalization is almost inevitable and perhaps desirable from the consumers' point of view. In fact it enforces consumer's 'right to choice,' as envisaged by UNO in its guidelines for consumer welfare.

But globalization, if not handled properly, has negative implications as well. One of the world's noted intellectuals, Noam Chomsky, describes globalization as institution for extension of transnational corporate tyranny...their first interest is profit. Governmental and financial institutions that are weak offer a breeding ground in which corruption can grow thereby cancelling out the potential benefits of globalization.

In our day-to-day life we become consumer by buying the goods or hiring the services. In the era of science & technology, the globalization, urbanization and modernization develop rapidly which results into vast competition in market. The traditional view of buying goods and particular services changed and many products, services and professions came under widened scope of consumer law. As a consumer we have much concern about money, choice, health and safety of life. Market is always dominated by the sellers and their attitude towards consumer is that of a weaker section.

Therefore, keeping in view the interests of consumers, the legislature by enacting just laws and the judiciary by interpreting the same in a just manner has to play an important and significant role in the distributive consumer justice. There is need to prevent exploitation of

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the consumers from the fraudulent sales, manufacturing defects, unfair trade practices and misleading advertisements.

In a globalized regime, goods are manufactured in one country and sold in another. Manufacturer of the defective goods may be located beyond the jurisdiction of the local courts and it may not be possible either to pass a decree against such a person or if a decree is passed it may be difficult to implement it. For instance, a company is incorporated in USA, manufacturing goods in China and selling them in India. For reimbursement of the defective goods sold by the company, the manufacturer has to be impleaded which may not fall within the territorial jurisdiction of the consumer courts in India. Similar situation can arise in the case of service providers as well. An interesting case came up before us the other day. An international traveller suffered a fracture at Bahrain Airport while changing the plane due to stopping of the escalator with a jerk. He came to Chennai and filed a complaint against Gulf Air and Airport Authority of Bahrain. Airport Authority of Bahrain does not fall within the jurisdiction of consumer courts in India and the Gulf Air pleaded that they were not the service provider at the airport and their liability was limited from the point of embarkation in the plane till the disembarkation only. Suitable laws have to be enacted either by bilateral agreements entered between the Nations or the members of the United Nations have to adopt a Resolution to take care of such situations and the legislatures of the respective countries have to incorporate the Resolution passed by the United Nations in their local laws.

MISLEADING ADVERTISEMENTS

Advertisements are a crucial aspect of any type of business because they promote products or let the public know about them. Consequently, when this route is exploited by unscrupulous business persons to mislead the public, then it may destroy the very purpose and image of advertising. It should be noted that the public can lose faith in advertising if they discover that large numbers of businesses are engaged in giving misleading information through advertisement. However, if the public or any other stakeholder fails to detect this, then it allows dishonest

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businessmen to offer promotions that they cannot deliver or to sell commodities that cannot function in the manner that they were supposed to. Advertisements, good or bad, influence the consumers physically, psychologically and emotionally. Aside from that, it is the right of the consumer to get value for his money.

A well-organised sector of manufacturers and traders with better knowledge of markets has come into existence, thereby affecting the relationship between the traders and consumers making the principle of consumer sovereignty almost inapplicable. The advertisements of goods and services in television, newspapers and magazines influence the demand for the same by the consumers though there may be manufacturing defects or imperfections or shortcomings in the quality, quantity and the purity of the goods or there may be deficiency in the services rendered. In addition, the production of the same items by many firms has led the consumers who have little time to make a selection to think before they can purchase the best.

As an instance, take the example of misleading advertisements of milk products for the children. A number of milk companies claim that their products enhance performance during sports. This assertion has no scientific backing. In fact, some physicians have claimed that skimmed milk can actually heighten the chances of getting prostate cancer. These experts have asserted that the information should be included in product packages so as to protect various consumers from any health risks.

Certain advertisements use celebrities to endorse their products. By doing this, the products will be creating the impression that it is those food products that can cause one to live their dreams or live a celebrity-like life. Adults have the ability to differentiate between marketing and real assertions. They can understand that celebrity endorsements do not necessarily mean that the product can cause someone to become just like the celebrity. However, such complex reasoning may not be prevalent amongst the children. They usually take things at face value and this misleads them into purchasing those items as they are.

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Fast foods (fried chicken, pizza, spaghetti, burger), candies and ice-cream products claim that they contain suitable healthy ingredients for consumers like carbohydrate, protein, fat, vitamin and mineral in good portion. The facts are usually contrary to the advertisement; they often lead to obesity by their use on daily basis.

Still to illustrate the point let us take the case of misleading advertisements given by the manufacturer of the cosmetics. Natural, botanical, organic cosmetics are usually claimed by several brands, which might be one of the reasons for consumers to buy, yet it does not mean one-hundred-percent guarantee towards our health. They still do not show transparent information about nano particles being used in cosmetics which may directly or indirectly affect human health in the anti-wrinkle creams and sun screen products. Those nano particles might contain carcinogens, mutagens, reproductive toxins and few hundred other chemicals with long-term even short-term effects. Consumers have to be aware of the dangers in health of such false advertising or years later they might suffer from cancer as the cumulative dangerous impact of the products.

Section 2 (1) (r) of the Consumer Protection Act gives a comprehensive definition of unfair trade practice and Section 14 deals with the directions that the court can give to deal with such practices. The consumer courts have given some excellent orders in this area, but they cannot deal with misleading advertisements effectively. The consumer courts neither have the power nor the infrastructure to investigate suo motto into misleading advertisement nor take up such cases on their own. The consumer courts can only adjudicate over complaints filed before them. However, the consumer courts can issue interim orders stopping such advertisements pending disposal of the case. They can give directions to the advertiser to discontinue such advertisements and not to repeat it. They can award compensation for any loss or suffering caused on account of such unfair trade practice; they can also award punitive damages and costs of litigation. But most important, they can direct the advertiser to issue corrective advertisement. Section 14(1)(hc) of the Act, describing the powers of

INAUGURAL SPEECH OF HON'BLE JUSTICE ASHOK BHAN

the court, says that the court can order “corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement.” In so far as misleading advertisements are caused, this is the most important provision and can really have a deterrent effect, if used effectively. Unfortunately, this provision has hardly or perhaps never been used. Which advertiser will dare to publish false or misleading advertisement, with the threat of spending money on corrective advertisements that completely damage him, hanging over his head?

National Commission has given certain path breaking judgments in cases dealing with misleading advertisements. In its order in the case of M.R. Ramesh v. M/S Prakash Moped House and Others, (RP No 831 of 2001) the apex consumer court warned against advertisements that use fine print to hide crucial information pertaining to products and services, thereby misleading the consumer. And by awarding substantial compensation to the consumer, who was misled by such an advertisement, the ‘National Commission made it clear that it would not take such violations of consumers’ right to information lightly. It’s advised to manufacturers and service providers,” advertisements should not mislead and should give a clear picture of the quality of the goods sold.”

In another case of Bhupesh Khurana v. Vishwa Buddha Parishad, (OP no 168 of 1994) a class action suit was filed by twelve students, who had joined the BDS course offered by the Buddhist Mission Dental College run by Vishwa Buddha Parishad. The students’ complaint was that the college, in its advertisement calling for applications for admission to the course, had given the impression that it was affiliated to Magadh University, Bodh Gaya and recognised by the Dental Council of India and was fully equipped and qualified to give the Bachelor of Dental Science degree to the students. However, after joining the college and attending classes, the students found to their dismay that the annual examinations were not being held because the college was neither affiliated to Magadh University nor the course, recognized by Dental

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Council. As a result, they not only lost two valuable academic years, but also the money spent on fees, hostel charges, etc.

Holding the service rendered by the college to be deficient, the National Commission directed it to refund the admission expenses of all the twelve students along with 12 per cent interest calculated from the date of receipt of the amount till the date of payment. In addition, it also directed the institution to pay Rs 20,000/- to each of them by way of compensation for the expenses defrayed on purchase of books, hostel, etc and for the loss of two academic years. It also awarded Rs. 10,000 as costs of the petition.

Advertisements should not mislead in any way by inaccuracy, ambiguity, exaggeration, omission or otherwise. Unfortunately despite several laws meant to protect consumers against such unfair trade practices, false and misleading advertisements continue to exploit the consumer.

CONCEPT OF E-COMMERCE/E-CONSUMER:

Another aspect which is to be discussed here is “E-Consumer Protection.”

E-commerce relates to buying and selling of information, products and services via computer networks i.e. it is a means of transacting business electronically through Internet. In other words, it is a means of conducting business/trading/marketing online. It is an efficient way of entering into transactions, both for consumers and e-retailers. However, in many ways, e-consumers are more vulnerable as they typically cannot examine the product prior to purchasing it and may not know from whom they are buying.

In general the rights of a ‘consumer’ as provided by the domestic legislations like Sec. 6 of the Consumer Protection Act, 1986 in India, are also available to electronic consumer because no special stipulation has been framed in most of the consumer laws regarding applicability or non-applicability of electronic transactions. But due to difference in the nature and place of business or medium of business few unique practical problems like place of business, jurisdictional issues, non-

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availability of common dispute resolution system, as there is every possibility of cross border transaction in electronic system (e-shopping), are indispensable in case of electronic transactions or e-commerce which certainly require special measures that are not provided in the existing consumer legislations. Considering these aspects strong protective mechanisms are required to be set up and stringent measures in form of laws need to be framed otherwise it will not only affect the e-consumers but respective Government shall also lose their state revenues.

Number of e-consumers is growing due to its user-friendly nature but at the same time the risk factors for using internet for e-shopping is also increasing and about to catch danger mark if not restricted and regulated properly by a time bound regulation on the same. Numerous reasons are there for the protection of e-consumer like creations of hackers duplicate account, disclosure of private information without consent, masking, caching, etc., but few problems make the protective measure indispensable in this respect and required speediest protective mechanism.

The electronic transactions in the present legal set up is full of insecurity and uncertainty because of absence of proper legal mechanism and that is due to a universal fact that technology developed faster than law though out the globe but it does not mean that law shall not be able to protect technological offences. To cope up with the technological advancement we have to take the help of technology as Charles Clarks renowned remark, "the answer to the machine is in the machine" is perfectly suited in the modern situation. Indeed, the perfect reply to the technological abuses is the application of technological innovation.

The existing consumer laws of India are unable to protect e-consumers rights properly so the consumers have to be more cautious and careful about the use of e-market for e-shopping.

Consumer protection issues have gained a considerable amount of attention both from the academicians and the policy-makers. Despite

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the attention, a review of legal frameworks shows that they have failed to the e-consumer needs. It has emerged within the public policy frameworks dominated by commitments to economic progress to freedom of corporations to do business as they choose and the interests of consumers have been ignored. It is not able to protect the consumers from infringement of their rights in electronic modes. Even those frameworks that have begun from the consumer perspective have become frozen in time due to technological advancement or by lack of will of the law making authority to make the existing laws a dynamic one so that it can cover protective issues of both sorts of violations of consumer rights which is really far-reaching in its present shape and provisions. In India we have lots of fragmented laws to cope up the challenges mentioned above apart from Consumer Protection Act, 1986, but the need of the hour is to have a consolidated law to deal with all above mentioned situations so that the electronic consumers' rights can be protected properly.

IMPLEMENTATION OF CONSUMER WELFARE LEGISLATION

REASONS FOR FAILURE

There are so many reasons why the various Laws and Regulations are not effective in dealing with the challenges imposed by the misleading advertisements and globalisation of the markets. Some of them are:

- (i) Consumers in India are mostly illiterate and ignorant. They do not understand their rights. Consumers are widely dispersed and are not united. They are at the mercy of businessmen. On the other hand, producers and traders are organised and powerful.
- (ii) There is increasing supply of duplicate products. It is very difficult for an ordinary consumer to distinguish between a genuine product and its imitation. He pays the price for the original but gets a substandard product.
- (iii) Some businessmen give misleading information about quality, safety and utility of products. Consumers are misled by false advertisement and do not know the real quality of advertised goods.

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- (iv) Outdated laws and poor enforcement of them are some of the lacunas in protecting the consumers from exploitation by the traders. The need of the hour is better laws in keeping with the times, better enforcement, corrective advertisements, better self-regulation by industry independent regulator to regulate health and children related advertisements.
- (v) MRTP Act had the powers of taking suo motu action whereas the Consumer Protection Act or ASCI, does not have such powers. Only if a consumer or industry complaints to the Consumer Courts or to ASCI then the action can be taken.

SUGGESTIONS

- a) In view of the illiteracy, ignorance, poverty and backwardness in India where the trading community is well organized and the consumers are still unorganized, it would be correct that voluntary organizations come forward to educate the consumers to protect their rights and privileges. It is extremely imperative to encourage volunteers, who are gallant, audacious and forthright, concerned in consumer protection movements. Judicial activism should be increased in consumer related issues also and parental role should be played by the Supreme Court for consumer redressal agencies.
- b) Govt. should establish laboratories equipped with latest international standard technologies for testing of consumer goods to determine their quality, purity and relative merit and it should be proactive towards the cunning policies of MNCs to exploit the consumer. Government should make efforts to create a consensus for 'global consumer policy.' It is time to make some amendment in the Act and to give powers to the consumer courts for suo motu action so that they can take up cases of false advertisements on their own.
- c) Information Service Providers and Internet Access Providers may unite to establish industry norms for appropriate behavior in offering consumer transactions over their systems. Major commercial interests that choose to offer products online may establish industry

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organizations that purport to guarantee an optimum level of consumer protection for purchasers of their products.

- d) E-Consumers will have more protection if they use a credit card rather than a debit card. They should never give credit card or personal information as part of any purchase by email or via a web page that is not encrypted (a secure socket). Credit card companies are now issuing separate card security codes to protect credit card transactions from fraud.
- e) Nations should seek bilateral treaties that establish reciprocal arrangements for enforcing consumer protection laws between Nation-States that have similar laws. The World Trade Organization might determine that consumer fraud online constituted a threat to the viability of international trade and sanctions may be imposed upon non-conforming Nation-States.
- f) Government is setting up a National Consumer Protection Agency (NCPA) under the aegis of Ministry of Consumer Affairs to monitor and penalise companies that make misleading claims in their advertisements. It may recall the product and slap cases against the errant firms. It would have the power to investigate claims made by companies, either based on a consumer complaint or on its own and if found guilty, it could ask the company to immediately withdraw its advertisement. The firm would be asked to produce proof to substantiate its claim, failing which the NCPA could order recall of the product from the market.

II

INAUGURAL SPEECH OF HON'BLE MR. JUSTICE K. RAMANNA*

Consumer rights were recognized broadly in many ancient Hindu, Islamic and Christian religious scriptures; however, no literary work formalized them into a concise set until the 1960s. Consumer rights in India and the modern world owe their origin to the consumer revolution of the pre-60s in the United States of America.

It was John F. Kennedy, who firmly believed that for the growth of the Nation and for the development, the people at large who drive the economy and who are the consumers of the products and services need to be protected by legislation to protect their rights. After his historic speech on 15th March 1962, the consumer protection bill was passed in the US and ever since many countries celebrates this day as Consumers Day.

In India, December 24th is celebrated as National Consumer Day, as on this day in 1986, 25 years ago our Parliament passed the CPA.

* President, Karnataka State Consumer Dispute Redressal Commission,
Bangalore

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We can even say that the real freedom to consumers was on this day and ever since there has been a tremendous improvement in the common man getting better value for his money and proper redressal for his genuine complaints on fake, faulty or poor services.

Today I would like to share my views, on this dias regarding how the Advertisements misleads the public;

Advertisements have become part and parcel of our life. I am sure many of us here love watching ads during commercial break. But do you know most of the ads shown are misleading. The false advertisements have great influence mainly on children who demands many things from parents. But they do not know that it may be very harmful for their health.

For example we see so many ads on TV about skin creams and no one clearly refers that for which skin it is suitable and for which skin it's allergic. One such creams claim to make you fair within 7 days of application. Do you believe this? No for we know genes in the body decides fairness of the skin.

Also the face creams children often demand are for men not for children. Applying these creams will ultimately destroy their natural skins, as the children's skin is very soft.

So we should all be aware of these ads and should not buy any product by seeing the ad only.

Stephen Leacock once said that Advertising may be described as the science of arresting the human intelligence long enough to get money from it. I think that some advertisement companies are arresting our human intelligence way beyond our comfort levels.

It is said that in a free market, consumer is king. But in India, which boasts of rapid growth and aims for great power status, the buyer is shortchanged by toothless regulations.

In India, consumers often read about such huge settlements being made abroad between consumers and companies. But rarely do they

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see anything of the sort closer home where they are bombarded day and night by ads that make true, semi-true or false claims with little accountability. Most successful consumer cases in court are about faulty appliances or defective or inadequate services. There aren't many cases regarding misleading claims, which lead to large and exemplary settlements like in the developed world.

“We need a separate authority to deal with these problems in a speedy manner. Already a case has been made for setting up a National Consumer Protection Authority (NCPA) to deal with misleading advertisements, mainly to bridge the legal gap to deal with unfair/restrictive trade practices following the proposed winding up of the Monopolies and Restrictive Trade Practices Commission (MRTPC). Unfortunately it has not taken off yet.”

However, the CPA does suggest that in case of unfair trade practices, the court order for corrective advertisements to neutralise the effect of misleading advertisements at the cost of the party responsible for issuing the ad. “But, consumer courts neither have the power nor the infrastructure to investigate misleading advertisements or take up such cases *suo moto*. They can only take action on complaints filed before them. However, consumer forums can issue interim orders stopping such advertisements pending disposal of the case.” Yet, for all these measures to stop misleading claims in ads, there is no dearth of ads continuing to do so with impunity and with little consequence.

I am sure that in the next two days the delegates will dwell upon this aspect of utilizing the Information Technology to bring on more and effective changes in the CPA to be benefit of public at large and for the betterment of the country.

I am sure the delegates will dwell in deep about the Redressal aspect and come out with innovative suggestions to ensure speedy redressal to all consumers.

While on the topic today, since this august gathering is full of eminent people from the National Law School, it is my thought and suggestion

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that they also discuss the issue of having a short term, clear course for the “Members.”

With these words I take this opportunity to thank the organizers for this good opportunity given to me.

“LET THE CONSUMER BE THE KING ALWAYS”

22.09.2012

(JUSTICE K. RAMANNA)



1

IMPACT OF MISLEADING ADVERTISEMENTS ON CONSUMERS AND SOLUTIONS

*Mrs. Priyanka Khule- Kandekar**

INTRODUCTION

As said by Mahatma Gandhi — “A consumer is the most important visitor on our premises. He is not dependant on us, we are on him. He is not an interruption to our work, he is the purpose for it. We are not doing any favour to consumer by giving him an opportunity. He is us a favour by giving us an opportunity to serve him.”

As this is the era of globalisation and India is having a large number of populations, the advertisement proves to be a tool for gaining a class of consumers. Therefore the trader tries to attract the consumers by making different advertisements and for increasing the sale of product in the market. The inclusion of the popular personality in the advertisements proves to be fruitful for improving the sale of the products.

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A product or service may be advertised through a variety of methods such as hand –bills, circulars, mobile, direct mail, bill- boards, signboards, newspapers, magazines, radio, television, the internet.

It is rightly said - “Advertising is essentially a thing to induce consumption to make people buy things they do not want. In such a process, advertisements tend to mislead people, so that they buy things they really do not need.” An advertisement facilitates the dissemination of information about who is going to sell the product and at what price. It makes the people informed about the particular product so that they can decide as which one they will prefer more. Therefore what is needed is the advertisement must be clear in terms of its products, and results.

The misleading advertisements have their impact upon the minds of consumers. The consumers get attracted towards these products as these contain false claim and misrepresentation. Many of the transactions are entered into through e-commerce. The rule of caveat emptor i.e. buyers be aware has changed subsequently with the passage of time, and today due to such misleading advertisements ,buyer suffer in terms of financial loss and mental trauma. The right to information and right to choice are available with each and every consumer.

Earlier before Consumer Protection Act, there were certain legislations for protecting the consumers from such exploitation.

HISTORICAL BACKGROUND OF CONSUMER PROTECTION ACT

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.

Yet until the late 1970s, there was no systematic movement in the country for safeguarding the interest of consumers. But now it is widely acknowledged that the level of consumer awareness and protection is a true indicator of development of the country and progressiveness. The consumer movement in India is as old as trade and commerce.

But now it is widely acknowledged that the level of consumer awareness and protection is a true indicator of development of the country and progressiveness of civil society.¹

1 http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf

IMPACT OF MISLEADING ADVERTISEMENTS ON CONSUMERS AND SOLUTIONS

The main reason for this is the rapidly increasing variety of goods and services which modern technology has made available. In addition, the growing size and complexity of production and distribution systems, the high level of sophistication in marketing and selling practices and in advertising and other forms of promotion, mass marketing methods and consumers increased mobility resulting in reduction of personal interaction between buyers and sellers, have contributed to the increased need for consumer protection.

Legislative enactments to protect the rights of consumers

1. Indian Penal Code, 1860
2. Indian Contract Act, 1872
3. Drugs Control Act, 1950
4. Essential Commodities Act, 1955
5. Monopolies and Restrictive Trade Practices Act, 1969

Except for Monopolies and Restrictive Trade Practices Act (MRTP) all the other Acts were punitive and preventive in nature.

However MRTP Commission allowed the consumers to approach to it in case of complaints.

Unfair Trade Practices of MRTP Act

For preventing deceptive and misleading advertisements, MRTP Act has declared certain trade practices as unfair.

Types of Unfair Trade Practices²

1. Falsely representing that goods / services are of a particular kind, standard, quality, model.
2. Falsely representing second hand goods as new goods.
3. Making a false or misleading claim regarding usefulness of any product like making claim about the product without any documentation or support of laboratory test.

2 Mukesh Trehan Ranju Trehan, "Advertising and Sales Management," V. K. Publications, 2007, p 209

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4. Advertisements not disclosing material negative effects or side effects of the product.

Some unfair trade practices adopted by traders and producers³

Advertisement regarding weight loss claim of any medicine without proper test.

1. Using the words “Government Approved,” “Government supported,” “Certified” in the advertisement without actual approval.
2. In an advertisement of readymade garments it was claimed that the colour of the garments will not fade, but in actual practice it faded, such act is deceptive.

EVOLUTION OF CONSUMER PROTECTION ACT 1986 IN INDIA

In spite of these Acts the consumers did not have any effective mechanism or institutional arrangements for the speedy redressal of their grievances. Now all the powers regarding actions against under trade practices have been given to Consumer Courts set up under Consumer Protection Act.⁴

In the history of the development of consumer policy, April 9, 1985 is a very significant date for it was on that day that the General Assembly of United Nations adopted a set of general guidelines for consumer protection.⁵

The scope of the Act includes the possibility of forthcoming consumers who wants to join such consumer activity. It also includes the protection to consumers against the private and public body and the statutory bodies as well.⁶

The Consumer Protection Act has conferred six important rights for protection of consumers.

1. Right to safety,
2. Right to information i.e. right to be informed,

3 Ibid p.210

4 Mukesh Trehan RanjuTrehan, Supra 2 p.210

5 General Assembly Resolution 39/85

6 M.N. Shukla “Law of Torts and Consumer Protection Act,” 17th edition, 2005, p. 24

3. Right to choose,
4. Right to be heard,
5. Right to redressal,
6. Right to consumer education

International conventions relating to consumer Protection

1. International Convention on international means to protect freedom of expression by regulating commercial advertising-1982⁷

- i. This convention has stressed that appropriate advertising is an essential element of the market economy and that all action aimed at regulation or prohibition should be accompanied by a policy including measures such as better education of the young, strengthening of consumer associations.
- ii. Further it also speaks about prohibition of misleading, hidden and subliminal advertising or messages.

2. Article 10 of the European Convention on Human Rights

- i. The Committee of Ministers, in the light of Article 10 of the European Convention on Human Rights, instruct the Steering Committee on the Mass Media to examine international means to protect freedom of expression by regulating commercial advertising, especially on radio and television and to make concrete proposals, possibly through the conclusion of a European convention.

3. Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, 2003⁸

- i. **It Speaks about Obligations with regard to consumer protection:**

Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising

⁷ Assembly debate on 1 and 2 October 1982 (12th, 13th and 14th Sittings)

⁸ U.N. Doc. E/CN. 4/Sub.2/2003/38/Rev.2 (2003).

practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle.

Nor shall they produce, distribute, market or advertise harmful or potentially harmful products for use by consumers.

4. Human rights and the Framework Convention on Tobacco Control

- i. As stated by Committee on Economic, Social and Cultural Rights (CESCR) states have obligations to respect, to protect and to fulfil all human rights.

The obligation to respect requires states to refrain from directly (or indirectly) violating human rights or interfering with their realisation. States must abstain from developing policies, laws and regulations that negatively affect human rights.

Further it also mentions the obligation to protect requires states to take measures to prevent third parties' interference with human rights.

- ii. This obligation is essential for developing and a human rights approach to tobacco control.

Governments have a legal obligation, enshrined in human rights law, to regulate the tobacco industry to prevent the industry from interfering with the right to health and other human rights.

- iii. For example, governments must ban misleading advertisement of tobacco products (light, mild, etc.) in order to protect the right to health, right to information and right of consumers.⁹

1. Treaty establishing the European Community

The new Article 153 (ex Article 129a) of the EC Treaty has the objective of ensuring a high level of consumer protection, rather than simply contributing to such protection. Moreover, it emphasizes promoting the consumers' right to information and education and their right to organize themselves in order to safeguard their interests.

9 International Journal of Law, Cambridge University Press, doi:IO/IO17/SI744523II000I/39

Constitution of India and Consumer Protection Act

1. Art. 14 to 18 of Indian Constitution

The Constitution of India has protected the rights of consumers by taking into consideration welfare of the consumers. The rights under the Consumer Protection Act, 1986 flow from the rights enshrined in Articles 14 to 19 of the Constitution of India.

2. The Preamble of Indian Constitution

The preamble of Indian constitution speaks about justice i.e. economic and social. So if a advertisement is misleading then it is to be considered against economic and social justice. The Consumer protection Act is socio-economic benevolent legislation of modern times.¹⁰ So an advertisement must be clear, fair and precise.

3. The source

The source of Indian constitution is stated in the preamble is “we the people.” It means that there must be protection of interest of the people. As it is necessary that the society should be construed on the basis of egalitarian and equalitarian basis.

4. Art. 39

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

5. Article 46

Art. 46 of the Indian constitution provides that state shall endeavour to protect the economic interest of the weaker section of its population and also protect them from social injustice and all forms of exploitation which means all kinds of harassments and frauds in the market place.

Role of Consumer Protection Act

I. Power of consumer courts

The consumer courts can issue interim order stopping such advertisement pending the disposal of the case. They can also direct

¹⁰ Annop Kaushal, “Consumer Protection Law,” Universal publications, 1997, p.97

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punitive damages and cost of litigation. But most important they can direct the advertiser to issue corrective advertisement.

SECTION 14(1)(hc) OF THE CONSUMER PROTECTION ACT

It describes the powers of the court that the court can order “corrective advertisement” to neutralise the effect of misleading advertisement at the cost of opposite party responsible for issuing such misleading advertisement.

In M/s. Cox & Kings (I) Pvt. Ltd. v. Mr. Joseph A. Fernane,¹¹ National Consumer Disputes Redressal Commission confirmed the order of the State Commission with cost of Rs. 5,000/- to be paid to the Respondents by the Petitioner and also directed the Petitioner to withdraw the misleading advertisement under Section 14(1)(f) and to give corrected advertisement under Section 14(1)(hc) of Consumer Protection Act .

It also stressed that the order is to be complied with within four weeks from the date of the receipt of the same.

The position in India

I. Tata Pres v. Mahanagar Telephone Nigam Ltd,¹²

Indian supreme court held that Article 19 (1)(a) not only guarantees right of freedom of speech and expression but the but it also protects the right of an individual to listen, read and receive “commercial speech.”

Position of Misleading Advertisement under Consumer Protection Act in India

1. Reckitt & amp; Colman of India Ltd v. M.P. Ramachandran & others¹³

Five principles were enunciated in the said decision:

11 M/s. Cox & Kings (I) Pvt. Ltd.v. Mr. Joseph A.Fernane, Revision Petition No.366 OF 2005

12 Tata press Ltd. v. MTNL,AIR 1995 SC 2438

13 Reckitt & amp; Colman of India Ltd v. M.P. Ramachandran & others 1999 PTC (19) 741

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- i. A tradesman is entitled to declare his goods to be best in the words, even though the declaration is untrue.
- ii. He can also say that his goods are better than his competitors,' even though such statement is untrue.
- iii. For the purpose of saying that his goods are the best in the world or his goods are better than his competitors he can even compare the advantages of his goods over the goods of others.
- iv. He, however, cannot while saying his goods are better than his competitors,' say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible.
- v. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining the repetition of such defamation.

The settled law on the subject appears to be that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing.

However, a manufacturer is not entitled to say that his competitor's goods are bad so as to puff and promote his goods.

It, therefore, appears that if an action lies for defamation an injunction may be granted.

2. Pepsi Co., Inc. And Ors. v. Hindustan Coca Cola Ltd¹⁴

The Delhi High Court held that, the war of advertisement against each other's products is going on but that does not entitle the

¹⁴ Pepsi Co., Inc. And Ors. v. Hindustan Coca Cola Ltd., (2003 (27) PTC 305 (Del)

respondents to contend nor can be permitted to plead the past conduct as a good defence to denigrate the product of the appellant nor the market place is a suitable substitute for injunction.

3. Colgate-Palmolive (India) v. Anchor Health & Beauty Care¹⁵

The Judge at the High Court of Madras held that false claims by traders about the superiority of their products, either directly or by comparing them against the products of their rivals, were not permissible.

The Madras High Court in its interim order, the court restrained Anchor “from using the words ‘only’ and ‘first’ in the offending advertisement, in a manner sending a message as though the respondent’s product is either the only one containing all three ingredients, or the first to provide all-round protection.”

The court asserted that consumer interest is an element which must be considered when assessing comparative advertising. This appears to be the first time a court has included discussion of consumer interest in its analysis of such advertising.

At first glance, the decision appears to be inconsistent with earlier case law on this issue.

However, as no other rulings have referred to the interests of consumers, the Colgate Case is not in direct contradiction to prior decisions. The Judgment clears certain things.

1. No codified law

Unfortunately, there is no codified law in India to restrain companies from indulging in false publicity campaign (except to a limited extent under the MRTP Act and the Consumer Protection Act).

2. Only Judge - made laws

We only have judge-made laws developing in the recent past.

15 Colgate-Palmolive (India) v. Anchor Health & Beauty Care (2008) 7 MLJ 1119

Principles of English Law

1. Position of Trade and commerce :

It is only through trade and commerce that the British managed to expand their horizons and proclaim that the sun never set in their empire.

2. Awareness:

The level of awareness on the part of the consumers in Britain is very high when compared to the level of awareness on the part of the consumers in developing countries like India.

3. Tortious liability:

The fixation of tortious liability on the manufacturers and marketers of products and the entitlement of consumers to damages of unimaginable proportions is firmly rooted in the English soil, but the same is not the position in India.

3. United Breweries Limited v. Mumbai Grahak Panchayat¹⁶

- 1) In this case on recommendation of the Central Consumer Protection Council, the Consumer Affairs, Food and Public Distribution Department, Government of India has set up a working group on “Misleading Advertisements” to address various problems that consumers face with regard to misleading advertisements.
- 2) There is specific clause in the Consumer Protection Act, 1986, Section 14(1)(hc): It states that the provision is made to issue corrective advertisement to neutralise the effect of misleading advertisements at the cost of the opposite party responsible for issuing such misleading advertisements.
- 3) The State Commission in the light of the evidence on record has referred to a precedent of Australian Competition and Consumer Commission whereby the Australian Competition and Consumer Commission ordered the Commonwealth Bank of Australia, who contravened the Trade Practices Act, 1974, to publish television and in-branch corrective advertisements. The matter went up to

16 United Breweries Limited v. Mumbai Grahak Panchayat (2007) CPJ 102 NC

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the Federal Court and the Federal Court made orders about the form and scope of the corrective advertising.

- 4) The orders show that misleading advertising can be costly. An advertiser may have to correct that advertisement at significant cost. It pays for an advertiser to get the message right at the first time.
- 5) In the case in hand, the State Commission has not ordered the corrective advertisement by publishing the advertisement in T.V. probably thinking that the advertisements made on Railway Coaches and Railway Platform were sufficient. It has not been ordered to be placed on coaches for 3 months as the advertisement has been ordered to be displayed only for a week.
- 6) *Eenadu Telegu Daily v. Anantha Ram Kongara*
It was held in *Eenadu Telegu Daily v. Anantha Ram Kongara*,¹⁷ that error in publication of an advertisement by a newspaper is deficiency in service.

Role of Advertising Standards Council of India (ASCI) (1985)

1. Code of self-regulation

The Advertising Standards Council of India (ASCI) (1985) has adopted a Code for Self-Regulation in Advertising. It is a commitment to honest advertising and to fair competition in the market-place.

2. Protection of interests of consumers

It stands for the protection of the legitimate interests of consumers and all concerned with advertising - advertisers, media, advertising agencies and others who help in the creation or placement of advertisements.

3. Lowering the rate

So that this will result into lowering down of the rate of misleading advertisements and false claims and confidence of the consumers will be retained. Effective and efficient application of self-regulation code will prove to be fruitful.

¹⁷ *Eenadu Telegu Daily v. Anantha Ram Kongara* 1 (1993) CPJ 428

4. Voluntary Association

On certain occasions,¹⁸ however the ASCI orders were set aside by courts as ASCI being voluntary association was considered as usurping the jurisdiction of courts when it passed the order against non- members.

5. Role of ASCI

The ever increasing role of ASCI in regulating the practices of advertisement was felt by Indian Government and in 2006; ASCI code was made compulsory for T.V advertisements.

6. Amendment of the rules

The rules were amended as follows:¹⁹ "No advertisement which violates the code of self- regulation in advertising as adopted by the ASCI, Mumbai for public exhibition in India, from time to time shall be carried in Cable service."

7. Problem of ASCI

Though ASCI's efforts are there, the problem is it has no system of *suo moto* action. It waits for the complaints, from consumer many a times advertisement that violate ASCI's code go unnoticed as no one complains.

8. Recent action by ASCI

Despite this, The Advertising Standards Council of India has launched an initiative to track and control the misleading advertisements. This step is expected in the best interest of the consumers and it will also significantly reduce release of misleading advertisements.²⁰ The National Advertising Monitoring Service (NAMS) has identified 55 advertisements in print and on TV

18 Century Ply boards (India) Ltd. v. ASCI 1999

19 Vide a notification in Gazette of India, Dated August 2, 2006 issued by the Government of India

20 The Economics Times, April 17 2012

that could likely mislead the audience or make false and unsubstantiated claims.²¹

Action of UNICEF on Misleading Advertisement

1. Urgent need to pass a Law on Advertisement

UNICEF Viet Nam's Representative,²² Ms. Lotta Sylwander, applauded the Government of Viet Nam on passing the Law on Advertisement which includes a ban on the marketing of breast milk substitutes for children under 24 months.

2. The Law on Advertisement is meant to regulate the rights and obligations of organisations and individuals related to advertising.

3. Convention on Rights of Child

Viet Nam's National Assembly, guided by the Institute of Legislative Studies, has remarkably used the opportunity to fully comply with the Convention on the Rights of the Child (CRC) and the International Code of Marketing of Breast milk Substitutes.

4. Misleading Advertisement and right to health

It has also acknowledged that in fulfilling the child's right to health, the public must be protected from false and biased information that persuades mothers to give up breast feeding in favour of artificial feeding.

5. Role of WHO

The Code, adopted by the World Health Assembly in 1981, stipulates that all governments should adopt it into national legislation. The World Health Organization (WHO), UNICEF and scientists and doctors worldwide recommend exclusive breast feeding for the first six months of a child's life, along with continued breast feeding up to two years of age and beyond.

21 The Economics Times, 7 June 2012 22 http://www.unicef.org/eapro/media_18901.html

22 http://www.unicef.org/eapro/media_18901.html

The problems faced in India in implementation of Consumer Protection Act

1. Procedural delay

There is a fixed time limit as per Consumer Protection Act for disposal of complaint as 90 days and if the product testing is involved, it is 150 days. However a recent study on Consumer Unity and Trust Society in Rajasthan showed that only 26 percent of the cases were disposed of within stipulated time period of 90-150 days.

2. Lack of investigating machinery

There is no investigating machinery with consumer courts to detect and take actions against misleading advertisements.

3. Lack of transparency

Consumer group states that there is lack of transparency in ASCI's Complaint Redressal Process as it provides no reason for rejecting a complaint and does not have the provision for review of the decision.

4. Right to redress

Under the Act, a consumer can seek redressal only he has suffered a loss or a damage as a result of the unfair trade practice or deficiency in service or the unfair trade practices resorted to by a trader. However, the *per se* rule is not invoked.

5. Injunction

The Act does not empower the Consumer Redressal Fora to issue either interim injunction or "case and desist orders." These powers are vested in the Monopolies and Restrictive Trade Practices Commission under the Monopolies and Restrictive Trade Practices Act, 1969.

6. *Suo motto* action

The Act does not empower the Consumer Redressal Forums to take up cases *suo motto* as this is not the case with The Monopolies and Restrictive Trade Practices Act.

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The Monopolies and Restrictive Trade Practices Act, 1969 empowers and M.R.T.P. Commissions to inquire into any unfair practices upon its own knowledge or information.

7. **Publishing the names**

The Act does not empower consumer for a to publish the names of manufacturers, traders and dealers whose goods are found to be hazardous to public safety. This empowerment, if made, will work as a deterrent to the erring business community and make the consumers informed.

8. **No complaint when alternative remedy is available**

The Act does not permit a consumer to lodge a complaint with the Consumer Forum if a alternative remedy is available under some other law.

9. **Non justifiable rights**

The Act concedes six rights of consumers viz. right to choice; right to safety; right to be informed; right to be heard; right to redress and right to consumer education. But these rights have not been made justifiable.

10. **Right to environment**

The Act completely ignores the right of consumers to a healthy environment. It acknowledges only six rights of the consumers recognised by the international organisation of consumer.

11. **Storage of commodity**

The Act is silent on the question of storage of commodities.

12. **Awareness**

The consumers are not aware about their rights. So they do not move to courts for enforcement of their rights and again one more drawback is those who have paying capacity, can move to the consumer courts but not the poor.

13. **Bill**

It is necessary that the consumers must ask for a bill. So, that in future action against loss caused due to such misleading advertisement can be taken.

CONCLUSION

From this it can be concluded that in this era of globalisation, advertisement and misleading advertisement are the sides of same coin. Though there is a provision of publishing corrective advertisement, it is not sufficient and at the same time advertisement must adhere to ethics, morals and Self- regulation Code.

SUGGESTIONS

1. Labelling of products

It is the responsibility of the producers & service providers that they should clearly mention in the label, price, including information, its benefits and side effects. The producer or the service provider should not indulge in misleading advertisements to lure customers. This is cheating and makes the producer or the service provider liable for punishment.

2. Misleading claims and advertisements

Very often cosmetic product manufacturers make tall claims about the capabilities of their products. In reality not all of these are true. So it is needed that the claims in the advertisement must be true in its applications and results.

3. Role of ethics, morals, for protection of public interest

The advertisement should adhere to ethics and morals. So, that the interest of general public will be protected at larger extent.

4. Code of self-regulation

The advertisement must follow the code of self-regulation which itself will prohibit the publication of misleading advertisement.

5. Use of ADRM and ODRM

The consumer dispute resolution essentially requires use of “Alternative Dispute Resolution Mechanism” (ADRM) as well as “Online Dispute Resolution Mechanism” (ODRM).

6. Encouragement to consumers

There is need of encouragement to consumers to come forward against violation of their rights. And also safeguarding their interests can be done by providing them justice in speedy manner.

7. Need of statutory powers to ASCI

There is need to confer statutory powers on the Advertising Standards Council of India, which is a self- regulatory body. It can prove to be effective check on misleading advertisements.

8. Need for codified law

There is a need to have a codified law inclusive of all the provisions for protecting consumers from misleading advertisements.



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MISLEADING ADVERTISEMENTS – IMPACT AND REGULATIONS

*Priyanka Chakraborty & Naman Mohnot**

INTRODUCTION

“Advertising is a non-moral force, like electricity, which not only illuminates but electrocutes. Its worth to civilization depends upon how it is used.”

- J. Walter Thompson

The influence of advertisements on consumer choice is undeniable. And it's this fact that makes it imperative that advertisements be fair and truthful. Misleading and false advertisements are not just unethical; they distort competition and of course, consumer choice. False and misleading advertisements in fact violate several basic rights of consumers: the right to information, the right to choice, the right to be protected against unsafe goods and services as well as unfair trade practices. Since advertisements are basically meant to promote a product or a service, one does see some exaggeration in the way they

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extol the virtues of the product. But it becomes objectionable when it goes beyond that.¹

Advertising carries several responsibilities. Advertising informs the public so that they can be aware of products and make informed choices among different products or brands. Advertising also benefits businesses in assisting them to sell their products. But while dispensing its role as a dream merchant, advertising has also been in the vortex of controversy of the many ills that it brings to society. It is accused of encouraging materialism and consumption, of stereotyping, of causing us to purchase items for which we have no need, of taking advantage of children, of manipulating our behaviour, using sex to sell and generally contributing to the downfall of our social system.

Advertising does not function in a vacuum but in a market environment where several forces like consumer needs, business interests and government regulations are at work. It is a powerful force in terms of its persuasiveness and functions a critical social role. Moreover the high visibility and pervasiveness, it generates criticism and controversy. Much of this controversy springs from the fact that advertising is used more as a persuasive communication tool thereby creating serious impact on the tastes, values and lifestyles of society.

India has a long way to go before it really adopts stringent regulation and standards with regard to advertising. There are no bars on advertising in India. Unfortunately, many other government organizations will need to be involved to keep a check on the made law and then enforced by the police.

WHAT IS MISLEADING ADVERTISEMENT

When an advertisement of a water purifier that filters only bacteria (and not viruses) claims that it gives 100 percent safe water, then it is a false statement. When a mobile operator promises STD calls for 60 paise per minute, but omits to say that this rate is applicable only when calls are made to another mobile of the same company, then it constitutes misrepresentation. Similarly, when an advertiser or a

¹ <http://consumereducation.in/misleadingeng.pdf>, last accessed on 08-03-2012.

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manufacturer makes a claim about a product, he should be able to prove it or else it becomes a false statement. If he says that his refrigerator is best or that it keeps the food inside germ-free, that claim should be backed by adequate scientific data that substantiates the claim or else, it becomes a false statement. When an advertisement promises to give you a “free gift” every time you buy the advertised product, the free gift should really be so. If the manufacturer is recovering either fully or even partly, the cost of the so-called free gift, then the advertisement becomes a false or a misleading claim, coming under the definition of unfair trade practice. Likewise, if a retailer claims that he is offering a special discount on his goods as part of a festival celebration, while he is actually using the festival as an excuse to get rid of old and outdated goods, then he is deceiving consumers. When a toothpaste advertisement says that it prevents cavities, one expects the manufacturer to have the data to prove this. If he fails to do that, then he is making an unsubstantiated claim or a false statement. If an advertisement for a face cream claims that it removes dark spots on the face and even prevents them from coming back, the manufacturer should be able to prove this. Or else, it is a deceptive advertisement. Even reducing crucial information about the product to minute letters at the bottom of the advertisement could be termed as an unfair trade practice, particularly if such information is not intelligible to the consumer.

In fact, in the case of *M.R. Ramesh v. M/S. Prakash Moped House and Others*,² the apex consumer court warned against advertisements that use fine print to hide crucial information pertaining to products and services, thereby misleading the consumer.³

OBJECTIVE OF LEGAL CONTROL

The objective of regulating misleading advertising is to ensure that advertisements do not distort the facts about the product and mislead the buyer through subtle implications, omissions and false statements

2 Revision petition no.831 of 2001, National Consumer Disputes Redressal Commission, New Delhi.

3 <http://consumereducation.in/misleadingeng.pdf>, last accessed on 08-03-2012.

about the quality, quantity, features or other characteristics of the product or any service accompanying the product, e.g., repair and maintenance.⁴

DECEPTIVE ADVERTISING

- **Bait-And-Switch Advertising**

The bait and switch is a type of fraudulent advertising where advertisers will lure in a customer with the bait and then switch the deal so that the consumer ends up purchasing a higher priced item. A manufacturer may bait someone with the promise of a product at a very low price. Once the customer is hooked, the manufacturer will change the arrangement by claiming the product is no longer available at that price. The idea is that the seller has already drawn in the customer, so there is little chance that he or she will lose the customer even when the deal is changed. Consumer law allows for customers who have been a victim of the bait and switch to take action against the advertiser in court. If it is proven that the defendant has engaged in fraudulent advertising, then the plaintiff can be awarded damages. The bait and switch is considered to be false advertising because the manufacturer actually has no intention of selling the given item at the advertised price.

- **Online Deceptive Advertising**

Deceptive advertising is a practice that has been on-going for centuries. However, with technological advances, such as the Internet, online deceptive advertising has become more and more prevalent. Radio, television and online advertising have become the major outlets for manufacturers to promote their products. There are three main types of fraudulent online advertising: blatant misstatement of the facts, hidden fees and surcharges and false claim-belief interaction. Claim-belief interaction occurs when an advertiser's misleading claim results in an untrue assumption by the consumer. Many claims of online advertising fraud relate to privacy protection. When a consumer makes an online

4 <http://www.vikalpa.com/pdf/articles/2001/2001aprjun5157.pdf>, last accessed on 09-03-2012.

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purchase with a credit card, this information will not always be kept confidential. Also, many Internet sites will make claims of false investments or ways that an individual can make money by working at home. Many of these claims prove to be false.

- **Harassment and Coercion**

Many marketing techniques involve a certain intrusion into the sphere of privacy of the consumer, e.g. unsolicited mail or e-mail, cold-calling, door-to-door selling or touting for customers in public places. Therefore, each Member State has set up a framework of specific rules for distance marketing and face-to-face marketing in order to counter the specific risks for the consumer that are caused by these marketing techniques. These rules are tailored to the specific characteristics of the communication.

The notions of harassment and coercion dealt, serves as blanket for especially aggressive forms of pressurizing consumers in order to influence their transactional decision. Thus, a marketing practice may be considered as harassment or coercion with regard inter alia to its timing, nature or persistence or if it exploits a specific misfortune which has struck the addressed consumer. Thus, unwanted visits by a salesperson may, under certain circumstances, constitute an unfair commercial practice. In addition to the marketing practices outlined above that have been considered unfair because they unfairly intrude the consumer's sphere of privacy, a marketing technique may be considered aggressive if it places the consumer under pressure to decide whether or not to accept the seller's offer.

- **Undue influence**

While harassment and coercion are the most blatant forms of aggressive selling techniques, the notion of undue influence designates more subtle and therefore often more effective methods of unfairly influencing the consumer's transactional decision. Therefore, the laws set strict limits to emotional advertising. It may constitute an undue influence if the seller exploits the special feeling of trust the consumer addressed has towards a third party.

CONCEPT OF UNFAIR TRADE PRACTICE

A comprehensive definition of UTP is given in the MRTP Act. An identical definition of UTP appears in Section 2(r) of the CPA.⁵ Thus, the concept of unfair trade practice under the two legislations is the same. However, the mechanism for regulation of UTP under the two legislations is somewhat different. A UTP, in so far as it relates to advertising, refers to any unfair method or deceptive practice adopted for promoting the sale, use or supply of any goods, or for the provision of any service. Moreover, the following three advertising practices are particularly specified as unfair trade practices:

- ♦ Making false claims and misleading advertisements.
- ♦ Offering of bargain prices or pseudo discounts.
- ♦ Conducting of pseudo sales promotion contests.

The provisions relating to the regulation of unfair trade practices were incorporated in the MRTP Act, 1969, with effect from August 1, 1984. False Claims and Misleading Advertising. As provided under Section 36A (1) of the MRTP Act, the following statements, whether made orally or in writing or by visible representation, would amount to an unfair trade practice.

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- 5 Section 2 (r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;
- (1) the practice of making any statement, whether orally or in writing or by visible representation which,-
 - (i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
 - (ii) falsely represents that the services are of a particular standard, quality or grade;
 - (iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
 - (iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
 - (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
 - (vi) makes a false or misleading representation concerning the need for or the usefulness of, any goods or services;

REGULATORY MEASURES

In view of its enormous capacity to harm the public and the consumer interest, unfair advertising is sought to be regulated in almost all major countries of the world. In India, statutory provisions for the regulation of misleading advertising are contained in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and the Consumer Protection Act, 1986 (CPA). The regulatory measures for misleading advertisement under the MRTP Act and the CP Act are similar to a certain extent. Under both the enactments, a misleading or deceptive advertisement amounts to unfair trade practice (UTP).⁶ Moreover, the regulatory measures under the two major consumer protection legislations are applicable to goods as well as services and to private as well as public undertakings. The statutory provisions for the regulation of misleading advertisements of drugs and magic remedies are contained in the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. These provisions are briefly stated below

1. The Consumer Protection Act

Section 2 (r) of the Consumer Protection Act gives a comprehensive definition of unfair trade practice and Section 14 deals with the directions that the court can give, to deal with such practices. The consumer courts have given some excellent orders in this area, but they cannot deal with misleading advertisements like the MRTPC. For one, the consumer courts neither have the power nor the infrastructure to investigate, suo motto into misleading advertisement nor take up such cases on their own, as done by the MRTP Commission.⁷ The consumer courts can issue interim orders stopping such advertisements pending disposal of the case. They can give directions to the advertiser to

6 <http://www.vikalpa.com/pdf/articles/2001/2001aprjun5157.pdf>, last accessed on 09-03-2012.

7 The MRTP Commission established under Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969, discharge functions as per the provisions of the Act. The main function of the MRTP Commission is to enquire into and take appropriate action in respect of unfair trade practices and restrictive trade practices. In regard to monopolistic trade practices the Commission is empowered under section 10(b) to inquire into such practices (i) upon a reference made to it by the Central Government or (ii) upon its own knowledge or information and submit its findings to Central Government for further action.

discontinue such advertisements and not to repeat it. They can award compensation for any loss or suffering caused on account of such unfair trade practice; they can also award punitive damages and costs of litigation. But most important, they can direct the advertiser to issue corrective advertisement. Section 14(1)(hc) of the Act, describing the powers of the court, says that the court can order “corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement.” In so far as misleading advertisements are caused, this is the most important provision and can really have a deterrent effect, if used effectively. Unfortunately, this provision has hardly or perhaps never been used. Which advertiser will dare to publish false or misleading advertisement, with the threat of spending money on corrective advertisements that completely damage him, hanging over his head? Imagine this: an advertisement for a shampoo claims that it stops hair fall. The court looks at the evidence before it and holds that the advertisement was false. It then directs the manufacturer to issue corrective advertisements stating that the claim made in the earlier advertisement was false and that the shampoo does not prevent falling of hair, for three months on all television channels on which the false advertisements appeared earlier.

ORDERS OF THE APEX CONSUMER COURT PERTAINING TO MISLEADING ADVERTISEMENTS

In its order in the case of *M.R. Ramesh v. M/S. Prakash Moped House and Others*,⁸ the apex consumer court warned against advertisements that use fine print to hide crucial information pertaining to products and services, thereby misleading the consumer. And by awarding substantial compensation to the consumer, who was misled by such an advertisement, the National Commission made it clear that it would not take such violations of consumer’s right to information lightly. It’s advised to manufacturers and service providers “advertisements should not mislead and should give a clear picture of the quality of the goods sold.” This case pertains to a motorbike – Hero Honda CD- 100 that Mr. M.R.Ramesh bought in Bangalore in February

⁸ Revision petition no.831of 2001, National Consumer Disputes Redressal Commission, New Delhi.

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1993. His contention was that at the time of purchase, he was assured that the bike would run 80 kms on a litre of petrol. However, the bike gave 22 kms less than promised. He filed before the National Consumer Disputes Redressal Commission, New Delhi, an advertisement published in October 1993, wherein the manufacturer had made such a claim about the mileage of the motorcycle. The manufacturer, on the other hand, brought on record advertisements issued during the period which carried an asterisk on the numerical figure of 80 and at the foot of the advertisement in small print, said “at 40 kmph/ 130 kg,” thereby qualifying the claim. The National Commission made two important observations here: (1) that there was no explanation from the manufacturer as to how the advertisement shown by the consumer did not carry any such qualifying statement. (2) Even advertisements that specified at the bottom in fine print, “40 kmph/130 kg” or “under standard conditions” were not intelligible to the consumer and were therefore deceptive. Commission said “Such an advertisement as put out by the respondents is misleading. It amounts to unfair trade practice. When the respondents claimed that motor cycle can give mileage of 80 kms per litre, they cannot just be absolved of their responsibility not to clearly indicate that this would be so when the motor cycle is driven at a speed of 40 kms per hour and the load would be 130 kg. Simply by putting an asterisk and then indicating such condition in small print at the bottom of the advertisement is certainly deceptive. Moreover, when it is stated that this mileage can be obtained at a particular speed and load under “standard conditions,” then those standard conditions must be indicated so that the consumer is duly informed of the bargain he is in it. Rather in our view any such advertisement should take into account the conditions of the roads in the cities.” It directed the manufacturer not to make such a claim in future without stating clearly, intelligibly and “in the same type of letters,” the basis for the claim. The consumer wanted the price of the motor cycle to be refunded to him. However, keeping in mind the fact that the case was almost ten years old, the National Commission instead awarded the consumer a compensation of Rs 25,000.⁹

⁹ M.R.Ramesh v. M/S Prakash Moped House and Others, revision petition no. 831 of 2001, National Consumer Disputes Redressal Commission, New Delhi.

2, In the case of *Bhupesh Khurana v. Vishwa Buddha Parishad*,¹⁰ a class action suit was filed by twelve students, who had joined the BDS course offered by the Buddhist Mission Dental College run by Vishwa Buddha Parishad. The students' complaint was that the college, in its advertisement calling for applications for admission to the course, had given the impression that it was affiliated to Magadh University, Bodh Gaya and recognised by the Dental Council of India and was fully equipped and qualified to give the Bachelor of Dental Science degree to the students. However, after joining the college and attending classes, the students found to their dismay that the annual examinations were not being held because the college was neither affiliated to Magadh University nor the course, recognized by Dental Council. As a result, they not only lost two valuable academic years, but also the money spent on fees, hostel charges, etc. Holding the service rendered by the college to be deficient, the National Commission directed it to refund the admission expenses of all the twelve students along with 12 per cent interest calculated from the date of receipt of the amount till the date of payment. In addition, it also directed the institution to pay Rs. 20,000 to each of them by way of compensation for the expenses defrayed on purchase of books, hostel, etc., and for the loss of two academic years. It also awarded Rs. 10,000 as costs of the petition.

REGULATION OF ADVERTISING UNDER CPA

Although the definition of UTP given in the CPA is the same as the one used in the MRTP Act, the mechanism for its regulation under the CPA is substantially different. The regulatory provisions of the CPA are to be enforced through the redressed of grievance by a three-tier, quasi judicial machinery, set up at the district, state, and the national levels, known as the District Consumer Disputes Redressal Forum, the State Consumer Dispute Redressal Commission, and the National Consumer Disputes Redressal Commission, respectively. There are nearly 500 district forums (one in each of the districts) and 32 State Commissions (one in each of the states and union territories) in the country, besides the National Commission set up at New Delhi. A complaint against any unfair trade practice (which includes misleading

¹⁰ Civil Appeal No. 1135 of 2001.

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or deceptive advertising) as well as defective goods, deficiency in service, charging of excessive prices and offering of unsafe products for sale can be filed before the appropriate consumer court by any consumer or a recognized ‘consumers’ association or the Central Government or the State Government [Section 2(1) (b) of the CPA]. Consumer courts enjoy the powers of a civil court for purposes of hearing the cases filed before them [Section 13(3) of the CPA]. They are required to follow a simple procedure for the disposal of cases without adhering to technical rules of evidence. These are meant to provide speedy relief to the aggrieved persons. In the case of a UTP, a consumer court can pass a ‘cease and desist’ order against the erring party, award a suitable compensation to the aggrieved person, and order the payment of costs incurred by the winning party in pursuing the case (Section 14 of the CPA). Thousands of complaints are received and adjudicated upon by these consumer courts every month. The majority of the cases pertain either to a deficiency in a service or defective goods encountered by consumers. The number of cases pertaining to unfair trade practices arising out of misleading and deceptive advertising is negligible.

2. Monopolies and Restrictive Trade Practices Act

There are several laws, regulations and codes to tackle false and misleading advertisements. But one law that really made an impact in the eighties and the nineties was the Monopolies and Restrictive Trade Practices Act. In the year 1984, the government brought, through an amendment, “unfair trade practices” under the purview of the Monopolies and Restrictive Trade Practices Commission. And thereby brought advertisements under the scanner of the investigative wing the Office of the Director General, (Investigation and Registration) as well as the MRTP Commission.

While Section 36 A of the MRTP Act defines an unfair trade practice (UTP), Section 36B gives the Commission the power to inquire into any UTP: 1) upon its own knowledge or information, 2) upon receiving a complaint, 3) upon reference by the central or the state government and 4) upon application made to it by the Director General (Investigation and Registration) Similarly, 36 C provides for investigation by the DG into suspected unfair trade practices including misleading

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advertisements. The Commission can also ask the DG to conduct preliminary investigation. 36 D deals with the powers which may be exercised by the Commission inquiring into an unfair trade practice. 36D. Powers which may be exercised by the Commission inquiring into an unfair trade practice:

- (1) The Commission may inquire into any unfair trade practice which may come before it for inquiry and if after such inquiry, it is of opinion that the practice is prejudicial to the public interest or to the interest of any consumer or consumers generally, it may, by order direct that-
 - (a) The practice shall be discontinued or shall not be repeated;
 - (b) Any agreement relating to such unfair trade practice shall be void or shall stand modified in respect thereof in such manner as may be specified in the order;
 - (c) Any information, statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published, as the case may be, in such manner as may be specified in the order.
- (2) The Commission may, instead of making any order under this section, permit any party to carry on any trade practice, if it so applies and takes such steps within the time specified by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest or to the interest of any consumer or consumers generally and, in any such case, if the Commission is satisfied that necessary steps have been taken within the time so specified, it may decide not to make any order under this section in respect of that trade practice.
- (3) No order shall be made under sub-section (1) in respect of any trade practice which is expressly authorised by any law for the time being in force.

BAIT ADVERTISING REGULATIONS

The publication of any advertisement for the sale of a product or service on a bargain price is also not permitted under the MRTP Act [Section 36A (2)]. It would be an unfair trade practice if a person

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publishes any advertisement, whether in the newspaper or otherwise, for the sale, at a bargain price, of goods or services that are not intended to be offered for sale at the advertised price or for a reasonable period or in a reasonable quantity. Saks Promotion Contests provided under the MRTP Act [Section 36A (3)], an advertisement shall amount to an unfair trade practice if the advertiser offers any pseudo gift or prize to those participating in the sales contest or creating an impression that something is being given free of charge when it is fully or partly covered by the amount charged in the transaction as a whole. Moreover, conducting of any contest, lottery or game of chance or skill, for the purpose of promoting the sale of any product or any business interest, will also amount to an unfair trade practice. In many cases, the gift or prize offered free of charge along with the product is not really free — its cost is already included in the price of the product. Offering of any such gift or prize would amount to an unfair trade practice in two cases:

- When the intention of the seller is not to provide the gift or prize, i.e., the gift offer is not intended to be honoured.
- When an impression is created that something will be given free while its cost is fully or partly included in the price of the product offered for sale. Under the garb of promotional contests, sellers lure the unsuspecting and gullible consumers to buy unnecessary product

SELF REGULATION BY THE ADVERTISING STANDARDS COUNCIL OF INDIA¹¹

In the absence of an established statutory mechanism dedicated to the regulation of advertising, the industry itself has sought to develop a model for voluntary self-regulation in the form of the Advertising

11 The Advertising Standards Council of India (ASCI), established in 1985, is committed to the cause of Self-Regulation in Advertising, ensuring the protection of the interests of consumers. The ASCI was formed with the support of all four sectors connected with Advertising, viz. Advertisers, Ad Agencies, Media (including Broadcasters and the Press) and others like PR Agencies, Market Research Companies etc. Its main objective is to promote responsible advertising thus enhancing the public's confidence in Advertising.

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Standards Council of India ('ASCI') While in some cases, falsehood or misrepresentation of facts is obvious, in most cases, one has to go behind the advertisement to find out whether it is uttering falsehood or truth. And this is where the problem lies. By the time an unethical advertisement is exposed, it would have already done the damage. It is for this reason that the Advertising Standards Council of India is trying to inculcate self-regulation among its members so that such advertisements do not appear at all.

“Regulate yourself or someone else will” is its constant refrain. A voluntary body of all those involved in advertising, including advertisers, advertising agencies and the media, ASCI has drawn up a comprehensive advertising code for self-regulation. The four fundamental principles of the code are:

1. To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements.
2. To ensure that advertisements are not offensive to generally accepted standards of public decency.
3. To safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type this is unacceptable to society at large
4. To ensure that advertisements observe fairness in competition so that the consumer's need to be informed on choices in the marketplace and the cannons of generally accepted competitive behaviour in business is both served.¹²

LEADING CASES

1. Regaul v. Ujala Case¹³

A television advertisement promoting Ujala liquid blue showed that two-three drops of this brand were adequate to bring striking whiteness

¹² <http://consumereducation.in/misleadingeng.pdf>, last accessed on 08-03-2012.

¹³ M Balasundaram v. Jyothi Laboratories Ltd., Judgement of the MRTP Commission, 10/10/1994. Citation: 1995(82) CC 830.

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of clothes while several spoons of other brands were required for the same effect. A lady holding a bottle of Ujala was looking down on another bottle without any label, exclaiming ‘chhi, chhi, chhi!’ in disgust. The manufacturers of Regaul, a competing brand, complained to the Commission that the advertisement was disparaging its goods. The Commission was of the view that ‘a mere claim to superiority in the quality of one’s product’ by itself is not sufficient to attract clause (x). In the advertisement, neither did the bottle carry any label nor did it have any similarity with the bottle of any other brand. The Commission, thus, was of the opinion that it could not be classified as a case of disparagement of goods.¹⁴

2. Novino Batteries’ Case¹⁵

The judgement of the Supreme Court in the Novino Batteries’ case has had an important influence on all the cases raising questions about advertisements. Lakhanpal Industries Ltd., had collaboration with Mitsubishi Corporation of Japan for manufacturing Novino batteries.

Mitsubishi Corporation was the owner of the well-known trade name, National Panasonic. Lakhanpal Industries, in its advertisements, claimed that Novino batteries were made in collaboration with National Panasonic. This was technically incorrect as National Panasonic was only a trade name and Lakhanpal Industries could not have collaborated with a trade name. The Supreme Court ruled: When a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such a representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion? The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language. Similarly, a statement, which may be inaccurate

¹⁴ *Ibid.*

¹⁵ Lakhanpal National Ltd v. MRTP Commission, Judgement of the Supreme Court, 02/05/1989. Citation: 1989 AIR (SC) 1692.

in the technical literal sense can convey the truth and sometimes more effectively too than a literally correct statement. It is, therefore, necessary to examine whether the representation complained of contains the element of misleading the buyer. Does a reasonable man, on reading the advertisement, form a belief different from what the truth is?

The position will have to be viewed objectively and in an impersonal manner. Following this, the court held that, even though, literally, the representation made by Lakhanpal Industries was inaccurate, it could not be held to be an unfair trade practice.¹⁶

3. New Pepsodent v. Colgate Case¹⁷

Hindustan Lever Ltd. advertised its toothpaste, 'New Pepsodent' in print, visual and hoarding media, claiming that this particular brand was '102 percent better than the leading toothpaste.' In the television advertisement, samples of saliva of two boys were taken for testing hours after brushing. One boy had brushed with the New Pepsodent while the other one had used, according to the commentary, leading toothpaste. The test of the two samples was visually depicted side by side. The slide carrying the sample of 'the leading toothpaste' showed a large number of germs while that of the New Pepsodent showed negligible quantity of germs. While the sample was being taken from the boys, they were asked the name of the toothpaste they had used for brushing. While one boy said Pepsodent, the response of the second boy was muted. However, the lip movement of the boy indicated 'Colgate.' Also, when the muting was done, the music played in the background resembled that of the jingle used in the Colgate advertisement. The market share of toothpaste for Colgate and Hindustan Lever was 59 percent and 27 per cent respectively. The Commission was, thus, of the view that a reference to a 'leading and famous brand' implied Colgate. A doubt, however, arises from the fact that the statistics on market share are produced by the market research

16 *Ibid.*

17 Hindustan Lever Ltd. v. Colgate Palmolive (India) Ltd., Judgement of the MRTP Commission, 18/11/1998. Citation: 1999(2) CPJ 7.

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agencies and the consumers may not be aware of this. Thus, a viewer need not necessarily interpret ‘leading brand’ to mean Colgate. The Commission, however, was of the view that Colgate has been in the business of manufacturing and selling toothpaste in India for more than 50 years. According to the Commission, the word toothpaste has become synonymous with Colgate over the years. In addition, it noted that the jingle in the background was the familiar one of Colgate. The comparative product in the television commercial could, thus, be identified as the Colgate.

Dental Cream. Thus, it became a case of comparative advertisement and a claim could be made of disparagement of Colgate’s products.

RECOMMENDATIONS AND SUGGESTIONS

Following are the recommendations¹⁸

1. Formulation of a National Consumer Protection Comprehensive Policy in conformity with the CP Act; BIS Act, Weights and Measures Act and related laws with thrust on aggressive promotion of consumer rights protection and special focus on rural areas and deprived sections of consumers in active partnership with all actors and stakeholders.
2. Recognition of the existing consumer awareness campaign as a National Campaign in the Eleventh Plan (along the lines of e-governance campaign) since it cuts across all sectors and needs to be seen both at Central and State/UT level through convergence of skills and resources drawn from all government departments.
3. National System for Standardisation to provide a rational framework for development of unambiguous and reliable market/society driven standards in areas of economic and social activities especially in areas affecting health, safety and environment and to notify national standards for the country.
4. National system for Conformity Assessment and Compliance to bring in complete synergy at the national level in areas of

18 http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_consmr.pdf, last accessed on 08-03-2012.

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certification of products and services, accreditation and enforcement of standards will be adopted.

New Legislations and Institutions: The recommendations in relation to New Legislations and Institutions are:

(a) New Legislations

- 1. National Consumer Protection Authority Act:** It is proposed that a National Consumer Protection Authority (NCPA) be established to fill in the impending gap in legislation to be caused by winding up of the MRTPC as the Competition Commission of India (CCI) is not being empowered to deal with unfair trade practices, being hitherto dealt by the MRTPC.
- 2. National Quality and Standardization Authority Act:** This Act would cover all operational provisions to achieve uniformity in approach for setting up standards and ensuring compliance thereof.
- 3. A Central Legislation governing the spot markets** across the country will be enacted to enable and streamline traders in all commodities from all over the country;

(b) New Institutions

1. National Quality and Standardization Authority
2. National Consumer Protection Authority
3. National Electronic Spot Market
4. National Enforcement Authority
5. Internal Grievance Redressal System
6. Ombudsman
7. Special Verification Agents
8. Standing Committee

Existing Legislations: Consequent upon the recommendations made, certain modifications in the Existing Legislations are necessary, such as:

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- 1. Amendment of Consumer Protection Act, 1986** - There are a number of proposed Amendments relating to CPA including number of concepts under the definition section, such as Branch Office, inclusion of Goods likely to be hazardous, investor as a consumer, inclusion of the mandatory municipal services under the concept of service, expanding the definition of “deficiency,” extending the concept of UTP & RTP etc.
- 2. Amendment of BIS Act, 1986** – Existing BIS Act would be amended to facilitate implementation of National Standardization Policy and National Conformity System – proposed herein.
- 3. Simplification of Taxation Laws**–For a smooth flow of goods, it is necessary that comprehensive VAT should be implemented in all the states. There should be uniformity in all the state legislations and other local taxes should be discontinued. The Octroi acts as a barrier to the trade, so it should be abolished.
- 4. Amendment to the Forward Contracts (Regulation) Act, 1952 to strengthen the regulator.**

An amendment to the Forward Contracts (Regulation) Act, 1952 has been proposed and introduced in Parliament to provide financial and functional autonomy to FMC. It also provides for generation of internal resources to meet the expenses towards regulation of the Commodity Derivative markets.
- 5. Amendment to Weights and Measures Act, 1976** - To keep abreast of technological advancements and also to enable Special Verification gents (SVAs) for taking up verification of sophisticated weighing or measuring instruments.
- 6. Review of various laws and regulations:** To address the new developments in the field of retailing like direct selling.

CONCLUSION

In order to protect consumer interest, the government should establish an independent broadcast regulator who will draw up a strict code of practice - particularly for telemarketing services - so that only those products and gadgets that do not violate the Drugs and Magic Remedies Act and have proven value are allowed to be promoted on

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television. As for other advertisements that are found to be false or misleading corrective advertisements are the best solution. Another option is to revive the MRTPC as the Unfair Trade Practices Commission with the specific purpose of preventing false and misleading advertisements. Though comprehensive legal framework for the control of unfair, deceptive and misleading advertising in India exists, the practice continues almost unabated. Consumers and their organizations must assert their rights against unscrupulous businessmen indulging in such a practice and bring such cases to the notice of the enforcement agencies, which, in turn, have to play the role of a watch-dog of public interest.



3

ADVERTISEMENTS AND CONSUMER'S RIGHT TO INFORMATION

*Y.G Murlidharan**

“Marketing is getting increasingly impersonal. Consumer choice is influenced by means of advertising utilizing highly developed arts of persuasion. The consumer typically cannot know whether drug preparations meet minimum standards of safety, quality and efficacy. He usually does not know how much he pays for consumer credit, whether one prepared food has more nutritional value than another, whether the performance of a produce will in fact meet his needs, or whether the ‘large economy size’ is really a bargain...”

[John F Kennedy, in his speech in the Congress on 15th March 1962]

Fifty years after this historic speech by John F Kennedy, the situation appears to be the same. In fact the marketplace has become more complicated for the consumer. The marketing and advertising industry has grown gigantically. The television, internet and mobile telephone have

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revolutionized the advertising and marketing industry. Consumers are bombarded with messages to buy, buy and buy. As Martin Lindstrom has observed in his recent book *buyology*, whether we're buying a cell phone, a Swiss anti-wrinkle cream, or a Coca-Cola, shopping is a huge part of our everyday lives. Which is why each and every day all of us are bombarded with dozens, if not hundreds, of messages from marketers and advertisers' TV commercials, Highway billboards, Internet banner ads. Strip mall storefronts. Brands and information about brands are coming at us constantly, in full speed and from all directions. The result of all these is that the consumer is confused and has very little access to accurate and reliable information.

Basically, consumer information is anything that adds to the knowledge about a product, a service, a law, or anything that relates to the things consumers buy and use in everyday life. Of the five consumer rights spelled out by Kennedy – safety, information, choice and redress – the right to information is perhaps the most basic, if only because, without information, the others are frequently impossible to obtain. A consumers' need for information arises for various reasons. It has a close links with other consumer rights. First, the right to safety is crucial and in some cases good consumer information can literally save lives. If a consumer doesn't know about using an electronic gadget it could make a difference between life and death. Similar is the case with food, drugs and cosmetics.

The right to choose is the summation of all the consumer's rights and without consumer information choice is meaningless. If a consumer lacks information about the availability of goods and services, how it performs, what it costs and whether it represents value for money, he/she cannot make a choice. Besides, consumers can make a choice only when information is available about the alternatives. If information about different goods and services are not available, there is no means of comparing them and perhaps of discovering that some of them are bad and not useful. It is information that will reveal that goods that are essentially the same are priced very differently. Similarly, when things go wrong, it is information about the redress mechanism that enables a consumer to get replacement or compensation for the injury suffered. Finally, a consumer can assert his rights only when he is well informed

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about the various legal instruments available to approach the relevant Redressal forums. Thus the realization of all the basic consumer rights depends on consumers' right to information.

If protection of consumers depends on 'information,' it is obvious that the information provided to them should be true and not misleading. In other words the quality, source and methodology of providing information are what that matters. Though consumers get information from various sources, not all of them can be trusted. Getting the right information which gives the facts that a consumer needs, is important. For this consumers have to filter the vast amount of information that he receives. Filtering, as applicable to consumer information, refers to checking information with THREE parameters. Firstly, it is about the independence of the information. Consumers receive information from various sources, most of them with commercial interest. Information about a product may flow from the manufacturer, seller, distributor, retailer and trade associations. More specifically, it may be through advertisements. These sources would not like to provide consumers with inaccurate information. But neither are they likely to highlight any drawbacks inherent in their products. Advertisements are one of the important sources of information. But the contents cannot be and should not be accepted as true and fair unless the consumers put in extra efforts to decipher its contents. After all the purpose of advertisement is to attract a consumer towards a product or service and to earn his/her brand loyalty.

It is well documented that though advertisements do provide some information it also plays on the psychology of the consumers. The words, catchy slogans, colour, brand ambassadors, pictures, layout etc., are used to convey messages about the product. In the process these 'message conveyers' blur the critical mind of the consumers. Before placing an advertisement in the media, marketers try to uncover what is going on in the minds of the consumers when they choose one brand to another, what information passes through their brain's filter and what information doesn't. Martin Lindstrom calls this as 'Neuro marketing,' an intriguing marriage of marketing and science. It is a study of the subconscious thoughts, feelings and desires that drive the purchasing decisions consumers make each and every day of our lives.

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Many sources of information are subjective and do contain value judgments. Making exaggerated claims about the small benefits of a product and concealing its major drawbacks is what some advertisements do. For instance a pill or a drug may have one benefit but several side effects. The labels highlight the benefit and place information about the side effects in a corner of the label that goes unnoticed by the consumer. Even the size and font of the letters differ. Hence the second element that a consumer has to ascertain is whether the information is factual.

The third element that a consumer has to consider is whether the information is accurate. As goods and services become increasingly complex, getting accurate information about products and services is becoming difficult. Though advertisements do not contain inaccurate information, nevertheless, they may not be accurate as well. Accuracy may refer to the number of years a product can be used, the mileage of the vehicle per liter of fuel, the amount of energy that can be saved and such other parameters. Very rarely producers, manufacturers and traders will provide accurate information. Consumers have to depend on test reports published by independent testing agencies. Unfortunately, in India such reports are yet to gain popularity. At present the Consumer Education and Research Centre [CERC] in Ahmedabad and Voluntary Organization in the Interest of Consumer Education [VOICE] are testing products and publishing reports. The CERC's magazine 'Consumer Insight' and 'Consumer Voice' published by VOICE are the two independent sources of information available to consumers.

Self-Regulation vs. Legal Regulation

Providing independent, factual and accurate information about their products and services is one of the moral and legal obligations of the manufacturers, sellers, traders and retailers. In certain developed countries trade associations, chambers of commerce etc., provide independent information about the products produced by the industry they represent. Irrespective of the brands, trade bodies publish reports about products for the benefit of the consumers and traders themselves. But it is doubtful whether information provided in the form of advertisements by manufacturers is truly factual and accurate. With consumer's inability to distinguish between information and

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advertisement blurred, many a time advertisements are taken as truthful and accurate. Particularly in India where the bulk of the consumers are carried away by colourful posters and attractive media slots, often inaccurate information is fed through advertisements. Besides, illiterate consumers believe whatever they hear as factual and accurate. These and other reasons call for insulating consumers from the hazards of exaggerated advertisements.

Two instruments are available to help consumers get proper information about products and services. Firstly, it is self-regulation of advertisements and secondly legal instruments. Many countries, including have established self-regulatory mechanisms to monitor advertisements in the interest of consumers. In India, the Advertisements Standards Council of India (ASCI) has been involved in this process. While many advertisements considered being unethical, immoral and obscene has been withdrawn or amended as per the instructions of the ASCI. A complaints' handling mechanism has been set up within ASCI to look into the complaints from the consumers. However the greatest drawback of self-regulation is that it is voluntary and any industry may opt out of the self-regulatory mechanism. In a situation wherein laws by themselves are ineffective, it would be too much to expect results from a self-regulatory mechanism.

In India a number of laws have been framed to provide accurate and factual information to the consumers. The labelling requirements provided under various laws and regulations goes to prove the commitment of the state in providing information to the consumers. From the view point of consumer rights, any law on information should:

1. Require all necessary information to be given to consumers about the goods and services they acquire, especially in relation to therapeutic goods and toxic products by:
 - a. Requiring appropriate statements and warnings to accompany toxic products.
 - b. Regulating the supply of therapeutic goods and toxic products to ensure information is disclosed in a manner consistent with international best practice.

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- c. Establishing procedures to monitor national and international developments relating to therapeutic goods and toxic products.
 - d. Prescribing mandatory information standards to require particular information to be disclosed about particular goods not otherwise regulated.
2. Ensure consumers are able to compare different products, by;
 - a. prohibiting deceptive packaging.
 - b. requiring packages to clearly identify their price and their contents.
 3. Protect consumers from conduct which is false or misleading, by:
 - a. Prohibiting conduct, in relation to the supply of goods or services to a consumer, that is misleading or deceptive or likely to mislead or deceive or which is unfair.
 - b. Prohibiting representations about goods or manufacturers and suppliers which are not true or which could mislead consumers.
 - c. Prohibiting any particular sales or marketing practices which act to the detriment of consumers.
 4. Require all necessary information to be given to consumers about food and drinks in order to enable them to make informed decisions regarding health and nutrition
 5. Ensure that necessary information about goods and services is required to be accurate and comprehensible

Keeping the above requirements in view the Government of India has made it mandatory to provide certain categories of information and it is scattered over in a host of legislations. Some of them are highlighted below.

The Food Safety and Standards Act 2006, every package of food shall contain information on the label with regard to name of the food, list of ingredients and percentage of ingredients subject to certain conditions. Nutritional information or nutritional facts per 100gm or 100ml or per serving of the product shall be given on the label contain the energy value in kcal, the amounts of protein, carbohydrate and fat in

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gram or ml. Considering the fact that many consumers would like to chose between vegetarian and non-vegetarian food, the Regulation requires the label to contain a symbol with a colour code.

The Legal Metrology Act, under Rule 4 and 6 requires every pre-packed commodity offered for sale, distribution or delivery to contain on the label the following declarations:

- The name and address of the manufacturer, or where the manufacturer is not the packer, the name and address of the manufacturer and packer and for any imported package the name and address of the importer
- The name, address, telephone number, e-mails ID, if available, of the person who can be or the office which can be, contacted, in case of consumer complaints.
- The common or generic names of the commodity contained in the package and in case of packages with more than one product, the name and number or quantity of each product.
- The net quantity, in terms of the standard unit of weight or measure, of the commodity contained in the package or where the commodity is packed or sold by number, the number of the commodity contained in the package;
- The month and year in which the commodity is manufactured or pre-packed or imported.
- The retail sale price of the package
- Where the sizes of the commodity contained in the package are relevant, the dimensions of the commodity contained in the package and if the dimensions of the different pieces are different, the dimensions of each such different piece.

The Drugs and Cosmetics Act, 1940 as amended from time to time provides for regulation of import, manufacture, sale and standards of drugs and cosmetics thereby protecting the interests of the consumer. According to this Act all drugs sold should contain information about the name of the medicine, name and address of the manufacturer, batch number and date of manufacture, date of expiry of the medicine, detailed

composition of the medicine and precautions regarding harmful effects or side effects of the medicine. If the medicine contains a substance specified in Schedule G (of the Act), the label should contain the words 'Caution: it is dangerous to take this preparation except under medical supervision.'

The Textiles (Consumer Protection) Regulation, 1988 under the provisions of Textiles Development and Regulation) Order, 2001 and under Section 3 of the Essential Commodities Act, 1955 prescribes the following markings to be made by the manufacturers before their packing for delivery.

- Markings on Tops containing wool fibre: Name and address of the manufacturer, net weight, mean fibre length and fibre composition of tops
- Markings on Yarn made wholly from cotton: Name and address of the manufacturer, count of yarn, net weight and month of year and packing
- Markings on cloth containing cotton and/or wool fibre: Name and address of the manufacturer, length and width, fast to normal washing or not, seconds, damaged piece as the case may be, month and year of packing fibre composition and fibre composition

The emergence of independent regulatory institutions, have given a boost to the consumers' right to accurate and factual information. The Insurance Regulatory and Development Authority (Insurance Advertisements and Disclosure) Regulations, 2000, requires every insurer or intermediary or insurance to follow the norms specified by the IRDA will issuing advertisements. The advertisements released by the insurance companies should not be unfair or misleading. The following advertisements are considered to be unfair or misleading: that fails to clearly identify the produce as insurance

- a. makes claims beyond the ability of the policy to deliver or beyond the reasonable expectation of performance
- b. describes benefits that do not match the policy provisions
- c. uses words or phrases in a way which hides or minimizes the costs of the hazard insured against or the risks inherent in the policy

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- d. omits to disclose or discloses insufficiently, important exclusions, limitations and conditions of the contract
- e. gives information in a misleading way
- f. illustrate future benefits on assumptions which are not realistic nor realizable in the light of the insurer's current performance
- g. where the benefits are not guaranteed, does not explicitly say so as prominently as the benefits are stated or says so in a manner or form that it could remain unnoticed
- h. implies a group or other relationship like sponsorship, affiliation or approval, that does not exist
- i. makes unfair or incomplete comparisons with products which are not comparable or disparages competitors.

The Insurance Regulatory and Development Authority
(Protection of Policyholders' Interests)

Regulations, 2002 has specified that all life insurance policies should contain the following information:

- a. the name of the plan governing the policy, its terms and conditions
- b. whether it is participating in profits or not
- c. the basis of participation in profits such as cash bonus, deferred bonus, simple or compound reversionary bonus
- d. the benefit payable and the contingencies upon which there are payable and the other terms and conditions of the insurance contract
- e. the details of the riders attaching to the main policy
- f. the date of commencement of risk and the date of maturity or dates on which the benefits are payable
- g. the premiums payable, periodicity of payment, grace period allowed for payment of the premium, the date the last installment of premium, the implication of discontinuing the payment of an installment of premium and also the provisions of a guaranteed surrender value

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- h. the age at entry and whether the same has been admitted
- i. the policy requirements for (1) conversion of the policy into paid up policy (2) surrender (3) nonforfeiture and (4) revival of lapsed policies
- j. contingencies excluded from the scope of the cover, both in respect of the main policy and the riders
- k. the provisions for nomination, assignment and loans on security of the policy and a statement that the rate of interest payable on such loan amount shall be as prescribed by the insurer at the time of taking the loan
- l. any special clauses or conditions, such as, first pregnancy clause, suicide clause etc., and
- m. the address of the insurer to which all communications in respect of the policy shall be sent
- n. the documents that are normally required to be submitted by a claimant in support of a claim under the policy

The Telecom Regulatory Authority of India (TRAI) requires the service providers to comply with the following norms.

- All publication/Advertisements of tariffs shall be in a specified format and shall provide certain essential information.
- The websites of the service providers and the tariff brochures available in the retail outlet shall contain complete details of the tariff plans.
- No chargeable value added service shall be provided to a customer without his explicit consent.
- The pulse rate/tariff for premium rate service shall be published in all communications/advertisements.
- Service providers shall inform customers in writing, within a week of activation of service, the complete details of his tariff plan. The changes in any item/aspect of tariff in the chosen package shall also be intimated to the customers in writing.

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- No tariff plan shall be offered, presented, marketed or advertised in a manner that is likely to mislead the subscribers.
- All monthly fixed recurring charges which are compulsory for a subscriber under any given plan shall be shown under one head.

However neither self-regulation nor legal provisions have worked effectively. Misleading advertisement continue to flourish in the media and the market place. The number of complaints filed in the consumer forum across the country is an indication of the failure to regulate advertisements. Particular reference may be made to advertisements relating to real estate business, drugs and medicines, investment proposals and multi-marketing schemes. Though most of these businesses come within the purview of one or other regulatory authorities, the loopholes in the law have come in the way of prosecution of the wrong doers. Secondly, advertisements are so nicely worded that they escape the clutches of law, but at the same time attract the consumer. Third, provisions to protect consumers from unethical and unlawful advertisements are scattered in a number of legislations, thereby making it difficult for consumers to approach the appropriate forum. Hence the need for a comprehensive law as available in other countries. The following steps are suggested:

- The existing laws, rules and regulations relating to advertisements and labeling requirements are to be studied in detail.
- The number of complaints, prosecutions etc., under each of the laws are to be compiled and analyzed. This will reveal the loopholes and lacunae in each of the legislations.
- The laws, rules, regulations and best practices across the world are to be studied and a comparative analysis prepare
- Based on the above analysis a draft law is to be prepared.



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4

IMPACT OF MISLEADING ADVERTISEMENTS ON CONSUMERS AND SOLUTIONS

*Vivekha Pon, Ritika Mogha & Richa Chaturvedi**

INTRODUCTION

After globalization, India is rapidly embracing consumerism. Competition in the market has increased manifold and the producers face an increasing need to attract customers to buy their products. Therefore, a lot tactics are employed to lure the audience. As long as the techniques used are fair, there will be a healthy competition, which will translate to the benefit of the consumers. But the problem arises when misleading tactics are used. These misleading advertisements have an adverse impact on the customers. It affects the consumers freedom of choice, purchasing behavior and may sometimes prove to be hazardous. Hence, a check on misleading advertisement becomes imperative.

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The advertisement has a very strong psychological impact. Even if a person is not in a need of a product, advertisements create an urge in him/her to buy the product.

There are self regulatory organizations for instance, the Advertisement Standard Council of India (ASCI) functioning to regulate the advertisements and also to deal with the complaints against misleading advertisements. They have strict codes of conduct for advertisement but they lack enforcement powers. In order to strengthen the regulatory mechanism, the Ministry of Corporate Affairs has proposed to set up a National Consumer Protection Agency which will be empowered to prevent misleading advertisements and to also initiate suo moto action.

The problematic situation is that life of an advertisement is limited (usually 4 to 6 months) and by the time an action is taken, the purpose of the advertisement gets served. Hence a speedy mechanism should be put in place. The awareness among the consumers is the most important factor to deal with misleading advertisements. In order to determine the awareness among the customers an empirical study becomes important. There is also a need to analyze the real life instances to come up solutions for the same.

IMPORTANCE OF ADVERTISEMENT IN THE PRESENT DAY

Advertisement is a means by which a seller approaches the buyer. An advertisement will be successful if it evokes confidence in the public. Therefore, any practice which tends to impair this confidence should not be permitted.

In today's world, advertisement has a lot of impact on the people. In India, television advertising accounts for nearly 42% of the total expenditure on advertisements, whereas print and outdoor make up 43% and 5% respectively. Radio and retail advertising constitute the rest at 4% and 0.50 % respectively.¹

1. Viveat Suasana Pinto, Mixed ad industry outlook for 2012, Business Standard, Mumbai, 05.03.2012, available at <http://www.business-standard.com/india/news/mixed-ad-industry-outlook-for-2012/466749/>, last visited on 14.07.2012.

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Zenith Opt media has estimated that India's advertising expenditure will reach Rs.30,704 Crores in 2012, growing at a rate of 37.50 % over the year 2009.²

SI.NO.	MODE OF ADVERTISEMENT	ESTIMATED EXPENDITURE FOR 2012 IN CRORE
1	Newspapers	13,957
2	Television	12,801
3	Outdoor	1,408
4	Radio	965
5	Magazines	729
6	Internet	669
7	Cinema	172
	TOTAL	30,701

According to Mary Gardiner Jones,³ “advertisements today are said to be primarily designed to communicate by evoking the overall feelings of their audience and associating their expectations and desires – both material and psychological in some way with the product. As one advertising expert puts it, “the role of advertising is to connect human desires with production and so to create mass markets and to make the satisfaction and these desires an economic function.”

A well organized advertising also enables the consumer to make an informed choice of the goods he/she chooses to buy. Hence, it is

2 Sapna Nair, Ad expenditure in India to reach Rs. 30, 704 crore by 2012, 16.12.2009, available at http://www.afaqs.com_news/story/25798_Ad-expenditure-in-India-to-reach-Rs-30704-crore-by-2012, lastvisited on 14.07.2012.

3 Mary Gardiner Jones, The Cultural and social impact of advertising on American Society, Osgoode Hall Law Journal, Vol.8, No.1, p.68, available at http://heinonline.org/HOL/Page?handle=hein.journals/ohlj8&div=9&g_sent=1&collection=journals, last visited on 20.07.2012.

understood that advertising is important and it is also understood that prevention of misleading advertisements is also equally important.

MEANING OF MISLEADING ADVERTISEMENT

The term misleading advertisement has not been specifically defined under the Consumer Protection Act, 1986 or any other legislation in India. However, Section 2(1)(r) defines the term 'unfair trade practice' under which misleading advertisements may be covered.

The major Law Lexicon⁴ defines 'misleading advertisement' as, "Advertising that deceives or is likely to deceive those to whom it is addressed or whom it reaches and, because of its deceptive nature, is likely to affect consumers' behaviors or injuries or is likely to injure a competitor."

CONSTITUTIONAL PROTECTION TO ADVERTISEMENTS

Article 19(1)(a) of the Constitution of India provides for right to freedom of speech and expression. But wherever the public interest warrants, the Courts have always imposed reasonable restrictions on this right, in accordance with Article 19(2).

In **Hamdard Dawakhana v. Union of India**,⁵ the Supreme Court was of the opinion that, "when an advertisement takes the form of commercial advertisement which has the element of trade or commerce, it no longer falls within the concept of freedom of speech, for the object is not the propagation of ideas, social, political or economic or furtherance of literature or human thought; but the commendation of the efficacy and importance of certain goods."

Later in **Tata Press Limited v. Mahanagar Telephone Nigam Ltd (MTNL)**,⁶ Supreme Court overruled the above position and held that commercial advertisement is also a part of freedom of speech and expression. Commercial Advertisement would result into generation of resources for such newspapers and these resources would result in a

4 P. Ramanatha Aiyer, The Major Law Lexicon, 4th edn., 2010, Vol.4 [J-O], Lexis Nexis, Butterworths Wadhwa, Nagpur, p.4353.

5 Hamdard Dawakhana (Wakf) Lal... v. Union of India, 1960 AIR 554 at 555.

6 Tata Press Limited v. Mahanagar Telephone Nigam Ltd (MTNL), (1995) 5 SCC 139

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better and effective running of the newspapers. Moreover, people have a right to commercial information, which if not allowed, the economic system in a democracy would be handicapped.

A FEW TYPES OF MISLEADING ADVERTISEMENTS

The misleading advertisers adopt various tactics to wrongfully attract the consumers to buy their products. Though they are of many types, the significant among them are Puffery, Bait advertisements and surrogate advertisements.

Puffery⁷

Puffery serves to 'puff up' an exaggerated image of what is being described or shown. Puffery can push one product attribute at the implicit expense of another attribute or it can also push the overall value of a product. It means the use of harmless superlatives. It is used to boast of the merits of their products (best, finest, number one, etc.). Law permits trade puffing or exaggeration. But subjective statements of opinion about a product's quality are so untrue that it becomes an outright spoof and which is not true.

For example - Hindustan Lever company was directed to stop its campaign that its Pepsodent toothpaste was 102 per cent better than the Colgate toothpaste. Hindustan Lever was restrained from referring to any Colgate Toothpaste in any manner, either directly or indirectly, by means of any allusion or hint in its TV commercials or newspaper advertisements or hoardings.

Hence, puffery has been permitted by law but not at the cost of disparaging products of other manufacturers or that will result in loss or injury to the customers.

Bait advertising⁸

The 'bait' is the especially an attractive offer designed to lure customers to a business. When they arrive, the bait is unavailable and the customer is encouraged to buy other more expensive goods. This

7 Dr. Sheetal Kapoor, Legal and ethical aspects of advertising available at http://www.exchange4media.com/e4m/media_matter/omnibus.asp, last visited on 22.07.2012.

8 *Ibid.*

is called a 'bait and switch' scam. It mainly takes advantage of consumer psychology and deprives consumers of a choice.

It can be explained through the following example. When a consumer is lured into a retail outlet by an advertisement for a low cost item and then is sold a higher priced version. The advertisers advertise as 'Sale upto 50% off' and when a customer enters the shop he finds out the sale is only on a handful outdated selected items and he is pressurized to purchase another more expensive item which is on 'fresh stock.'

Surrogate advertisements

Surrogate advertising is when an advertisement has the logo or brand of another company advertised within it.⁹ One of the major reasons for surrogate advertisement is to circumvent the laws relating to ban on the advertisement of alcohol or cigarettes. The product shown in the advertisement is called the 'surrogate.' The surrogate could either resemble the original product or could be a different product altogether, but using the established brand of the original product.

Other Misleading Methods

Sometimes advertisements make inconsistent comparisons, by comparing with other competitive products. But they compare only those attributes where their product wins, leaving the false impression that it is the best of all the products. Another method commonly used is misleading illustrations of serving suggestion pictures on food product boxes showing additional ingredients beyond those contained in the package. Sometimes false coloring is used to indicate that the food is riper, fresher and healthier than what it actually is. The advertiser also adopts the process of angel dusting whereby adding an ingredient in an insignificant quantity but advertising it as an important component. Some advertisers simply guarantee without a remedy in case the product fails the expectations.

9 Ms. Barcelona Panda, Surrogate Advertisements: India's Response Towards International Regulations <http://www.manupatrafast.in/pers/Personalized.aspx>, last visited on 15.07.2012.

VERGHESE COMMITTEE REPORT

Vergheese Committee Report in 1978 is one of the significant reports, based on which certain general rules of conduct were laid down by the Government. Some of the rules are relating to misleading advertisements. According to the rules:

1. No advertisement shall contain references which are likely to lead public to infer that the product advertised or any of its gradients has some property or quality which is incapable of being established e.g. care for baldness.
2. Advertisement should not be designed to confuse the consumer's mind as:
 - a. The imitation of the trademark or name of a competitor or the packaging or labeling of goods or
 - b. The imitation of advertising devices, copy, layout or slogans.

The report also provides a safeguard to prevent misleading advertisements, by mentioning that the advertisers or their agents must be prepared to adduce evidence to substantiate any claims or illustrations.

Even All India Radio¹⁰ and Doordarshan while preparing their codes for commercial advertising have taken inspiration from this report.

LEGISLATIONS THAT SEEK TO PREVENT MISLEADING ADVERTISEMENTS

The ever increasing growth of advertisements necessitated the enactment of various legislations to keep a check over those likely to mislead the people. The advertisers have a responsibility towards the society and hence it is necessary to ensure the truthfulness and honesty of representation made in the advertisements. In India, various laws are prevalent to ensure the protection of the interest of the people.

Some of the specific legislations dealing with misleading advertisement are :

¹⁰ Code for commercial advertising over All India Radio available at [http://allindiaradio.gov.in/Information/ Commercial+Code](http://allindiaradio.gov.in/Information/Commercial+Code), last visited on 21.07.2012.

1. Consumer Protection Act, 1986:

The Act was enacted in 1986 to ensure a speedy and efficient remedy against misleading advertisements. The term 'unfair trade practice' defined under Section 2(1)(r) of the Act encompasses misleading advertisements. A consumer who is affected by a misleading advertisement can file a complaint before a consumer forum and the forum is empowered to take the following actions as per Section 14 of the Act:

- i. Award compensation for the loss suffered by the Complainant
- ii. Pass a cease and desist order
- iii. Issue interim orders stopping such advertisements during the pendency of the complaint
- iv. Direct the advertiser to issue corrective advertisement

2. The Monopolies and Restrictive Trade Practices Act, 1969 (limited applicability)

The Act is repealed and replaced by the Competition Act, 2002, but as per Section 66(3) of the Competition Act, all cases pertaining to monopolistic trade practices pending before the MRTP Commission are transferred to the Competition Appellate Tribunal and adjudicate in accordance with the provisions of the MRTP Act. The MRTP Act has been very effective in curbing misleading advertisement.

3. The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

This Act was enacted to control the advertisement of drugs in certain cases and to prohibit the advertisement of drugs in certain purposes of remedies alleged to possess magic qualities. This Act does not provide for issuing corrective advertisements and also the enforcement of this Act is poor due to the presence of large unorganized sellers in the country.

4. The Drugs and Cosmetics Act, 1940

Initially this Act dealt only with drugs, later in 1962, a provision for cosmetics was also added. At present this Act provides for remedy against misbranded, adulterated, spurious drugs and cosmetics, etc. But

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the authorities under the Act are not yet equipped to deal with cosmetics. Not a single case has been filed under this under Act regarding cosmetics.

ROLE OF ASCI AND PROPOSED NCPA

Advertising Standards Council of India (ASCI) is a self-regulatory voluntary organization of the advertising industry. It is represented in all committees working on advertising in every ministry of the Government of India. It receives and processes 120-140 complaints annually against advertisements from a cross-section of consumers and the general public.

ASCI has a code for self-regulation drawn up by people in professions and industries in or connected with advertising, in consultation with representatives of people affected by advertisements and has been accepted by individual corporate bodies and associations. Some of the basic guidelines are:

- To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements.
- The guidelines aim to achieve the acceptance of fair advertising practices in the best interests of the ultimate consumer.

The ASCI has also attempted to define the term advertisement as, “a paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions or behavior of those to whom it is addressed. Any written or graphic matter on packaging or contained in it, is subject to this code.”

ASCI has introduced a Fast Track Complaints Council (FTCC) for speedy resolution of intra-industry complaints. The aim of FTCC is to dispose off the complaints within 7 days of registration.

Though ASCI is trying to regulate the advertisements, it does not have any executive power to enforce its decisions. Therefore, the Government is proposing to set up a National Consumer Protection Agency (NCPA) to monitor and penalize companies that make misleading claims in their advertisements. The NCPA, under the Consumer Affairs Ministry, would be empowered to take severe action, including recall of the product and slapping cases against the firms.

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In order to overcome the drawbacks faced by ASCI, NCPA will also have an executive as well as suo motto powers to take action against the erring companies.¹¹ Though it is a welcome step, the NCPA aims only at curative remedy and not preventive remedy. It is suggested that before an advertisement is aired, the NCPA should be given the power to peruse the evidences and ensure the correctiveness of the claims.

PROTECTION OF CHILDREN AGAINST MISLEADING ADVERTISEMENTS

Children account for a huge target market of 300 million available to advertisers and hence they focus on them to make their advertisements more effective. The advertisers try to exploit the following characteristics of children:¹²

- Children are naive and gullible and are vulnerable to advertisers' enticements.
- They lack independent judgment and experience.
- It is the strategy of selling to parents by convincing the children.

Doordarshan prevents such exploitation by expressly excluding advertisements which suggests in any way that, unless the children buy or encourage other people to buy the products or services, they will be failing in their duty or lacking in loyalty to any person. It also prevents advertisements that lead children to believe that if they don't use the advertised product, they will be inferior in some way to other children or that they are liable to be condemned or ridiculed.¹³

11 Ritu Kant Ohja, Government plans watchdog to check misleading advertising advertisements, 09.03.2012 available at <http://www.indianexpress.com/news/govt-plans-watchdog-to-check-misleading-ads/921694/>, last visited on 14.07.2012.

12 Dr. Sheetal Kapoor, Legal and ethical aspects of advertising available at http://www.exchange4media.com/e4m/media_matter/omnibus.asp, last visited on 22.07.2012.

13 Sheth K. Dilip, Code for commercial advertising on Doordarshan, Consumer Protection law, 2003 edn., Snow White Publications, Mumbai at p.1340.

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SELF REGULATION TO PREVENT MISLEADING ADVERTISEMENTS

A self regulation by various entities involved in advertising is definitely more effective than any other mode of regulation.

The following bodies have devised a code of self regulation for themselves:¹⁴

1. The Indian Newspaper Society- members comprising of newspaper and magazines has developed a code of advertising ethics.
2. Consumer Education Research Centre- it creates awareness amongst the consumers against unethical and misleading advertising and it also fights cases against erring advertisers.
3. Self-regulation by Advertisers and Agencies- they recognize that their advertisements reflect on the company, therefore they carefully scrutinize all messages to ensure that they are consistent with the image the firm wishes to project.
4. Regulation of Telecom Companies by TRAI- the Telecom regulator directed the operators not to present misleading advertisements of their tariff plans. It also directs the Companies to show recurring charges to Consumers under single head.¹⁵

STUDY OF THE POSITION TAKEN BY THE COURTS WHILE DEALING WITH MISLEADING ADVERTISEMENTS

The cases reported under Section 2(1)(r) of the Consumer Protection Act for unfair trade practices are on a rise. The cases under this provision range from airlines to educational institutions to electronic goods.

The consumer forums have consistently opposed the practice adopted by advertisers of reducing crucial information into minute letters

14 Advertising ethics and laws, Paper 3 available at <http://210.212.95.124/studymaterial/pgdapr/pgdapr-103.pdf>, last visited on 22.07.2012 at p.23.

15 PTI, Don 't give misleading ads on tariff plans: TRAI to telecom companies, Times of India dated 18.05.2012a vailable at http://articles.timesofindia.indiatimes.com/2012-05-18/telecom/31765239_1_tariff-plan-telecom-regulatory-authority-telecom_operators, last visited on 14.07.2012

thereby trying to conceal the same from the notice of the consumer. In another instance, in *Kingfisher Airlines Kingfisher House Western Express Highway v. ML Sudheen*,¹⁶ the National Commission has ruled against the advertisement of Kingfisher airlines whereby it promised a package of 26 tickets for a sum of Rs. 50,000. But the complainant was later refused tickets to the desired destinations. The argument of Kingfisher that they had mentioned the terms and conditions of the package under “View Current Sectors” was rejected on the ground that it was only an unscrupulous way to cheat the consumers.

Sometimes educational institutions misrepresent to the public that they are in collaboration or affiliation to particular institution or university, but in fact they do not have any affiliation. The consumer forums have strongly condemned such practice. In *Mukesh Gupta v. Kiran Thakur*¹⁷ an Organic Agriculture Management Course in its prospectus claimed to have collaboration with National Productivity Council, Government of India Organization. The complainant under this belief joined the course and completed the training. Later, he was not issued any certificate and it was found that the Council had denied any collaboration with the opposite party in respect of the said course. The Commission held the opposite party liable for unfair trade practice and ordered reimbursement of the fees along with compensation.

While dealing with cases relating to puffing and disparagement, the consumer forums have held that puffing one’s own product is allowed only to the extent it does not disparage competitor’s goods. In *Hindustan Unilever Limited v. Procter and Gamble Home Products Limited*,¹⁸ HUL claimed that advertisement of fairness cream by Procter and Gamble disparaged its product. Such disparagement was not by name, it was subtle but still it communicated to the viewer that like products of others

16 *Kingfisher Airlines Kingfisher House Western Express Highway v. ML Sudheen*(2012)CPJ543(NC),<http://www.manupatrafast.in/pers/Personalized.aspx>, last visited on 20th July, 2012

17 *Mukesh Gupta v. Kiran Thakur*, 2011, CTJ 52 (CP) (NCDRC)

18 *Hindustan Unilever Limited v. Procter and Gamble Home Products Limited*, 2010(43)PTC460(Cal),<http://www.manupatrafast.in/pers/Personalized.aspx>, last visited on 20th July, 2012

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were lacking in something. It advertised that, “Kyaaapki fairness cream sirfupar se kaamkartihain” and this question is followed by -”Jaise ye kaamkaresirfupar se, andar se nahin.” It held that “Making puff” is permissible in law but disparagement of the goods of the rival would be illegal.

SUGGESTED AMENDMENTS FOR THE LEGISLATION

The following are the proposed amendments to be incorporated in the Consumer Protection Act, 1986:

- Section 12 which deals with the manner in which complaint shall be made, provides that the complaint can only be made by a consumer who is already affected by a misleading advertisement. Instead, it is suggested that actually being misled by the advertisement should not be made a criteria to file a complaint. Therefore, the Section can also include a *‘Complaint by a person who finds an advertisement to be misleading.’*
- Section 2(1)(r) gives a list of unfair trade practices but it does not expressly mention about the burden of proof. In practice, the burden of proof lies on the Complainant which deters the consumers to come forward to file a complaint. It is suggested that in place of rule of reason, Per se rule should be followed. Therefore, the Section may be modified to *include a presumption in favor of complainant and to shift the burden on opposite party.*
- There should be a provision for imposing fine on misleading advertisers which must have regard to the advertiser’s *average profit from the date on which the advertisement was published.*
- It is suggested that the proposed National Consumer Protection Agency is empowered to *scrutinize the claims made in an advertisement even before it is published.* This preventive approach will be more effective than the curative approach which is being followed.
- In India, the presence of various legislations including the Consumer Protection Act, the Drugs and Magic Remedies (Objectionable Advertisements) Act, etc. have resulted in a lot

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of confusion and a sort of dilution of the law applicable to protect the interest of consumers. For instance, till the Monopolies and Restrictive Trade Practices Act, 1969 was in practice, there was confusion about the jurisdiction of the MRTP Commission and the Consumer forum to deal with unfair trade practices, since both the legislations dealt with the same issue. In order to overcome this problem, it is proposed that India should have a comprehensive legislation in the lines of Philippines to address the problems of the consumers.

The Republic Act 7394 of Philippines ensures protection of consumers against hazards to health and safety, deceptive, unfair and unconscionable sales acts and practices. It also provides for welfare of consumers by promoting consumer education and awareness. For instance, there is a provision for including a consumer representative in the drafting and formulation of social and economic policies and also to devise adequate mechanism for ensuring proper redressal. The legislation demarcates the activities and has created appropriate departments for specific purposes. There are departments for trade and industry, agriculture, health, education, consumer credit transactions, etc.¹⁹

The dispute resolution mechanism of Philippines is also worthy of mentioning. They promote amicable resolution of disputes by entering into mediations.²⁰

- Section 14(1)(hc) of the Consumer Protection Act, 1986 provides the remedy of issuance of corrective advertisement to neutralize the effect of misleading advertisement. Corrective advertisement should be interpreted in issuing corrective statements mentioning the falsity in the misleading advertisement to break the continuing effect on consumer's behaviour. This throws light on their previous unfair trade practice thereby costing their reputation.

19 See also Philippines consumer protection law available at http://www.affordablecebu.com/load/business/philippines_consumer_protection_law/6-1-0-1158#ixzz26nNOPbtL last visited on 20.9.2012.

20 *Ibid.*

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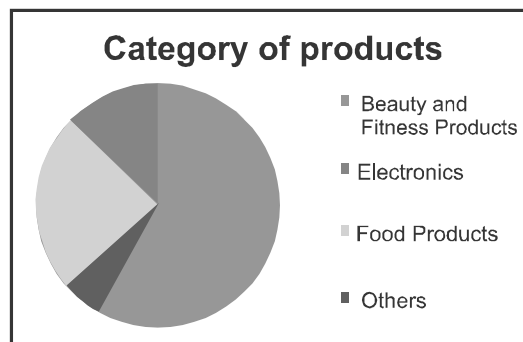
ANALYSIS OF EMPIRICAL DATA GATHERED THROUGH A SURVEY

A pilot study was conducted to prepare questions that will be helpful to analyze the impact of misleading advertisement on consumers. An attempt was made to cover different aspects of misleading advertisements including the influence of advertisements, the category of products which are more likely to mislead, efficiency of the Consumer Grievance Redressal Mechanism, online shopping and 2 descriptive type questions relating to examples of misleading advertisements and their experience of being misled by an advertisement.

The Respondents were from different parts of the country. They were approached in person, through mails and also through telephone. The responses were received from people belonging to age groups ranging from 18 years to 75 years.

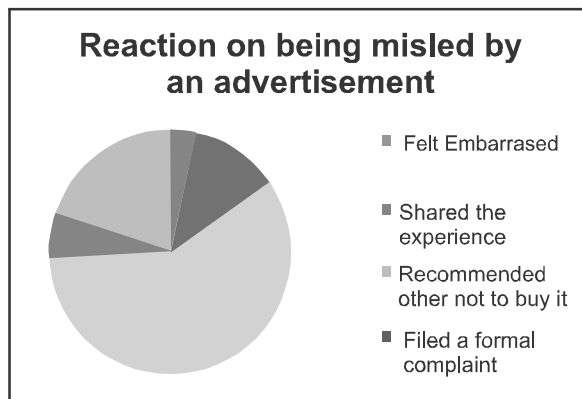
Category of products for which advertisements are most likely to mislead

After analyzing the questionnaire it could be definitely concluded that both men and women consider that advertisements for beauty and fitness products are most misleading followed by advertisement for food products and a few people consider electronic advertisement to be misleading. Some of the Respondents find advertisements in sectors like jewellery, pharmaceuticals, education, telecom services also to be misleading.



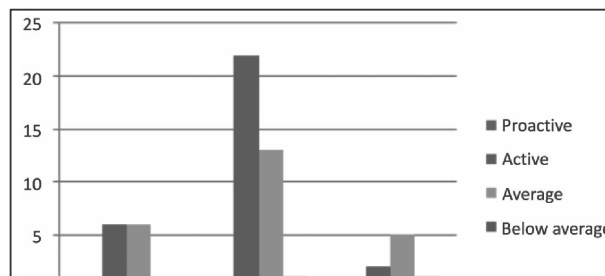
Reaction on being misled by an advertisement

Going by the responses, we found that only 4 out of 56 Respondents had filed a formal complaint on being misled by an advertisement. We also find that majority of the Respondents (39 out of 56) have strongly recommended / advised others not to go for that product. From this we can infer that people are hesitant in filing a formal complaint and only prefer to caution others about the misleading advertisement.



Rating oneself as a consumer

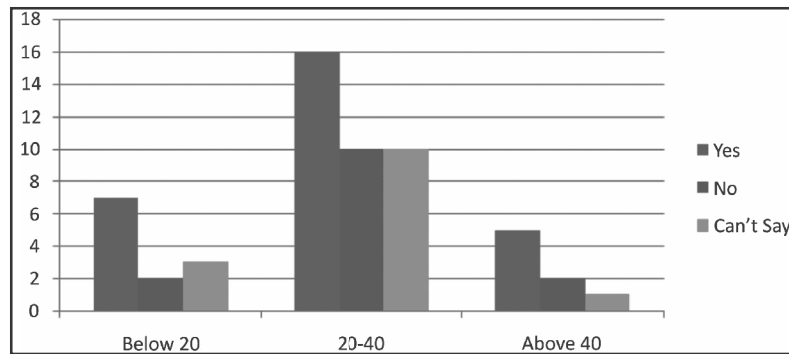
The Respondents were asked to rate themselves as a consumer in order to get an idea of the level of awareness among the consumers. It was found to our surprise that nobody claimed themselves to be a pro-active consumer across all age groups. Consumers belonging to the age group of below 20 consider themselves to be active or average. Majority of the consumers belonging to the age group of 21 to 40 consider themselves to be an active consumer and those belonging to the age group of above 40 consider themselves to be an average consumer.



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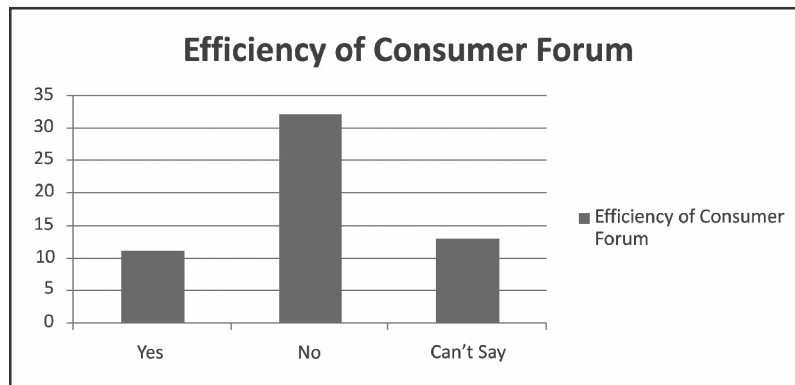
Number of People misled by advertisements

Majority of people belonging to all the age groups have been misled by advertisements (as indicated by the blue bar).



Efficiency of Consumer Grievance Redressal Mechanism in India

When the Respondents were asked about their opinion about the efficiency of Consumer Grievance Redressal Mechanism in India, more than 57% replied that they think that the mechanism is not efficient because the process is time consuming and the compensation awarded is meager. Only less than 20% think that the consumer forums are approachable and they provide a speedy remedy.



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The questionnaire also contained descriptive type questions requiring the Respondents to mention any real life instance of being misled by an advertisement. Many of the responses were similar in nature. Majority of the Respondents have mentioned that Beauty Products like Fairness Creams, Hair oils, Shampoos, teeth whitener, face wash deodorants to be misleading. In fact the Respondents had mentioned that anti-dandruff shampoos like head and shoulder increase the dandruff instead of controlling it. Pantene/Parachute hair fall therapy advertises that hair fall will be controlled instead it results in increase of hair fall. From the answers we could infer that a majority of the Respondents think Fairness Creams like fair and lovely do not result in enhancing the fairness.

The second major opinion of the Respondents is that Health, Fitness, Nutrition, Fat loosening, Height increasing advertisements are very misleading and harmful also. One of the Respondents mentioned that there were a lot of side effects when she used Sauna Belts. Health drinks and dietary supplements like Complian and Horlicks do not give the effects which they claim to. Products like Maggi, Sunfeast Pasta are advised to be healthy for children but actually they are not. Yoko Height Increaser does not help in increasing the height.

Another category of misleading advertisements are the offers on tickets given by airlines and travel packages. On the face of the offer it seems to be attractive but the actual deal provided is hidden in the terms and conditions. Malaysian Airlines advised that the travel from Chennai to Malaysia is only Rs. 3000/- not disclosing the fact that the return ticket is for Rs. 10,000/-.

Some of the Educational Institutions advertise that they are affiliated to a particular university/ certified by a particular university whereas they are actually not. And also they claim to provide 100% placement which is not the case. The Real estate sector has also involved in a large scale of misleading advertisements. It advertises that the plots are available at particular rate and that the delivery will be made within a particular period of time. But mostly it turns out to be misleading.

The advertisements for Household Goods like dish wash bars, mosquito repellent, vegetable cutters are generally advertised to be very

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effective. Infact Respondents claim that mosquito repellent like All Out do not repel the mosquito infact mosquito sit over them. Vegetable Cutters advertised through teleshopping as an easy means to cut vegetables but infact they take longer time than normal knives and that too vegetables are not properly cut.

Many Respondents have been misled by advertisement providing 'Upto 50% off' when actually the offer is for selected items and hence using it as a bait to attract customers to the shop. Advertisements also mention that there is an offer with a condition that 'Offer till stocks lasts' and most generally the stock does'nt last. Sometimes the offer mentions 20% off and they don't reveal that it will be applicable only on purchasing 5 items from the shop.

One of the Respondents has told that when he bought a Tata Docomo data card, he was promised a scheme of 3.1 Mbps but the speed turned out to be much lesser.

CONCLUSION

The analysis made in the essay has brought to light the brooding presence of misleading advertisements. When a survey of real life incidents about misleading advertisements was conducted by way of random sampling it could be inferred that 28 out of 56 Respondents have been misled at one point of time or other. This brings out the necessity for regulating the advertisements. The need of the hour was felt by the government and on 9th March, 2012 and the government decided to set up a National Consumer Protection Agency with executive as well as suomoto powers under the Ministry of Corporate Affairs. In addition to these powers it is submitted that the Agency should also have powers to grant interim injunctions so that the impact of misleading advertisements on people is reduced.

Apart from that, the advertising agencies should also have a sense of social responsibility not to deceive and cheat the public. Before an advertisement is made public, it should be thoroughly examined in order to avoid misleading contents in it. Unlike in India, it United States mensrea is not a criteria to determine the misleading nature of advertisements. Similarly, India should also eliminate mensrea as a criterion for determining misleading advertisement in order to have an

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effective mechanism in place. The consumer forum should not hesitate to award exemplary compensation on proof of misleading advertisement in order to have strong deterrent effect on the advertisers.

From the responses to the questionnaire it was found that only 4 out of 56 Respondents preferred to file a formal consumer complaint on being misled. This highlights the fact that people do not find consumer forums to be accessible due to the tedious and cumbersome procedure involved. Therefore an easy way to initiate a consumer complaint through toll free number is proposed. Immediate action should be taken by the agency for complaints received. Never the less the importance of improving awareness among the consumers cannot be undermined. Law students can play an important role in spreading the awareness through propaganda, workshops, legal literacy programs, conducting seminars and putting posters. Consumer Awareness advertisements on television and print media will go a long way in curbing the impact of misleading advertisement on the customers.



5

JURISDICTION CONCERNS IN E-CONSUMER CONTRACTS

*Pratima Narayan**

INTRODUCTION

Cyberspace has heralded a borderless frontier, which offers limitless opportunities to the commercial world. This demands a new understanding of what regulates the virtual space and how regulations work. Ironically, globalisation and e-commerce emerged at about the same time making it convenient to overcome spatial barriers in the global market. With its ubiquitous reach, the architecture of electronic commerce provides a dynamic and collaborative platform to business and consumers. This has resulted in increased competition and lower prices. While consumers get to choose from a whole range of goods and services across the world, from anywhere and at any time, businesses are constantly innovating new technologies in order to adapt to new and evolving challenges in the area of e-commerce.

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From an economic perspective, both organisations and individuals benefit from e-commerce. Businesses choose to sell their products and services through electronic mode because they gain access to the global market without much intervention of traditional market intermediaries. This in turn enables consumer to reach out to a variety of goods and services at competitive prices. Even during financial hardship, businesses get to provide visibility of their goods and services in the international market at relatively low costs. Customers can inquire about their order status around the clock at the click of a mouse.

Consumer protection within domestic markets is no doubt a well-established concept. But the same does not hold in the international realm. The OECD in its recommendations concerning Guidelines for Consumer Protection in the Context of Electronic Commerce adopted in 1999, rightly identified e-commerce as being 'Inherently International in Nature.' The potential of the internet to create a virtual borderless market has made the conventional territorial-based laws governing consumers in India incompatible with the non-territorial nature of e-transactions.

Although the issues that arise out of e-consumer contracts are many, very few cases have been brought to the courts. The primary reason for this is that the internet has posed one big challenge to jurisdictional problems. *AnkurRaheja v. SIFY Limited & Others* (2004) was perhaps one of the first e-consumer cases in India, in which 'deficiency in service' was proved against an internet service provider. The case related to non-disclosure of significant terms and conditions, which included hidden conditions that after downloading of 750 MB data in a month the speed would be reduced to 14 Kbps and also a new condition that if a customer downloaded more than 150 MB data in a day, then he was penalized in the form of reduction of package validity by one day, but still packages were advertised as unlimited. The case which was brought before Delhi's North-West District Consumer Forum, interpreted the matter from the point of view of definition of Broadband as laid down by TRAI, which lays down criterion of minimum speed of 256 Kbps to be regarded as Broadband. Accordingly, the Court held that providing of 14 Kbps speed instead of 256 Kbps is in itself a 'deficiency in service.' A compensation of Rs 8,200 including refund of Rs 1,200 paid for two months internet connection was imposed on

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the company for indulging in Unfair Trade Practices and deficiency in service.

This article discusses the present position of law governing consumer contracts on the internet both in the domestic and international market. A comparative study, based on e-consumer laws in UK and Singapore is also attempted to understand the manner in which these countries have addressed the issues pertaining jurisdiction.

E-commerce

Put simply, electronic commerce involves buying and selling of goods and services through electronic means. The OECD, while addressing the Economic and Social Impact of Electronic Commerce in 1999 stated – *“In order to explore and estimate the socio-economic impacts of electronic commerce, it is essential to define electronic commerce. As with many new services, this is not a simple matter, as definitions given by various sources differ significantly. Some include all financial and commercial transactions that take place electronically, including electronic data interchange (EDI), electronic funds transfers (EFT) and all credit/debit card activity. Others limit electronic commerce to retail sales to consumers for which the transaction and payment take place on open networks like the Internet. The first type refers to forms of electronic commerce that have existed for decades and result in trillions of dollars worth of activity every day. The second type has existed for about three years and is barely measurable.”*¹

United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) define E-commerce as *“Electronic commerce, broadly defined, is the process of using electronic methods and procedures to conduct all forms of business activity. It encompasses the production, advertising, sale and distribution of products via telecommunication networks.”*²

1 OECD, The Economic and Social Impact of Electronic Commerce, Paris: 1999, Box 1.1, p.29.

2 <http://www.unescap.org/drpad/publication/survey1999/svy5a.htm>, last visited 12/08/2012.

The Information Technology Act, 2000,³ with its objective of providing legal recognition to transactions carried out by electronic means, refers 'electronic commerce' to transactions carried out by means of electronic data interchange and other means of electronic communication, which involve the use of alternatives to paper-based methods of communication and storage of information. The scope of electronic commerce is wide enough to include not just the actual buying and selling of products, but includes pre-sale and post-sale activities.

Modes of E-commerce

Consumer contract in e-commerce may take place in one of the following ways⁴:

a. Communication via E-mail

In this scenario, the customer and supplier simply exchange messages through electronic mails, through their own computers or on computers to which they have access. This is similar to the standard telephone communications.

b. Communication via the World Wide Web

Communication on the World Wide Web may take place either through a common server or through intermediate/multiple servers.

3 Based on UNCITRAL Model Law of Electronic Commerce, 1996.

4 Lars Davies, Contract Formation on the Internet Shattering a Few Myths, in Law and the Internet *Regulating Cyberspace*, Lilian Edwards and Charlotte Waelde (ed.) (Oxford: Hart Publishing, 1997), p.105. The analysis to determine whether a contract has been formed has two distinct but interrelated parts; the topography or structure of the network connection between the communicating computers and the services used for communicating. The internet is such an incredibly flexible and powerful communications system that it is impractical to examine every possible topography. However, not all is lost as virtually all communication on the internet takes the form of a combination of one or more of five basic scenarios. A good approach is therefore to attempt to examine these five scenarios; they could be regarded as constituting a basic set of building blocks; networking using lego bricks perhaps.

The five basic scenarios are as follows: simple communications between two computers, communication carried out on a common server, communications via intermediate servers, multiple intermediate servers and networks, and the virtual market place.

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In case of communications carried via common server, the parties communicate with each other using a common server, irrespective of the fact that the parties may be in different jurisdictions. All communications take place on this server. In case of communication through intermediate servers/ multiple servers, the network includes servers located in different jurisdictions and the message is relayed to any one or several servers before it is actioned. The World Wide Web, as Lars Davies⁵ calls it is a virtual market place, where the websites are sited on servers which host pages or services offered by several commercial concerns which in effect represent a form of virtual marketplace, where businesses have their information accessed by customers. The topographies in turn have an effect on the analysis of three important questions - if, where and when.⁶

Jurisdiction Issues in E-consumer Contracts

Consumer confidence primarily involves two convictions – that the consumer will get what he expects and that if things go wrong, the consumer can seek a remedy. Digital technology has brought about significant changes in consumer's buying trends. Traditionally, most consumer contracts were domestic in nature. A consumer would buy foreign goods only if he travelled abroad or he would do so through a seller/ distributor in his own country. The internet medium allows consumer to cross boundaries in matters of seconds, without being aware of the transition or the foreign jurisdiction. Per Iain Ramsay⁷ "*globalization has increased the international dimensions of access to justice and consumer protection as developments in communication technology facilitate the possibility of cross-border frauds.*"⁸

5 Lars Davies, Research Fellow, Information Technology Law Unit, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London.

6 Lars Davies (1997: 110-111).

7 Iaian Ramsay, Professor, Kent Law School, University of Kent.

8 Charles E.F.Richett and Thomas G.W.Telfer (ed.), *International Perspectives on Consumer Access to Justice*, (Cambridge: Cambridge University Press, 2003), p.1.

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As a general rule, if the court rendering the judgment suffers from want of jurisdiction, its judgment is nullity and may be ignored. Conventional categories of jurisdiction include:

- a. **Personal jurisdiction:** This involves jurisdiction over a defendant who has a personal contact with the state, either contractual or tortious.
- b. **Subject-matter jurisdiction:** This indicated the court's jurisdiction to hear claims based on the nature of the plaintiff's claim. For instance, limitation based on pecuniary aspects, family, land etc.
- c. **Jurisdiction over property (in rem):** Jurisdiction is based on the location of the defendant's property. For instance, location of inventory warehouse of an e-business.⁹

The Consumer Protection Act, 1986 provides for a 3 tier Redressal Machinery approach in resolving consumer disputes. The pecuniary and territorial jurisdiction to file a consumer complaint is as follows:¹⁰

i. Pecuniary Jurisdiction

- a. District Consumer Disputes Redressal Forum (District Forum) – which limits the value of claims to Rs. 20lakh
- b. State Consumer Disputes Redressal Commission (State Commission) – which limits the value of claim from Rs. 20 lakh to Rs. 1crore
- c. National Consumer Disputes Redressal Commission (National Commission) – where value of claim exceeds Rs. 1crore.

ii. Territorial Jurisdiction

- a. The party against whom the claim is made actually and voluntarily resides or carries on business or has a branch office or personally works for gain in that area or

9 Gerald R. Ferrera, et. Al, *Cyber Law Text and Cases*, 2nded., (United States: Thomson- South Western, West, 2004), p.17.

10 Sections 11, 15,17,19,21 and 23 of Consumer Protection Act, 1986.

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- b. Where there are more than one opposite party, each such party actually and voluntarily resides or carries on business or has a branch office or personally works for gain in that area or
- c. The cause of action, wholly or in part, arises in that area.

Some of the key concerns pertaining to jurisdiction are discussed hereunder:

a. Anonymity of Parties

The most significant reason for lack of consumer confidence in electronic transactions lies in resolving anonymity of parties to the consumer contract. For instance, a consumer may purchase goods (such as books or CDs) through a website – where the contract is concluded in cyberspace and the payment obligation is also effected online. Though the performance of the characteristic obligation of the contract (delivery of good) occurs in the real world in exactly the same way as offline contracts, the parties to the online transaction do not encounter each other during the transaction, unlike in a ‘brick and mortar’ model. This in turn results in greater risks of fraud, problems relating to delivery, return of goods etc.¹¹an important challenge in e-commerce is that internet companies are often difficult to locate. E-mail domains, designation of websites, electronic addresses or home pages do not necessarily relate to the place of business of the supplier. The supplier may hide behind the business seat of the provider.¹²

Arif Azim’s case (commonly called the Sony Sambhandh case) was the first instance which involved cyber crime conviction. Sony India Private Ltd. started a website called www.sony-sambandh.com, targeting Non Resident Indians. The website enabled NRIs to send Sony products to their friends and relatives in India after paying for it online. The company delivered products to the concerned recipients. In May

11 Jonathan Hill, *Cross-border Consumer Contracts*, (Oxford: Oxford University Press, 2008) p.11.

12 Norbert Reich, *Consumerism and Citizenship in the Information Society in Consumer Law in the Information Society*, Thomas Wilhelmsson, SallaTuominen and HeilTuomola(ed.), (The Hague/London/Boston: Kluwer Law International, 2000), p.168.

2002, someone logged onto the website under the identity of Barbara Campa and ordered a Sony colour television set and a cordless head phone. She gave her credit card number for payment and requested that the products be delivered to Arif Azim in Noida. The payment was duly cleared by the credit card agency and the transaction processed. After following the relevant procedures of due diligence and checking, the company delivered the items to Arif Azim. At the time of delivery, the company took digital photographs showing the delivery being accepted by Arif Azim. The transaction closed at that, but after one and a half months the credit card agency informed the company that this was an unauthorized transaction as the real owner had denied having made the purchase. The company lodged a complaint for online cheating at the Central Bureau of Investigation which registered a case under Section 418, 419 and 420 of the Indian Penal Code. The matter was investigated into and Arif Azim was arrested. Investigations revealed that Arif Azim, while working at a call centre in Noida gained access to the credit card number of an American national which he misused on the company's site. The CBI recovered the colour television and the cordless head phone. The court convicted Arif Azim under Section 418, 419 and 420 of the Indian Penal Code — this being the first time that a cyber crime has been convicted. The court, however, felt that as the accused was a young boy of 24 years and a first-time convict, a lenient view needed to be taken. The court therefore released the accused on probation for one year.

Another internet fraud that came to light in 2007 was the complaint lodged by Kingfisher airlines with the Economic Offences Wing (Mumbai), which involved online booking of more than 15,000 tickets of Kingfisher Airlines, using specific codes of an equal number of credit cards, all issued by ICICI Bank. The fraud had come to light after thousands of credit card holders approached ICICI Bank saying they had never booked a ticket. The airline had charged the amount to the bank, which in turn, had passed on the tab to its customers. In this case, the gang had booked tickets online using credit card numbers obtained from restaurants, hotels, shopping malls and other retail outlets.¹³

13 http://articles.timesofindia.indiatimes.com/2007-01-25/india/27875773_1_cvv-credit-card-air-tickets, last visited on 10/08/2012.

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A more recent instance occurred in the case of yatra.com. Yatra.com is a website which provides for travel information, pricing, availability and reservation for airlines among other travel related activities. In March 2012, yatra and other organizations sold kingfisher airlines tickets through yatra super saver scheme with heavy discounts, where passenger would know the name of the airlines only after booking the ticket. This was a period during which no one was ready to purchase tickets of kingfisher airlines. On March 28, Kingfisher cancelled the flight and the passengers were only given the option of refund and were not given the option of alternate airlines.¹⁴

b. Location of Activities

The geography of the internet being purely virtual, obstacles facing cross-border consumer complaints become significant. E-commerce generates complex sequences of events, which can be spread among different countries. For instance, A, in India decides to download an article from a website and pays money through credit card and is unable to perform the download. He wants to sue the owner of the site. But the owner is in Singapore. The site itself is based in a server in Thailand. Where does the defendant reside?

For the purpose of jurisdiction, websites are divided into active and passive websites. Active websites encourage the browser to enter information identifying the browser and/or providing browser's interests or buying habits.¹⁵ For instance, in *Minnesota v. Granite Gate Resorts*,¹⁶ the defendant advertised an online gambling service on the internet, and subsequently formed a mailing list which included Minnesota residents. However, no gambling activities *per se* were considered by the Court. The Minnesota Court of Appeals held: "*The defendants are subject to personal jurisdiction in Minnesota because, through their*

14 <http://www.consumerdaddy.com/consumer-reviews-for-television-eighteen-yatracom-p-2902.htm>, last visited on 12/08/2012.

15 Ankit Majumdar, *Jurisdiction and the Internet*, (Nandan Kamath, *Law Relating to Computers, Internet and E-commerce: A Guide to Cyber Laws*, Delhi: Universal Law Publishing Co.Pvt.Ltd.,2000), p.30.

16 568 N.W.2d 715 (Minn. Ct.App.1997).

internet activities, they purposefully availed themselves of the privilege of doing business in Minnesota to the extent that the maintenance of an action based on consumer protection statutes does not offend traditional notions of fair play and substantial justice” On the other hand, a passive website provides information in ‘read-only’ format. In *Blackburn v. Walker Oriental Rug Galleries*,¹⁷ the court held that a website with no purchasing option and only an e-mail response mechanism was ‘passive’ and thus warranted no claim on jurisdiction.

However, the middle ground consists of websites, where a user can exchange information and in such case it is for the court to assert jurisdiction by examining the level of interaction and commercial nature of the exchange on the website.

Such extra-territorial character of cyberspace activities is also provided under Section 75 of the Information Technology Act, 2008, which extends jurisdiction of Indian courts to any offence or contravention committed outside India by any person irrespective of his nationality. The only requirement in assuming jurisdiction by the Indian courts is that the act or conduct constituting the offence or contravention must involve a computer or computer system or computer network which is located in India. However, this provision applies only to those offences or contraventions listed under the Information Technology Act, 2008. The IT Act, being a purely industry-based enactment apparently does not address the domestic concerns of consumer grievance. At the same time, this raises another concern of traditional territorial-based consumer protection law trying to exercise sovereign powers over a borderless space.

Moreover, it is also unclear at this point if the agencies would have the authority over a company whose only contact with the consumer is a given state is over the internet. Even if the internet based company is bound by the authority, it may simply ignore the requirements imposed on them by regulators and state legislators, especially where the company has its establishment in a distant country.

17. E.D. Penn.7 April 1998.

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Speak Asia is a good example in the recent times of companies incorporated in a foreign state carrying out internet based business activities in other countries. Speak Asia Online is a marketing services firm based in Singapore which works on a multi-level marketing (MLM) model that rewards its members on taking surveys and referring more members to take them. To be a member, a customer has to invest Rs. 11,000/- p.a, get a “E-Zine” and is required to do some surveys, and thereafter get paid handsomely for participating in some online surveys, which Speak Asia claimed a successful revenue model built upon providing sound Surveys and market information to their numerous clients, mostly operating in the FMCG sector. There was heavy advertising during the IPL matches and several newspapers too. However, during May 2011, several news channels brought to the fore the hugely suspicious business model. None of the FMCG Companies for whom Speak Asia claimed to undertake survey, supported the claim and some even outright denied engaging Speak Asia at all.

Following complaints from various consumer groups, the matter is being investigated by the Ministry of Companies Affairs, Economic Offences Wing, market regulator SEBI and bank regulator Reserve Bank of India. The Chief Operating Officer and a few other officers involved have been charged under Section 420 IPC. The Home Ministry suspects that the fraud may have been to the tune of Rs. 2000 crore and more than 20 lakh investors may have invested in Speak asia globally.¹⁸ Where do the investors move to seek redressal with no business establishment incorporated in India?

In a bid to resolve issues on location of activities in virtual banking, the RBI in its guidelines on regulation and supervision of internet banking recommends that only such banks which are licensed and supervised in India and have a physical presence in India will be permitted to offer Internet banking products to residents of India. Thus, both banks and virtual banks incorporated outside the country and having no physical

¹⁸ <http://www.indianexpress.com/news/speak-asia-fraud-rs-2-000-crore/825777/>, last visited on 09/08/2012.

presence in India are not permitted to offer Internet banking services to Indian residents.¹⁹

The human and corporate actors and the computing and communicating tools, through which internet transactions are effected, have a real world existence, located in one or more places. These elements are sufficient to give national jurisdiction a justification to claim jurisdiction.²⁰ This is how an American court in *International Shoe Co. v. Washington*²¹ held that due process required only that, in order to subject a defendant to a judgment *in personam* if he were not present within the territory of the forum, to find out if he has certain minimum contact with it, such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ This is also known as the “minimum contact doctrine” adopted extensively by the US courts in determining jurisdiction.

This approach is similar to the one adopted under Brussels I Regulation, which confirms the traditional view that the consumer is the weaker party. According to Article 15(1)(c)²² of the Regulation, if the business targets its customers in a particular country the business should be subject to the protective rules which either assign jurisdiction to that state or apply the national law of that state to govern the contract. Brussels I Regulation further alleviates the burden on the consumer to show that the advertisement on the website was specifically addressed to him. It suffices, for the purpose of the provision, that the online vendor directs its activities to the Member State, or any part of it where the consumer is domiciled.²³

19 <http://rbidocs.rbi.org.in/rdocs/notification/PDFs/21569.pdf>, last visited on 10/08/2012.

20 Chris Reed, *Internet Law Text and Materials*, 2nd ed., (Delhi: Universal Law Publishing Co. Pvt. Ltd., 2004), p.218.

21 326 U.S.310,316 (1945).

22 Also Rome I Regulation, Art 6(1); Rome Convention, Art.5.

23 <http://www.bileta.ac.uk/Document%20Library/1/Jurisdiction%20over%20disputes%20relating%20to%20electronic%20consumer%20contracts%20under%20Brussels%20I.pdf>, last visited on 18/07/2012.

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c. Status of Server

A server is a computer used to host websites, mailboxes and other data messages. It acts as an intermediary to facilitate communications between internet users. In the e-commerce context, a server acts as storage of the business, hosting all digital products. In other words, server is the location where the online store is physically located and the digital subject-matter is technically delivered. Now the question is whether the server, which plays such an important technical role in e-commerce, should be considered for the purpose of identifying jurisdiction? The argument however, is that a server functions no more than a medium of communication, such as telephone or telex machine, which is used only as a medium of communication in a traditional commercial transaction. A single business can adopt more than one server for a single business transaction. For instance, one server may host the website, a second one may receive orders and payments and a third server may act as storage and upload digital products. It is further argued that a server is simply used to provide technical support without any decision making, responsibility or autonomy. The position of a web server was considered in *Amberson Holdings LLC v. Westside Story Newspaper*,²⁴ wherein the court held that “*personal jurisdiction could not be found under the International Shoe minimum contact test. This case demonstrates the likelihood of difficulties in satisfying the minimum contact and fair play and substantial justice tests for jurisdiction on the basis of where a server is located. Given the nature and difficulties in ascertaining what server(s) a website uses, this is hardly surprising.*” Considering the autonomy of parties in the e-commerce context, it brings us to a new question whether a server should be considered as a connecting factor for the purpose of determining jurisdiction.

E-consumer Protection: Position in UK and Singapore

a. Position in UK

Electronic consumers in UK are protected both by traditional laws, which are common to buyers purchasing over the counter as well as

²⁴ *supra* at n.8, p. 379.

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over the internet and regulations exclusively designed to deal with online transactions. The traditional laws include the Sale of Goods Act, 1979, Consumer Protection Act, 1987, Consumer Credit Act, 1974 etc. The Unfair Terms in Consumer Contract Regulations, 1999 is a UK statutory instrument, which implements the EU Unfair Consumer Contract Terms Directive 93/13/ EC into domestic law, that protects consumers' rights where they enter into agreements with retailers who try to impose unfair terms in the agreement. There are also numerous other pieces of legislation, many of which will apply to different contract and product types.

Online regulations are largely derived from the European Union Directives (EU Directives), which include the 2002 Electronic Commerce Regulations, the Consumer Protection (Distance Selling) Regulations 2000 and the Electronic Signatures Regulations 2002, the Data Protection Act 1998 among others.²⁵

The 2002 E-commerce Regulations apply to businesses that:

- sell goods or services to businesses or consumers on the internet, or by email or Short Message Service (SMS), ie text messages
- advertise on the internet or by email or SMS
- convey or store electronic content for customers, or provide access to a communications network.

The Regulations mandate all commercial web sites to provide information such as personal details of the company, steps involved in completing the contract on-line, whether the contract will be stored by the retailer and/or permanently accessible, the technical means the site uses to allow consumers to spot and correct errors made while inputting their details prior to the order being placed directly and permanently available to consumers via the website. The Regulations also require that all prices must be clear and unambiguous and web sites must state whether the prices are inclusive of taxes and delivery costs.

²⁵ <http://www.legislation.gov.uk>, last visited on 20/07/2012.

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The Consumer Protection (Distance Selling) Regulations 2000 are designed to protect customers who are not physically present with the seller at the time of purchase. They cover purchases made via email and the internet, together with telephone and mail order. They only apply to transactions between businesses and consumers (individuals acting outside the course of their business) and do not include business-to-business contracts and auctions. The Regulations mandate businesses to provide appropriate information about the e-commerce transaction both during pre-contractual stage and information required once the purchaser has decided to continue to order for the product/service and details of any guarantee or after-sales services. The DSRs also lays down provisions regarding cancellation of orders within a stipulated period (called 'cooling-off period'), refund and return of goods.

The Electronic Signatures Regulation 2002 deals with the legal recognition of electronic signatures and the process under which they are verified, generated or communicated, and the removal of obstacles in other legislation to the use of electronic communication and storage in place of paper. The Regulations are limited in scope, addressing only the supervision and liability of Certification Service Providers (CSPs) and certain issues of data protection.

b. Position in Singapore

In Singapore, consumer protection in general are governed by a spate of legislations such as Consumer Protection (Fair Trading) Act, Consumer Protection (Trade Descriptions and Safety Requirements) Act 1975 and the Commodity Trading Act (Chapter 48A). The Multi-level Marketing and Pyramid Selling (Prohibition) Act (Chapter 190) prohibits the registration of businesses that are designed to promote multi-level marketing schemes or pyramid selling schemes in relation to the distribution and sale of commodities and makes it unlawful for any person to promote such schemes. Other traditional legislations include Sale of Goods Act, Unfair Contract Terms Act etc.

In the e-commerce context, Electronic Transactions Act 1998, which is based on the UNCITRAL Model law, deals with the issues of certainty of electronic records and transactions. It addresses the liability of network service providers and the formation and validity of electronic contracts. Additionally, the Act acknowledges the retention of electronic

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records and the use of repositories. It also discusses the security procedures necessary to create secure electronic records and signatures, as well as secure digital signatures. The Computer Misuse Act 1998 addresses potential computer abuses such as denial or interruption of computer services and unauthorised disclosure of access codes.²⁶

The National Trust Council (NTC) was formed in 2001 with the objective of building confidence amongst businesses and consumers so as to spur e-Commerce growth in Singapore. The NTC in collaboration with the Government of Singapore addresses relevant concerns from industry. The Council includes members representing both private and public sectors. Further, Trust Sg.sg is an online shopping directory where Singapore accredited online businesses list their product and services.

CONCLUSION

The extraordinary growth of Electronic Commerce has greatly influenced the way business is being carried in the present generation. Unlike in the past, consumers have become an integral part of the growing community of global traders in the electronic market. Apart from new opportunities, it has also created numerous concerns and challenges on businesses and consumers who embark on this new course of business. E-commerce can be achieved to its fullest potential in the electronic civilization only when online consumers are afforded the same level of protection as conventional consumers.

Although very few cases on e-consumer contracts have been brought before the courts in India so far, it does not mean the subject requires any less attention. The reason for this is that the existing laws are inadequate to address the challenges posed by the ubiquitous nature of e-commerce, which is a hindrance for the consumer to access to justice. In this regard, the following are some recommendations which can help enhance consumer confidence in e-commerce:

a. Adequate and Transparent Information

Consumers involving in electronic commerce should be afforded adequate and transparent information regarding the business details

²⁶ <http://www.ida.gov.sg/Policies%20and%20Regulation/20060627155443.aspx>, last visited on 23/07/2012.

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such as company name, geographical address and other contact details, relevant registration and license numbers, stages involved in completing the online contract, adequate information about goods and services, payment procedures etc. Just as it is mandated under the UK E-commerce directives to provide adequate information about the electronic transactions, India should also adopt regulations to this effect in its consumer protection laws. Punitive damages must be imposed on businesses who fail to provide true and correct information regarding their place of establishment on their websites. It is also recommended that self-regulatory bodies like BBB and Euro label should be set up in India, which can provide certifications to businesses at affordable prices as to its authenticity, so that consumers can trust the websites they intend to transact.

b. Physical Presence of Business Entities

The banking regulatory body, RBI has in its guidelines on regulation and supervision of internet banking²⁷ regulated online banking activities by making it mandatory for banks incorporated both in India and outside India to have a physical presence in India for carrying out internet banking activities in India. Such licensing and physical presence of banks enables RBI to control activities of the banking industry better. It is recommended that industries, especially financial service based industries must bring out self-regulations which mandate a physical position of the business directing their professional or commercial activities to India, which makes it convenient for the industry specific regulators to exercise control on the business activities. This also enables courts to attach physical assets of the business in case of consumer claims.

c. Uniform Guidelines Addressing Jurisdiction in Cross-border E-consumer Frauds

Considering the universal nature of e-commerce and the enormous cases involving cross-border frauds that take place each day, businesses, consumer representatives and governments across the globe should work together in bringing out some common regulatory

²⁷ *Supra* at n.19.

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guidelines such as the EU Directives on e-commerce, addressing jurisdictional issues by commonly applying the principle of “country of destination,” considering the intention of the website to target consumers in the respective country. Perhaps, a self-regulation among the South Asian countries along the lines of EU Directives could be a good beginning in bringing out uniform guidelines on e-consumer protection. The guidelines must also consider standards for adopting geo-location software for businesses which can considerably help businesses target their consumers with due respect to national and state boundaries.



6

E-CONSUMERS : PROTECTION AND SOLUTIONS

*Jyoti Maheshwari & Pragya Vats**

INTRODUCTION

E-commerce has been defined by Roger Clarke as “*the conduct of commerce in goods and services, with the assistance of telecommunications and telecommunications-based tools.*”¹ It involves buying and selling of information, products and services through computer networks. E-commerce has essentially automated commercial practices by displaying products on the web, registering orders, processing payments online and co-ordinating inventory and delivery.² The increase in the use of e-commerce and the emergence of the internet as a virtual market place gives rise to novel consumer protection issues. This paper will discuss the key concerns that consumers face while engaging in

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1 Helge Huffman, Consumer Protection in E-Commerce, University Of Cape Town,2.

2 David E. Sorkin, Payment Methods for Consumer-to-Consumer Online Transactions, Arkon Law Review.(2001).

e-commerce and it will also examine the challenges posed by e-commerce to the traditional approach of consumer protection. It will also discuss the different resolution mechanisms available to solve online consumer disputes. A survey conducted on students has been attached as Annexure-I.

I. AN OVERVIEW OF ELECTRONIC COMMERCE

The growth of e-commerce across the globe has been exponential, revolutionising the traditional process of buying and selling of goods and services. This unprecedented growth in e-commerce has undoubtedly benefitted the consumers leading to more competitive prices, availability of wider range of goods and services and more convenient services.³ E-commerce has helped consumers in gaining information about the available goods and services which improves the decision-making process. For instance, in the United States of America, the impact of e-commerce on drug advertising has been noticed, wherein manufacturers of medicines for ailments such as depression, migraine and headache provide detailed information on their respective websites. In this particular case, e-commerce has successfully slashed the costs of communication and advertising and benefitted the consumers in gaining more information about the available drugs in the market.⁴

The global presence of the internet has enabled businesses to reach new markets and millions of new potential customers. E-commerce has enabled such businesses to bypass the traditional intermediaries in domestic jurisdictions, while being able to access global markets. Owing to its lower transaction costs, e-commerce has caused a steady increase in the number of sellers and suppliers in the market thus increasing diversity and competition in the market. Therefore e-commerce has been rightfully categorised as the new face of entrepreneurship which encompasses existing companies, organisations, small business and

3 Jefferey A Modisett, *Cyberlaw and E-Commerce: A State Attorney General's Perspective*, 94(2) *North western University Law review*, 643, 642(2000).

4. Gregory E Maggs, *Internet Solutions to Consumer Protection Problems*, 49 *South Carolina Law Review* 888, 890 (1998).

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individual online traders.⁵ It is widely perceived that e-commerce is still at its nascent stage and has not fully realised its potential especially in emerging markets such as India, which brings us to the role of consumer protection law. At the outset, it must be noted that the interests of e-consumers needs to be protected, which would positively impact the confidence of e-consumers causing an increase in online trade.

II. CONSUMER INTERESTS AND RISKS IN E-COMMERCE

In this section of the paper, the risks faced by consumers in e-commerce will be discussed. Studies have revealed that e-consumers face a numerous risks such as masking, catching, disclosure of private information without consent, phishing, hacking of bank accounts, misrepresentation of products, non-delivery of goods and poor quality of services.⁶ Furthermore, violation of consumer interest has been reported on online market places like Ebay and Yebhi.com amongst others. In order to understand the challenges posed to e-consumers and the complexity of such online transactions, a short case study of a C2C model eBay has been conducted. While eBay as an online intermediary has seen unprecedented success, it has had its share of controversies relating to abuse of consumer interest and copyright infringement.⁷ eBay serves as an online market place, having sale of products by independent sellers through auction and fixed price. While eBay itself does not engage in the actual selling and delivery of products, it does earn revenue from the sellers. In order to minimise its liability in case of any violation of consumer interests, eBay does not take any responsibility for the items listed on the website.⁸ Information about the products is treated as “*third*

5 Ivonnely Colon Figg, Protecting the new face of entrepreneurship, 12 Fordham J Corp. & Fin. Law 230, 234 (2007).

6 ShashiNathMandal, 'Protection of E-consumers' rights in electronic transactions , 7-12, available at : <http://ssrn.com/abstract=1880958> (Last visited on July 25, 2012).

7 Sandeep Krishnamurthy, eBay - A Business History, Ecommerce Management: Text and Cases, available at <http://ssrn.com/abstract=662881> (Last visited on July 27, 2012).

8 User agreement of eBay, *available at*: <http://pages.ebay.in/help/policies/user-agreement.html>. (Last visited on July 26, 2012) .

party user generated content”⁹ and thus enabling eBay to deny responsibility for any misrepresentation regarding the attributes of the product and fake sellers. Thus eBay has constructed a legal framework to protect itself from any liability arising out of consumer dispute.

However eBay has been involved in certain legal conflicts over abuse of consumer interests.¹⁰ Consumer complaints mostly have been regarding the frauds committed in the auction format of eBay, wherein sellers have been known to exaggerate the value of the product on offer. Furthermore, e-consumers of eBay have also complained about instances of bid shilling on eBay,¹¹ manipulation of the rating system¹² and cases of identity thieves.¹³ Misrepresentation of the characteristics of the products and failure in delivery and payment of the same also constitute consumer complaints.¹⁴ The reason behind this is that the standard of care and protection for consumers present on eBay, which is lower in comparison to a traditional auction.¹⁵

Due to the expansive reach and space of this virtual market, concerns abound on matters of the location and legitimacy of online businesses, information about the terms and conditions of the purchase, warranties, refund and return policies, the security of the information disclosed in the transmission process and the privacy of the personal information.

9 *Ibid.*

10 Andrés Guadamuz González, PayPal and eBay: The legal implications of the C2C electronic commerce model, presented at 18th BILETA Annual Conference on Controlling Information in the online Environment (London, April 2003).

11 *Ibid.*

One highly reported case of this was when a seller, Kenneth Walton had entered his individual bid of \$4500 in an auction of a painting which ultimately fetched \$135,805.

12 Nielsen, Jakob (1999), "Reputation Managers Are Happening," available at <http://www.useit.com/alertbox/990905.html>. (Last visited on July 27, 2012).

13 *Ibid.*

14 David E. Sorkin, Payment Methods for Consumer-to-Consumer Online Transactions, Arkon Law Review. (2001)

15 Jun Gu, Consumer Rights Protection on the Online Auction Website - Situations and Solutions: A Case Study of eBay presented at BILETA Annual Conference, (Hertfordshire, April 16-17, 2010)

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(A) PROTECTION FOR E-CONSUMERS UNDER INDIAN LAW

In India, the Consumer Protection Act, 1986 along with the Consumer Protection Rules, 1987 and the Consumer Protection Regulations, 2005 constitute the domestic legal framework for protection of consumer rights. While the provisions of the Consumer Protection Act, 1986 are applicable to disputes arising out of e-commerce, certain practical problems exist. As of now, in order to obtain protection under the domestic law, all the parties involved in e-transactions need to be based within the national boundaries so that the jurisdiction of the domestic consumer protection law applies.¹⁶ However, this does not account for majority of the e-commerce transactions, where parties are located in different jurisdictions.

The Consumer Protection Act, 1986 in its present form does not take into account the role of internet intermediaries like eBay. While the Act covers the vendors and the corresponding defects and deficiency in goods and services, it is completely silent on the accountability of online market places such as eBay. Reference needs to be made to the Information Technology Act 2008, which was enacted following the adoption of UN resolution on model e-commerce law. Section 2 clause (w) of this Act defines intermediary,¹⁷ which includes online market places. Section 79 of the Act¹⁸ provides grounds for absolving liability of intermediaries. The general rule is that an intermediary cannot be held liable for any third party information hosted by it, the exceptions being that if the intermediary is involved in the commission of such unlawful act and despite attaining 'actual knowledge' of the fact that such information stored on its platform is being used to commit an unlawful act, the intermediary fails to take any action towards removal of such information, then the intermediary would be held

16 Mandal, *Supra* note 6, at 16.

17 Sec. 2, Cl. w, Information Technology Act, 2008.

18 Sec. 79, 79(3) Information Technology Act, 2008.

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liable. Under Section 75 of the Act, the jurisdiction of Indian court is extended to any offence or contravention committed outside India by any person of any nationality, the only condition being that the act constituting the offence or contravention must involve a computer system/network located in India. However the Information Technology Act, 2008 does not address issues relating to consumer grievance. It can be argued that the Consumer Protection Act, 1986 should be amended to include the liability of online intermediaries, by including in the principle of liability as contained in Sec.79 and 81 of the Information Technology Act, 2008.

In such a scenario, if the intermediary allows misrepresentation of listed items despite having actual knowledge of the same, then civil liability under the Consumer Protection Act can be imposed. This is in conjunction with the judicial reasoning adopted for liability of online intermediaries for copyright infringement in certain landmark judgments such as *Viacom v. YouTube*,¹⁹ *Tiffany (NJ) Inc. v. eBay Inc.*,²⁰ *Lancome Parfrumsetbeaute v. eBay International AG*²¹ and *Evagorav. eBay Australia & New Zealand Pty Limited*.²² In these cases, it was held that online intermediaries like eBay could be held liable for copyright infringement on account of third party content, if they had specific information or reasonable knowledge of any such misrepresentation of items on the website and failed to remove such items despite having notice. The same logic can be applied in a consumer protection case, if such online intermediaries have actual knowledge of misrepresentation, fake accounts amongst others and failed to take action.

JURISDICTIONAL ISSUES IN E-COMMERCE

Consumer protection in e-commerce with the growth of cross-border transactions is no longer a domestic issue and subjects like

19 *Viacom Intern. Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 - Dist. Court, SD New York 2008.

20 *Tiffany (NJ) Inc. v. eBay Inc.*, 2008 WL 2755787 (S.D.N.Y. July 14, 2008).

21 *LancomeParfurms et beaute v. eBay International AG*[2009] EWHC 1094 (Ch).

22 *Evagora v. eBay Australia & New Zealand Pty Limited* [2001] VCAT 49.

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extraterrestrial application of domestic consumer protection legislations and enforcement of judgments of foreign courts have emerged. While numerous instances of e-consumer protection issues exist, very few cases have actually been brought to the courts. This can be attributed to the inconsistencies in jurisdiction and the unsuitability of the existing framework of domestic consumer protection legislations. Existing consumer protection legislations are built on certain outdated presumptions which do not apply in the virtual market place, where majority of the sellers and buyers are located in different jurisdictions. As a result, it is very difficult to apply the existing elements of domestic consumer protection laws over online cross-border exchanges. Cross-border transactions pose challenges to the established legal understanding of subjects such as choice of law and legal forum, contract construction and interpretation and dispute resolution mechanism. Furthermore, as of now no consensus has been reached on evolving a code of international legal rules applicable to e-consumers.²³ The Organisation of Economic Cooperation and Development has rightfully described e-commerce as being international in nature.²⁴ While e-commerce has created a market place which has no defined territorial and geographical boundaries, existing domestic consumer protection legislations are based strictly within the confines of the national jurisdiction. As a result, the traditional territorial based consumer protection laws have proven to be incompatible with the non-territorial nature of e-commerce transactions.

The foremost contentious point in relation to jurisdiction over e-contract is with respect to the location of parties who in majority of the cases are anonymous, with e-mail domains, websites and

23 Cindy Chen, United States and European Union Approaches to Internet Jurisdiction and their Impact on e-commerce, 25 U. pa. J. int'LeCon. L. 423(2004).

24 Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, available at http://www.oecd.org/internet/consumerpolicy_oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm (Last visited on July 27, 2012).

electronic addresses not necessarily relating to the place of the business. Moreover, the website domain and email address are not necessarily sufficient in determining the location and physical space of the e-seller. Jurisdiction becomes a challenge due to the complexity of e-commerce transactions wherein the seller, buyer, sever, internet service provider are located in different countries.²⁵ For instance, Speak Asia Online a market research firm based in Singapore was carrying out online survey activities in India. In order to participate in these online surveys, a customer had to make a payment of Rs. 11,000/- per annum. However, the claims of this company were found to be incorrect unravelling a fraud to the tune of Rs. 2000 crores.²⁶ While an offence of cheating has been made out under Sec. 420 of the Indian Penal Code, as the firm is not incorporated in India, as such no legal redress mechanism exists for the consumers. This particular case is reflective of the jurisdictional issues in e-commerce and is also indicative of the fact that legal mechanisms have not kept pace with technological development.

The minimum contact doctrine which places minimum contact with the territory of the forum claiming jurisdiction as a justification for claiming jurisdiction has been adopted extensively by courts in matters relating to consumer protection in e-commerce.²⁷ However, this doctrine has to be tested against the tenet of fair play and substantial justice; thereby the location of the server which plays a crucial role in e-commerce cannot be used for determining jurisdiction as it is simply a medium of communication where technical support is provided.

25 Norbert Reich, *Consumerism and Citizenship in the Information Society* in *Consumer Law*, 168, Thomas Wilhelmsson, SallaTuominen and HeiTuomola (ed.) (The Hague/London: Kluwer Law International, 2000)

26 Available at <http://www.Indianexpress.com/news/speak-asia-fraud-rs-2-000-crores/825777/> (Last Visited on July 26, 2012).

27 Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the coming implosion of Personal Jurisdiction Theory*, 39 *University of California Review* 1480, 1495 (2006).

(B) ENFORCEMENT CHALLENGES

Given the nature of e-commerce, enforceability of judgments and laws has become contentious. Speedy and visible enforcement is the key to public trust amongst the e-consumers. In many cases, the problem of enforcement arises because the cost of providing the enforcement far exceeds the benefit so provided, especially in cases of cross border litigations and transactions of small value. Furthermore, laws and regulations may not be enforceable due to lack of jurisdiction of the court.²⁸In consumer disputes arising out of cross border online contracts, enforcement of judgments obtained in one jurisdiction against the defendant located in foreign jurisdiction can become complicated as witnessed in the case of *Yahoo Inc. v. La Ligue Le Racisme et Antisemitisme*.²⁹

Here, different regulations over e-commerce in USA and EU will be discussed which had a bearing on the enforceability of judgments, indicative of the practical difficulties being faced by e-consumers. Although EU and USA are the biggest market of C2C and B2C transactions, they have divergent approaches to e-commerce protection laws.³⁰ Currently, USA consumer protection laws are biased against e-consumers and are not suitable for C2C online transactions, whereas EU laws place a higher burden on the e-business for providing the necessary information.³¹ In EU traditional consumer protection laws have been applied to e-commerce, resulting in the 'country of destination' approach, wherein an online transaction is governed by the laws of the consumer's place of domicile.³²

28 Darius Kloza, E-commerce and the Recognition and enforcement of judgments, 4(1) Masaryk University Journal of Law and Technology 21, 26 (2010).

29 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D.Ca. 2001).

30 John R. Aguilar, Over the Rainbow European and American Consumer Protection Policy and Remedy Conflicts on the Internet and a Possible Solution, 4 Int'l J. Comm.L & Pol'y 1.1 (1999/2000).

31 John Goldring, Consumer Protection, Globalization and Democracy, 6 Cardozo J. Int'l & Comp. L. 1, 4 (Spring 1998).

32 Karen Stewart & Joseph Matthews, Online Arbitration of Cross-Border, Business to Consumer Disputes, 56 U. Miami L. Rev. 1111, 1116 (2002).

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In *Yahoo Inc. v. La Ligue Le Racisme et Antisemitisme*, this law has encountered difficulties, wherein Yahoo! a USA based internet service provider was ordered by the French court to remove the Nazi memorabilia posted by sellers on its online auction site as it was in direct violation of the French law which prohibits the posting of Nazi-related propaganda and memorabilia.³³ The court ordered Yahoo! to make it impossible for the Internet users in France to gain access to the online auction site displaying such artefacts. In response to this judgment, Yahoo! sought a declaratory judgment from the United States District Court in California stating that such an order of the French Court could not be enforced under USA laws as it would infringe on the freedom of speech guaranteed by the Constitution of the USA.³⁴ This declaratory judgement was granted and it was held that while the French court can pass judgments protecting its citizens, the USA district court cannot enforce a foreign judgment which violates the protection granted under USA laws and Constitution.³⁵ This case illustrates the difficulty of enforcing consumer protection laws when there is a conflict between the law of the consumer's and seller's domicile.

III. SOLUTIONS FOR BETTER PROTECTION OF E- CONSUMERS

In Part III, the various solutions are discussed so as to provide better protection mechanisms to the e-consumers and enhance the consumer confidence in electronic transactions. These solutions are divided into cross-border perspectives, other forms of dispute resolution and other consumer-oriented solutions.

(A) CROSS-BORDER PERSPECTIVES

In order to provide a more effective protection to electronic consumers in the Indian regime, it becomes important to analyze

33 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et' Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Ca. 2001)

34 Ivonnelly Colon Figg, *Protecting the new face of entrepreneurship*, 12 *Fordham J Corp. & Fin. Law* 230, 244 (2007).

35 *Ibid.*

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the status of e-consumers in other jurisdictions across the globe and the level of protection available to them. The researchers will mainly deal with the position in European Union and United States of America in order to shed some light on the cross-border approach to effective e-consumer protection in the sphere of applicable legislation and jurisdiction.

APPLICABLE LEGISLATION

The global network of the internet challenges the ability of each nation's jurisdiction to comprehensively address the issues of consumer protection. Recognizing this, the OECD in its 1999 Guidelines³⁶ has recommended internationally coordinated approaches for providing consumer protection. The European Union in furtherance of the same has devised a collective regulatory framework to protect the interests of the consumers in electronic transactions, acknowledging that the consumer is a weaker contractual party. The European laws set a minimum mandatory standard of protection and the Member states are free to provide additional protection to their consumers. This has led to a significant growth of e-commerce in the European Union with an extensive set of protections available to the e-consumers.³⁷ Under the EU regime, various legislations and directives together lead to effective protection of e-consumers. These include European Union Directives (EU Directives), which include the 2002 Electronic Commerce Regulations, the Consumer Protection (Distance Selling) Regulations, 2000 and the Electronic Signatures Regulations, 2000 along with the Data Protection Directive, 1995.

Since a variety of issues like privacy, data protection and information asymmetry arise in the context of Internet, a single legislation addressing these problems will not suffice and a multitude of laws have to provide for the effective protection of e-consumers.

³⁶ *Supra* note 25.

³⁷ OECD Conference on Empowering the E-Consumers: Strengthening Consumer Protection on the Internet available at <http://www.oecd.org/ict/econsumerconference/44260700.pdf>. (Last visited on July 27, 2012).

JURISDICTION

As has been seen before, the problem of personal jurisdiction has always been a thorny issue in international commercial transactions and the problem is amplified in cases where it takes place on a border less medium like the Internet.³⁸In the United States, the problem is resolved by adopting a ‘realistic approach’ whereby the negotiations, contemplated future consequences, the terms of the contract and the course of dealing between the parties are taken into account while determining the jurisdiction.³⁹ In the case of Zippo Manufacturing Co.,⁴⁰ the Court laid down the following tests for establishing the ‘minimum contacts’:

The defendant will be amenable to personal jurisdiction other than his own when (a) he sells products or services into the other jurisdiction or is actively doing business in the other jurisdiction and (b) the defendant maintains interactive web pages where users in the forum can exchange information with the host computer. However, if the defendant merely maintains a ‘*passive website*’ which simply provides information or advertisements, the defendant will not be amenable to personal jurisdiction in a forum other than his own. Thus, on application of the *Zippo* test, maintaining a mere passive informational website is not a valid basis for exercising *in personam* jurisdiction but if on a factual analysis, there is a greater degree of interaction, the defendant could be subject to personal jurisdiction in the other forum state. However, this factual analysis is not conclusive enough and leads to a gray area in cases of websites which fall between passive and highly interactive websites.⁴¹

38 Lucille M. Ponte, Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions, 12 *alB. L. J. sCi.& teCh.* 441, 482 (2002).

39 Michael Cordera, E-Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet,

27 *Rutgers Computer & Tech. L.J.* 231, 244 (2001).

40 *Zippo Manufacturing Co v. Zippo Dot Com, Inc.* 952 F. Supp. 1119 (W.D. Pa. 1997)

41 *Supra* note 39, at 485.

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However, the European Union adopts a very broad application of the effects doctrine i.e. the extent of the harmful impact of the conduct of the extraterritorial party within a foreign forum as a basis of exercising jurisdiction. This, in reality, translates into more pro-consumer approach. In fact, the European Commission has indicated that it is moving towards an approach wherein the e-consumers are given the freedom to decide whether they want to sue the e-business either in the consumers' or 'e-business' place of domicile.⁴² Even if the e-business seeks to bring an action against the e-consumer, the action can only be brought in the place of e-consumer's domicile.⁴³ The extent of consumer protection in EU is so high that even in cases of consumer contracts which contain a choice of law clause; the consumers cannot waive their habitual residence.⁴⁴ Thus, the e-businesses will not be absolved of their liability even by an insertion of a choice of law or choice of forum clauses. The US position on choice of forum clauses is different and have been upheld unless they are 'unfair' or 'unconscionable.'⁴⁵

On comparing the two approaches, it has been argued that the EU approach in order to provide greater protection fails to balance the needs of the e-consumers with those of the e-businesses. However, such an argument is not tenable in the current times when there is a crying need for boosting the confidence of e-consumers, the approach of EU seems to be more in sync with the aim sought to be achieved. Further, since the stakeholders have always been of the opinion that the online consumers should not be treated any differently from the brick and mortar consumers and hence, there is no reason why the benefits of their local jurisdiction should not

42 Ray August, *International Cyber Jurisdiction: A Comparative Analysis* 39(4) *American Business Law Journal* 531, 545 (2002).

43 EC Consumer Comments on Communication to the Council and the European Parliament – Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union, 1998 O.J. (C033) 003.

44 Ibid.

45 *Supra* note 39, at 267. See *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J.1999).

be made available to the e-consumers too. It is also reasonable to assume that if the e-businesses seek to expand their operation and gain increased revenues, they must be held accountable for it and the jurisdictional advantage to the consumers operates as an appropriate check on the same.

In the Indian scenario, where the growth of ecommerce is still in its nascent stages, it seems more tenable to adopt a judicious mix of the American and the EU approaches so that a balance is struck between the growth of e-businesses and the protection afforded to e-consumers.

(B) ALTERNATIVE FORMS OF DISPUTE RESOLUTION

In the context of consumer protection, the costs of court proceedings are too high as compared to the economic value of a typical consumer dispute and hence, the alternative forms of dispute resolution assume a lot of significance. The significance of such out-of-court methods such as arbitration is recognized in the European Commission Recommendations.⁴⁶ The various forms of dispute settlement are arbitration, mediation, negotiation and technology assisted measures.

Arbitration is recognized as a speedy, inexpensive and informal alternative to formal adjudication and consists of a binding award. Although the ability of arbitration to resolve –commerce disputes has been well-recognized but such disputes were traditionally in the Business2Business (B2B context) and the success of the arbitration model is doubted in the context of B2C transactions as the needs of consumers differ from those of the various businesses. The pre-dispute consumer contracts containing arbitration clauses for dispute resolution are too expensive and in cases of cross- border consumer disputes, the consumers cannot be sure of the applicability of the

46 EC Commission Recommendation of 30 March 1998 on the Principles applicable to the bodies responsible for Out-of- court settlement of Consumer Disputes, as sourced from http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31998H0257&model=guichett(Last visited on July 28, 2012).

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concerned laws as the regulations and treaties governing electronic commerce are lacking in most parts of the world.⁴⁷

At the same time, one needs to note that “*the answer to the machine lies in the machine*” itself. Thus, technological innovation is the perfect answer to the abuses of technology and this can lead to a more comprehensive protection for the e-consumers.⁴⁸ In places where the consumers are well-versed with technology, more technologically advanced communication tools, such as conferencing software, video conferencing or software-based mediation, can be used with the consent of both the parties.⁴⁹ However, this solution is also limited in its reach because the online consumer may not have sufficient access to the technological tools and skills and may not be able to afford the luxury of substantial online computer time. Further, the consumers may also be at a disadvantage as they may lack access to technological tools which are readily available in e-business organizations such as expensive video conferencing software etc.

Thus, the viability of dispute resolution mechanisms outside the traditional adjudication model is very limited due to the peculiar nature of consumer transactions over the Internet. The authors will now discuss important consumer protection measures.

(C) MISCELLANEOUS CONSUMER-ORIENTED SOLUTIONS FOR EFFECTIVE PROTECTION

Having dealt with the limitations of the cross-border solutions and other non-adjudicatory dispute resolution mechanisms, it is time to deal with solutions, which although require little effort but go a long way in ensuring effective consumer protection.

In many instances, the consumer is not able to seek redress as the cost of litigation far outweighs the benefit so provided. In such

⁴⁷ Donna M. Bates, A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes 27 *Fordham Int’L. J.* 823, 862 (2003-2004).

⁴⁸ *Supra* note 6.

⁴⁹ *Supra* note, at 468.

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cases, a feasible solution is to group together several complaints of a similar nature and thus, instilling a sense of empowerment in the consumers. In many of these instances, a substantive rebuke of a business in not complying with the lawful business procedure is often more appropriate for such wronged consumers than a meagre monetary compensation.⁵⁰

Further, speedy and visible enforcement is the key to boosting consumer confidence and in this context, the role of the Government becomes imperative. The Government can play a major role in sponsoring accreditation scheme for web traders; for example 'Trust UK.' Under this scheme, if a person purchases online through a member of the Trust UK scheme, the consumers have the guarantee that the business organization will protect the privacy, ensure that the payments are secure; inform the consumers about the terms and conditions they have agreed to and ensure timely delivery of products and services.

The need for educating the consumers about their rights can never be emphasized enough. An education campaign should encourage the e-consumers to be more informed about their rights in context of transactions over the Internet. Further, the OECD has always asserted that the consumer education should be provided not only by governmental agencies but also by non-governmental entities, business groups and other stakeholders and the obvious shared entities between these entities should incentive this approach.⁵¹

CONCLUSION

Internet has greatly revolutionized human life and made possible transactions between people in two distant corners of the globe just on a mouse-click. However, this unprecedented growth in technology has not been without its vices and consumers are more vulnerable in electronic transactions as compared to offline consumers. The situation

50 E-Consumer Protection: A Public Consultation on Proposals, arts and Humanities Research Council, (2010).

51. OECD New Policy Recommendations on Consumer Education , Organization for Economic CO-Operation and Development (2009).

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worsens in the context of Internet because there is no legislation to comprehensively address the sort of problems in such transactions and the jurisdiction of the Courts is challenged due to internet being a borderless medium.

In this context, it becomes important that a judicious mix of the US approaches and EU approach to jurisdiction so that the consumers are given the opportunity to bring an action against the e-business in their domicile without detrimentally affecting the interests of e-businesses. The Consumer Protection Act, 1986 needs to be suitably amended to take into account the interests of e-consumers so that the Courts as well as the other stakeholders are in a better position to respond to claims of e-consumers. Further, this legislation must work in tandem with other statutes since the medium of Internet raises various other issues of privacy, data protection, information disclosure etc.

The growth of e-commerce transactions have also led to the need for developing alternatives to formal adjudication like arbitration, mediation etc. However, even in other forms of dispute resolution, use of technology to remedy the problems posed by technological abuses will lead to adequate solutions. At the same time, it needs to be understood that all these efforts will be rendered nugatory if simultaneous efforts towards consumer education and improving consumer awareness are not undertaken. It becomes imperative that the different stakeholders come together for this purpose since an informed e- consumer works for the benefit of himself, government as well as the e-businesses and is thus, a cherished asset.



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7

“THE WAYS TO EMPOWER THE E-CONSUMER IN THE ALARMING FIELD OF ONLINE SHOPPING”

*M. Mahindra Prabu & P. Rajadurai**

INTRODUCTION

The online shopping is a new incline that gains momentum in the recent years in India. There are four phases in shopping right from the beginning. In first phase, the sellers bring their products in streets or directly to the doors of the consumers for sale. In second phase, the consumers have to visit the shops of the seller to buy any product. In third phase, the concept of super market and mall culture emerges wherein the consumers are free to pick their products from the shop and then goes for billing. In fourth phase, the consumer can order the product online and it will be delivered to the doors of the consumer by the seller. Here the seller uses internet as a medium for business transaction. Thus internet provides sellers to open their shops through

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a web portal which can be operated even in the home of the seller and at the same time the consumer can also place an order right from his home and the ordered goods will be delivered at the door steps of the consumer by a well packed courier service.

Being Indians we are having some ethos which is traditional in nature and we want to touch and feel the products before buy. But now our attitude changes and we began to trust the branded ones and also want to fulfill our needs in a speedy manner in this busy world. Thus this new trend attracts youth, middle class and upper class people.

On the other side of the coin this field became easy target for the wrong doers. The menace of fake websites and the role of hackers were threat to this modern trend. Also the deficiency and default by the sellers demands changes in the existing law because the sellers and buyers could be from different territories and the laws are territorial in nature. So it's the inevitable situation for the government to amend or to create a new statute which lives up to the expectations in safeguarding the e-consumer in this technologically advanced world. At a glimpse perspective, it shows that the online shopping is a new trend, its utility is very higher but indeed it's a highly complicated one and the e-consumers needs protection globally.

Who is an e-consumer?

There is no widely accepted definition for e-consumer worldwide. Generally a person buying goods or services over the internet which involves cash on delivery or online transaction through debit card, credit card etc., is called as an e-consumer.

Reasons for the growth of e-consumer

Internet users rapidly increase day by day throughout the world. They use internet to communicate each other and to make easy business transactions. They can get anything through internet at their doorsteps. Following are the main reasons for the growth of online shoppers in a detailed manner to have a clear understanding over this field.

Better Time Consumption

Time plays a vital role in all the things and online shopping is not exempted from this. If a person planned to buy some products, first of

all he have to allot a time to go and search for the products to know about the availability, if the product is not available on the first shop, then he has to move to the another shop. He used to travel a lot to get desired things. If the sellers busy with other consumers, then he has to wait passively. These are all the reasons that bind with the time related matters. Moreover in the busy urban cities traffic plays a vital role. Sometimes heavy traffic consumes a full day too. So for routine office workers it's not possible to shop on the working days and there will be rush in the weekend. But all these difficulties can be erased in a 14 inch screen by means of online shopping.

Faster and cheaper

There are wide varieties of models and products are available all over the world. Is it possible to see all products and the brand in various categories is a single shop within a day? Answer is definitely 'no' and impossible too. Even a world's largest commercial mall is also exempted from this. But it could be possible in a single online shopping website. Further it is easy to compare same variety of products in different online websites in a single page by means of an Internet browser.

Cheaper in the sense, for creating online websites and for the maintenance of the same a small amount of money is more than enough. But for acquiring and maintaining a shop in Urban and Rural involves huge investment, labours etc. These expenses added to the total cost of the product which results in a difference price tag of same products between normal traditional shop and online shopping websites.

Easy Transaction and Home Delivery

Unlike physical shopping, we don't need to wait in a long queue and there is no need of carrying cash in an assumption. The transaction mode is very easy and very simple in a single click. The home delivery by the e-sellers attracts consumer in large scale. Now-a day's plenty of online shops offer free shipping to the consumers because this field is flourishing rapidly which results in good yield of profit. They assure the consumers that the goods will reach home very safe mostly without any little damage.

Problems Faced by the e-consumers in online shopping

All is well until the problem rises. The proverb 'All the glitters are not gold' can be applied here to some extent. In this area, we are going to examine various problems that are emerges from the online shopping in the following.

Abuse of Personal Information

When a person planned to buy product from online means, he must required to register in particular online website and also have to comply with other terms and conditions of the e-seller/e-retailer. The basic requirements of most of the online shop is name, address, phone number, job details, annual income, date of birth etc., So there is a likelihood of transferring the personal information of e-consumers to their subsidiary companies or to some other unknown persons. So it's truly a threat to the concerned people's privacy.

Problematic Delivery

One of the major problem faced by consumers are delay in delivery. The online shops won't give any assured date of delivery. Sometimes they clearly specify too, it's not accurate instead they use the clause 'May,' 'within.' Further the e-consumer is asked to acknowledge safe delivery by affixing sign on a paper before the concerned product is inspected by him. Thus the delivery is very complicated when we compared with traditional shopping.

Ignorance of complaint and the problem of refund

As there are plenty of consumers online, there is responsibility on shoulders of online shopping website owners to create a separate cell or wing in their website to assist consumers but in practical they provide only the email id to submit the feedback and the complaint. In some websites they provide official telephone number. But when problem arises and the consumers try to contact by means of Email ID and telephone number, it ends in no response or inadequate response. Only very few websites refunds the money to consumer and had taken due care to deal with e-consumers problems. Most of the sellers try to ignore complaints from e-consumers regarding delay and deficiency in products and they are not ready to refund or exchange for their faults.

Complex Contractual Terms and Seller Warranty Issues

In many online shopping websites the terms used in the contract are very complex and have implied conditions favouring the seller. By clicking simply the ‘I agree’ button or icon of the computer screen, the e-consumers are automatically bound by the conditions that are put by the e-seller and in some cases, they won’t know by clicking the ‘I agree’ icon, they entered into a legally binding contract. The terms used in the contract are highly technical and it is very hard to understand even for a skilled person. These contractual terms have many implied conditions of sale in it which is unknown to the common public at the time of agreeing to these contracts. In some websites the contracts are such a lengthy one so there is a possibility for e-consumer who came to online shopping for time saving purpose to easily ignore the contents in the contracts. Later when he finds defect in that product, through these implied conditions the e-retailer or online shopping website easily escapes from the clutches of Law.

Moreover there are websites which use the illegal terms like ‘Goods once sold cannot be taken back because they deny the consumer the right to refund the amount paid for the defective product. Further some websites offer the products at very low cost with seller warranty i.e., without manufacturer warranty. It raises questions about its genuineness and original identity. If you put ‘seller warranty’ in practical purpose it is not at all a warranty but an attractive term to lure e-consumers’ money. As these kind of products when put into competition with original, as like original with less price tag, the e-consumers easily became easy prey to this unfair trade practices.

Security and Jurisdictional Issues

The world becomes a global village due to globalization and the laws of sovereign countries are territorial in nature and they failed to protect e-consumers globally as there is a jurisdiction issue and this is common in all the countries. The only way forward to resolve this issue is by means of international co-operation.

Further in this modern world, there are wide possibilities for hackers to easily interplay the transactions in internet and can steal away the secured information and thereby misuse the debit cards and credit cards of the e-consumer.

Position of European Union

The European Union, being the responsible authority of the European countries, through the European Union Directive¹ framed the rules and policies keeping in the mind of electronic contracts and e-consumers rights. Though the European Union established a set of rules and basic principles for the consumer protection for all their member states they also allow the member countries to set and implement their own laws according to their state welfare.

The Directive states that the supplier shall disclose

- His identity and the main business, the geographical address at which the supplier is established and any other geographical address relevant for the customer's relations with the supplier.²
- The identity of the representative of the supplier established in the consumer's Member State of residence and the geographical address relevant for the customer's relations with the representative, if such a representative exists.³
- Where the supplier is registered in a trade or similar public register, the trade register in which the supplier is entered and his registration number or an equivalent means of identification in that register.⁴

Therefore when a dispute arises on the online trade in electronic commerce, the consumer can trace the address and details of the e-seller and the member countries must give their co-operation and help the e-consumer to dissolve the dispute.

1 Directive 2002/65/EC of The European Parliament And of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

2 Art. 3.1 (1) (a) of Directive 2002/65/EC of The European Parliament And of the Council

3 Art. 3.1 (1) (b) of Directive 2002/65/EC of The European Parliament And of the Council

4 Art. 3.1 (1) (d) of Directive 2002/65/EC of The European Parliament And of the Council

Further, the European Union encourages the litigants to resolve the dispute through the Alternative Dispute Resolution systems (ADR). The European directive clearly says that the Member States shall promote the setting up or development of adequate and effective out-of-court complaints and redress procedures for the settlement of consumer disputes concerning financial services provided at distance and the Member States shall, in particular, encourage the bodies responsible for out-of-court settlement of disputes to cooperate in the resolution of cross-border disputes concerning financial services provided at distance.⁵ Also for cross border disputes outside European Union, the European Commission joined hands with an international network called ICPEN to ensure the safety of its e-consumers.

Position in United States

Being a developed country, United States had lot of experience in online consumer disputes. The Federal Trade Commission⁶ protects American Consumers through the Bureau of Consumer Protection. It is the only federal agency with both consumer protection and Competition Jurisdiction. It creates a fully operated 24 x 7 dedicated website for registering online consumer complaints. It collects complaints from the Consumers but it doesn't resolve individual complaints. The reason for collecting complaints from consumer is to help them to detect patterns of wrongdoing and thus it leads to investigations and prosecutions. For complaints of International nature it works together with ICPEN to combat cross border fraud and thereby provides protection US consumer globally. Through www.econsumer.gov a specially devised website created by ICPEN, a consumer of US can file a complaint against an entity in another country. Moreover they provide the Do's and Don'ts of online shopping and information about fake online shopping websites, their illegal activities and thereby create awareness among its citizens. Thus they have well established network to provide adequate protection to their consumers in both National and International Level.

5 Art. 14 of Directive 2002/65/EC of The European Parliament And of the Council.

6 The Federal Trade Commission is created in the year 1914 and it administers wide variety of consumer protection laws in United States.

Role of ICPEN

The International Consumer Protection and Enforcement Network (ICPEN) is an organization composed of Consumer Protection authorities from almost 40 countries. It is formed to share information about cross-border commercial activities that may affect consumer interests and to encourage international cooperation among law enforcement agencies. ICPEN does not handle individual consumer complaints; however, consumers may report their complaints about cross-border transactions with foreign companies using a specially devised website www.econsumer.gov. The complaints are accessible to certified government agencies in ICPEN member countries, which may use this information to investigate suspect companies and individuals, uncover new scams, and spot trends in fraud. The econsumer.gov website may also help consumers who choose to resolve their disputes by means of ADR mechanisms.

Position in India

In India due to globalization there is a sharp rise in e-consumers and it creates new problems, legal issues in this field. There is no definition for e-consumers under the Consumer Protection Act, 1986. The courts in India consider e-consumer disputes as normal traditional online consumer dispute. But it fails to live up with present scenario.

The Consumer Protection Act, 1986 is territorial in nature whereas the online shopping, a product of globalization involves cross border disputes. Now the question arises where this cross border disputes fits into Indian laws. The difference between the following two illustrations clearly depicts the lacunae in our Consumer Act regarding the e-consumer in India.

Illustration: 1

'xyz' an online shopping website having its head office at 'Calcutta' delivered a product to its consumer 'c' who ordered the product via online at Chennai. Later the product was found defective. Here 'c' can file the case in Chennai (where the cause of action arises) or in Calcutta where the defendant carries business.

Illustration: 2

‘ABC’ an online shopping website having its head office in ‘New York’ and has no branch office in India but has global exposure. ‘Z’ an Indian citizen, resides in Bangalore orders a product via online. The said product found defective and there is no proper response from the ‘ABC’ website regarding this issue. Now the question regarding jurisdiction problem arises where ‘Z’ should have to file his case.

According to Civil Procedure Code, 1908 the suits other than immovable property should be instituted where defendant resides or cause of action arises.⁷ Also the Consumer Protection Act, 1986 states that the District Forum has jurisdiction to try suits where the defendant voluntarily resides or carries on business or has a branch office or personally works for gain or where the cause of action wholly or partly arises.⁸ Further it states that the suit should be filed within the local limits of concerned District Forum and it raises a question regarding the position and power of the Consumer Court in cross border disputes and whether the suit filed by the consumer where the cause of action wholly or partly arises is maintainable or not.

When we look at the agreements of some online shopping websites they clearly mentioned that “in case of disputes only arbitration is available and the court review is limited over the arbitral award.” Further some international online websites in their agreements specifically stated that they are subjected only to laws of their own country though they have business in India and also these agreements have a clause which states it is subject to change without any prior notification to e-consumer. In such situations a question arises whether Consumer Act is able to safeguard the rights of the e-consumer as there is a contract to the contrary.

Rights of e-consumer

The Consumer Protection Act, 1986 provides certain rights to consumer. These rights include the right to be informed about the quality,

7 Sec.20 of Civil Procedure Code, 1908.

8 Sec.11 of The Consumer Protection Act, 1986.

quantity, purity, standard of the product.⁹ In normal traditional method the consumer can inspect the product and questions the seller about the functions and designs of the product. If there is any deficiency which is visually perceptible then he/she has the choice to go for the alternative or may even reject the offer. But in online shopping the consumer has only the option to look at the picture and information depicted by e-retailer or online shopping websites regarding the product. Before even he/she touches and inspect the original product it will be delivered to the consumer. If the product is found defective then as per some of the contracts of the online websites the consumer has only option to exchange and the shipping charges should be bear by the consumer for the fault of the e-retailer. According to S.41 of Sales of goods Act, 1930 the buyer's has the right to examine the goods. It states that,

- 1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
- 2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Therefore it is necessary to create awareness about these types of contractual terms among the people. Further in cases of delay some websites failed to provide any tracking facility for the product ordered. Even the consumer redressal section of these websites acts as a nominal body and found inactive. Therefore e-consumer should have the right to look and inspect the product at the time of delivery along with the right to track the ordered product.

Suggestive measures to protect e-consumer in India

Regarding Cross border disputes the developed countries are leading examples to solve the jurisdictional problems. Developed Countries like US, UK joined with other developing countries like China, Chile etc.,

9 Sec.6 of The Consumer Protection Act, 1986.

formed an International Network called ICPEN to gather and share cross border complaints and to help consumers resolve these complaints through Arbitration.

Now time had come for India to join such International Network or else she can create a new International network through her friendly and neighbouring countries because this type of network chooses Arbitration to resolve disputes and it will be easy for litigants from countries like India, rather to go for costly suits.

Moreover this kind of International Network needs a working partners therefore it is necessary for India to create a 24 x 7 dedicate National website for e-consumer problems. Therefore it is easy for e-consumers to lodge complaints online. Moreover this website may register the online shopping websites as like registered companies if they satisfy the following conditions.

- Must disclose the identity of the e-seller.
- Must disclose the geographical address relevant for the customer's relations with the supplier.
- Must maintain a branch office in India.
- To Provide 24 x 7 consumer support.
- Must abide Indian Laws.

And a list of those registered shopping websites may be displayed in National website so that the consumer can easily identify the safer websites for online shopping. Above all a separate body or wing which consist at least one person skilled in International Law to administer and to co-operate with other International networks. Further they can issue guidelines to e-consumer regarding the Do's and Don'ts of online shopping and may display a list of fake websites to create awareness among our people.

Moreover by amending Sec.11 of the Consumer Protection Act, 1986 a relaxation for e-consumer, in respect of cross border issues, should be made by allowing them to file the suit where the cause of action wholly or partly arises and the plea by defendant that the suit should be filed where he resides or carries his business should be summarily rejected.

25 YEARS OF CONSUMER PROTECTION ACT : CHALLENGES AND THE WAY FORWARD

In e-consumer dispute, if the courts strictly apply the contract clauses as discussed above then the end person who is going to get affected is the e-consumer. Therefore the Consumer Forum should be empowered to strike down terms which run contrary to the very objective of the consumer Act by way of amending the existing Consumer Protection Act.

Regarding the rights of e-consumer Sec.6 of the Indian Consumer Act should be amended to include following rights for e-consumer. They are :

1. Right to inspect the goods on delivery.
2. Right to cancel the order from the moment the consumer places order up to six working days before the delivery.
3. Right to return defective products.
4. Right to be refunded the amount paid without any deductions.
5. Right to cancel order and to be refunded in cases of delay in delivery.

CONCLUSION

Recently ASSOCHAM – Associated Chambers of Commerce and Industry in India in their press report stated that it expects 350% growth in this sector and the business of this sector will be around Rs.50000 crores in 2020. Therefore it is just and necessary that the present consumer Act should be amended to incorporate new terms like e-consumers and to safeguard their interests and rights. The amending Act should empower the e-consumer and be able to resolve the disputes in this modern world. It should provide and encourage Alternate Dispute Resolutions in consumer disputes. The people of India expect its government to safeguard their rights in Cross border disputes. Whether such expectations will be materialized? Whether the rights of e-consumer will be recognized? Whether India will catch the bus in this field in which other developed and developing countries already seated is to be answered in the coming days by proper amendment in this field.



8

ELECTRONIC MONEY AND PAYMENT SYSTEM: INDIAN PERSPECTIVE

*Abhishek Gupta**

In spite of the benefits of electronic money, uncertainties on the path of consumers and merchants about the underlying technology may well slow widespread acceptance of such systems. But with a proper governmental function and effective regulations we can build a systematic structure to overcome the odds of electronic money.

The Reserve Bank of India is doing its best to encourage alternative methods of payments which will bring security and efficiency to the payments system and make the whole process easier for banks. The Indian banking sector has been growing successfully, innovating and trying to adopt and implement electronic payments to enhance the banking system. Modernizing India's payment infrastructure would ease access, promote card usage and trigger a much needed transformation of banking and payment services.

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This paper argues that electronic money could become an important form of currency in the future and a key to better consumer patron enhancing the country's competitiveness as a global player.

1. INTRODUCTION

Money is widely accepted medium of exchange, a store of value, and a unit of account. It forms the basis for a smooth function of market system. Money is fungible: there is a tendency for older forms to take on old roles.

With the advent of Internet and Electronic Commerce, we are in the process of shifting significantly from paper currency to electronic cash. Stored-value cards with an embedded micro chip that stores money in digital form may become a customary circulating medium along with privately supplied digital cash stored in computers hard drives. These can be used over the Internet to facilitate new age commerce.¹

The transition from a paper-based monetary system to an electronic payment system will reduce transaction costs, expand markets, and empower individuals. The rules that govern the new monetary universe will have to be transparent, equally applied, and consistent with individual freedom if people are to have trust and confidence in cyber money and cyber commerce.

The days of cash in form of notes and coins are probably numbered. It is expensive to handle (expenses include risk both banks and merchant incur). This type of cash is also becoming increasingly easy to counterfeit at low cost, particularly given the quality of output that can now be produced by inexpensive colour photocopies. It is obvious that traditional cash also fails miserably as a medium of exchange for parties who are not in each other's presence at time of sale.

As money technology has evolved, methods of payment have also changed, but cash still often remains a preferred method of payment by many people. Over the past few decades various media and industry experts have predicted the demise of cash and the advent of the "cashless" society.

1 James A. Dorn, "The future of Money in the IT Age"

2. ELECTRONIC MONEY

Electronic money is nothing more than the replacement of physical cash in the shape of coins and banknotes with an electronic equivalent. According to Wikipedia, digital cash is:

A system that allows a person to pay for goods or services by transmitting a number from one computer to another. Like the serial numbers on real dollar bills, the digital cash numbers are unique. Each one is issued by a bank and represents a specified sum of real money. One of the key features of digital cash is that, like real cash, it is anonymous and reusable.

From this definition it is obvious that electronic money is very much like physical money for all practical purposes. It is anonymous; it is given value by a financial institution; and it must be subject to be used to pay for goods and services in any sort of transaction. The new Electronic Money Institutions European Directive—which will be discussed in more detail later—also defines electronic money for the purpose of the legal regime that will regulate this emerging sector. It states that:

‘Electronic money’ shall mean monetary value as represented by a claim on the issuer which is:

- 1) stored on an electronic device;
- 2) Issued on receipt of funds of an amount not less in value than the monetary value issued;
- 3) Accepted as means of payment by undertakings other than the issuer.

This definition is wide ranging, and attempts to be technology neutral. The requirements for a payment system to be considered electronic money are all there.

3. DEVELOPMENT OF PAYMENT SYSTEM

Markets of any sort involve transactions. These transactions usually end up in the seller being paid by the buyer. Until then, the whole transaction remains uncertain – the longer the delay is between undertaking to pay and actual payment, the greater is the uncertainty. The internet offers the prospect of a highly cost effective payment

system for low value transactions. Technology is able to offer nearly instantaneous settlement of transactions. In order to achieve such an objective, security issues will need to be successfully addressed without losing all of the benefits that accrue from internet's open structure.

In late 1990s, the technologies related to electronic money like electronic checks and embedded smart cards used the public key cryptography for transferring money. With the advent of e-mail, the transactions of electronic money started increasing. People started sending their credit card details via e-mail to buy goods. Later, the customers started having an online account to avoid transaction fees.

Now a days, the use of electronic money is possible due to cryptography and digital signatures. Public key encryption and decryption together are called public key cryptography. The public key encryption involves two keys, viz. public key and private key to authenticate the identity of an entity, electronically. As the name suggests, the public key is published and the private key is kept secret. Data is encrypted with the public key and the same data is decrypted with the corresponding private. Digital signatures are used when you are encrypting some important information that is to be kept confidential. Digital signatures involve the use of hash table that encrypt a hash using the private key and decrypts the hash using the private key.

4. EXISTING METHODS

The definition of electronic money is so broad as to include any sort of electronic device to store monetary value, the methods of electronic money are only limited to the existing technology. At present there are two main storage methods for electronic money, by software and by cards.

The most viable and promising electronic money system is that of storing monetary value in secure cards with microchips, known as smart cards. The smart card is simply put, "*a plastic rectangle containing an electronic chip and holding a certain amount of readable data.*" This technology is not only circumscribed to electronic payment systems, it is also to be found in several other areas such as digital television boxes and Subscriber Identity Module (SIM) cards for mobile phones. Smart cards for electronic payments use the chip to store certain amount

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of value, which can be charged in anything from a public phone to an Automated Teller Machine (ATM). For security reasons, the information in the card must be stored by use of encryption algorithms that can only be decoded by an adequate reader; otherwise the value from the card cannot be unlocked. The bearer will present the card to a retailer that has a card reader, and the value will be then unlocked and transferred to their account. This value is redeemable with the card issuer. Smart cards can also be used for Internet transactions if the consumer has a card reader attached to their computer, this reader will unlock the value in the card and send the information to the online retailer, facilitating an anonymous e-commerce transaction.

5. POTENTIAL BENEFICIAL EFFECTS OF ELECTRONIC MONEY

5.1 Lower cost

First, digital cash will make transactions less expensive because the cost of transferring digital cash via internet is cheaper than through the conventional banking system. To transfer money in traditional way, conventional banks maintain many branches, clerks, automatic teller machines and specific electronic transaction system. Overhead cost of all this bureaucracy is generated in part from less for money transfers and credit card payments. Since digital cash uses the existing Internet network and the specific computers of its users, the cost of digital cash transfer is much lower, near to zero.

Second, since the Internet has no political borders, digital cash is also borderless. Thus, the cost of transfer within a state is almost equal to the cost of transfer across different states.

The cost of international money transfer, now much higher than transfer within the states, will be reduced dramatically.

Third, the digital cash payment potentially can be used by anyone with the access to the Internet and Internet based banks. While the credit cards payments are limited to authorised shops, digital cash makes person to person payments possible. Thus, even very small business and individuals can use digital cash for all sorts of transaction.

The consequences of these effects are enlargements of new business opportunities and an expansion of economic activities on the Internet.

Even small business organisations can trade with customers all over the world.

5.2 Consumer convenience

Electronic money could prove very convenient for consumers. Because it involves advanced charge of money from the owner's bank account, almost anybody can be supplied with a smart card, as there is no risk to the issuer. Consumers will also find it useful to have to do without carrying cash\ for small transactions, such as bus fares.

5.3 Increased consumer confidence

Because a smart card only holds the amount of money that the bearer has placed on it, consumers will be more willing to use it to purchase over the Internet without fear of somebody else misusing the payment information, as happens with credit card fraud. Some of the schemes are also being issued with a built in locking code, which will allow users to lock the cash on a card, making sure that if the card gets lost or stolen another person will not be able to use the money.

5.4 Issuer advantages

As it has been mentioned, this system is much cheaper to operate than other payment models, which is a great advantage for issuing institutions. The liability for the issuer is also minimal, which reduces costs and enhances profits.

5.5 Anonymity

With e-money, there is anonymity. It is not the same case with liquid cash or credit and debit cards. E-money transactions mostly happen on the Internet through an online gateway where the identity of the payer is secured and behind the screens. The person on the other side receives the payment from the payer but does not necessarily know the identity of the person behind the money paid.

5.6 Record of Transactions

Each and every transaction made with electronic money is recorded in the bank's and the user's online records. These records have all the essential information about the transaction the name of the payer, the

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name of the receiver, the date, place and time it took place. This makes it more dependable and users can access their record of transactions at any time of the day.

6. POSSIBLE OBSTACLES OF ELECTRONIC MONEY

In spite of the benefits of electronic money, uncertainties on the part of consumers and merchants about the underlying technology may well slow widespread acceptance of such systems. Security, the need for hardware and software infrastructure as well as the fact that innovations are fast paced creating doubts about how long any technologies will be in use are some of its uncertainty.

Digital cash means that issuers will have to overcome not only distrust of the security of digital medium and simple inertia, but also strong nationalistic trust in political currency.

6.1 Consumer confusion

With three schemes competing to become the electronic money standard, there is a real possibility of the whole system becoming too complicated for users. One of the main problems with too many schemes would be that the user may not be able to use the card everywhere, which is what would be expected of a system that is meant to replace physical currency.

6.2 “Transnationality”

The most important character of electronic money is its not constrain by national borders. Users can purchase services and goods from any site anywhere on the Internet; Banks can issue electronic money relative to any stable, real currency.

Transnationality is a vital characteristic of this payment system. Digital cash will provide benefits and problems in the near future. It is the transnational character of digital cash that will open new business opportunities around the world but also bring great challenges for governments. The solution to these problems could lead to a controlled cyberspace, structures and regulation governing the use of funds. Alternatively, those who use it may regulate the economy of the Internet. Only time will tell.

6.3 Economical effects

If electronic money is issued privately, it may be independent of government conditions. Such cash will consequently have a kind of monetary freedom. Conditions that make government-issued money credible do not apply to private-issued currency. Government-issued currency is the official currency of a given state, and is used, in spite of its value, by the citizens of a given state.

6.3.1 Exchange rates

New-age cash could well create great instability in exchange rates. Since it will, initially at least, be a proxy for real currency (electronic value is to be bought with real cash and may be redeemed for real cash), there has to be an exchange rate applied to it. There must be a foreign exchange market in cyberspace. If there is a great deal of digital speculation, it could lead to be the de-stabilisation of foreign exchange rates. Speculative behaviour could accelerate the initial depreciation of any given currency and amplify general fluctuations in the market. A so-called bubble effect could occur.

6.3.2 Money Supply

The introduction of electronic money may affect the money supply in the real world. Those using the new type of cash would deposit real cash in a bank and would request digital cash in exchange of it. If a bank issuing digital cash, by maintaining a 100% reserve system, the amount of digital cash will be fixed to the amount of real cash on deposit. In this case no new money will be created.

However, if the Internet economy expands banks may soon choose to lend customers money in the form of digital cash. Banks will move to a virtual, fractional reserve system parallel to that found in real world. New money will be created. In other words, the total amount of digital money will exceed the amount of deposited real cash.²

2 When the banks in cyberspace begin loans in digital cash, it will exceed reserved real cash (money creation). Reflecting the fluctuation of money demand in cyberspace, the internet will absorb real cash. This will affect the supply in the real world.

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This development could mean that money in cyberspace will fluctuate with virtual economic activity, which in turn eventually has an impact on the real world's money supply. Suppose the virtual economy expands leading to a temporary storage of digital cash, the demand for digital cash will mean the transfer of real cash into electronic banks. Cyberspace will take in the real cash and shrink the money supply in the real world.

6.3.3 Financial crisis

If banks start to create new money in the form of digital cash, there will be an opportunity for bankruptcies, the chain effect of which may easily lead to virtual financial crisis. In the real world, the risk is minimised by a safety net offered by the central banks or institution as the Deposit Insurance Corporation. In cyberspace, so far, there is no central banking authority that provides the equivalent of the safety net.

It is possible that the default of one bank may lead to the defaults of other virtual banks. Customers may rush to their banks to demand a conversion of digital cash to real cash. If there is insufficient real fund on hand, there could be a serious financial crisis. In the absence of a virtual central bank, there is an increased risk of this sort of problem.

7. THE ROLE OF GOVERNMENT

There is considerable debate about what role governments should play in the transition to a digital world. Some argue that the government should play little, if any, role and allow the private sector to resolve most of the issues. Others advice the government to go so far as to set all the standards for issuing and using electronic cash, if not be the exclusive issuer of electronic cash. Still others recommend approaches that fall between those two extremes.

Government must be careful not to overreact to, or stifle, new innovations that can greatly benefit the consumer and the economy and should take advantage of marketplace solution to issues where appropriate. The fact is that Cyberspace differs from our everyday world in that coercive force cannot be projected across a network. It is not possible, within the confines of the internet itself, to compel anyone to do anything. This is going to be treated as a grave threat by most national governments.

Revolutions in the form of money inevitably have political consequences. The development of modern banking and the concomitant erosion of the government's monopoly of money creation played a significant role in the development of democracy. As electronic money could also threaten government control the lessons of history have great contemporary relevance.

8. ROLE OF RBI IN ENCOURAGING ELECTRONIC PAYMENTS

As the apex financial and regulatory institution in the country it is compulsory for the RBI to ensure that the payments system in the country is as technologically advanced as possible and in view of this aim, the RBI has taken several initiatives to strengthen the e-payments system in India and encourage people to adopt it.

- The Payment and Settlement Systems Act, 2007³ was a major step in this direction. It enables the RBI to “regulate, supervise and lay down policies involving payment and settlement space in India.”
- Apart from some basic instructions to banks as to the personal and confidential nature of customer payments, supervising the timely payment and settlement of all transactions, the RBI has actively encouraged all banks and consumers to embrace e-payments.
- In pursuit of the above-mentioned goal the RBI has granted NBFC's (Non-Banking Financial Companies) the permission to issue co-branded credit cards forming partnerships with commercial banks.
- The Kisan Credit Card Scheme was launched by NABARD in order to meet the credit needs of farmers, so that they can be free of paper money hassles and use only plastic money.
- A domestic card settlement company known as India pay has recently been started by the RBI, inspired by Unionpay in China, which will be promoting the use of cards i.e. “Plastic money.”

3 <http://www.rbi.org.in/scripts/FAQView.aspx?Id=73> .

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Initially functioning as an NGO, India pay will focus on potential customers from rural and semi-urban areas of India. Indiapay will have a much wider coverage than Visa, Master Card or American Express cards which have always been used for card-based settlements and might even pose a threat to them.

- The NREGA (National Rural Employment Guarantee Scheme) introduced by the Government will ensure rural employment in turn ensuring that the employees get wages. Each employee will have a smart card functioning as his personal identification card, driver's license, credit card which will also function as an electronic pass book, thus familiarising the rural populations with e-payments.

However, the Indian banking system suffers from some defects due to certain socio-cultural factors which hampers the spread of the e-payments culture even though there are many effective electronic payment channels and systems in place. Despite the infrastructure being there nearly 50% of all payments are still made in cash. The main reason for this apathy switch to e-payments comes from lack of awareness of the customer despite various efforts by the Government.

8.1 The Regulatory Framework

The RBI, the Indian financial regulatory authority was on overdrive in 2008-2010, as it unleashed a progressive set of measures, to catalyse the electronic payments landscape in India.

Under the Payment Systems & Settlements (PSS) Act of 2007, two regulations have been made by the Reserve Bank of India, the Board for Regulation and Supervision of Payment and Settlement Systems Regulation (BPSS), 2008 and the Payment and Settlement Systems Regulations, 2008. Both these Regulations came into force along with the PSS Act, 2007 on 12th August 2008. The BPSS would exercise the powers on behalf of the Reserve Bank, for regulation and supervision of the payment and settlement systems under the PSS Act, 2007.

The Payment and Settlement Systems Regulations, 2008 covers matters like form of application for authorization for commencing/

carrying on a payment system and grant of authorization, payment instructions and determination of standards of payment systems.

This was subsequently followed by the establishment of the National Payments Council with the following objectives:

“.....to consolidate and integrate the multiple systems with varying service levels into nation-wide uniform and standard business process for all retail payment systems &..... To facilitate an affordable payment mechanism to benefit the common man across the country and help financial inclusion”⁴

9. ELECTRONIC PAYMENTS IN INDIA: IMPERATIVES

India’s growing middle class presents FIs⁵ a significant opportunity to link economically-desirable consequences and derive substantial revenue streams from new banking and payment products, channels and customer segments while rising to meet a developing market’s consumer needs.

9.1 Imperative 1: Developing the Infrastructure with Co-opetition

The most critical factor hindering the adoption of electronic payments in India is the lack of a technology and payments infrastructure that can support the emerging financial system. In India, the best model for success in driving electronic payments does not necessarily understand how another emerging market approaches payments. Rather it is looking to another industry that has achieved phenomenal success by deploying what may be a uniquely Indian strategy. For FIs, many lessons can be borrowed from the strategic playbook of India’s telecommunications industry. Its meteoric rise - growing 52 percent annually for the period 2005-2010 — has made it one of the world’s largest mobile markets. Understanding the growth of Indian telecom, achieved by leveraging a co-opetition approach, helps crystallize a development strategy for financial services to support the country’s banking and electronic

4 Electronic payment India 2011 by Upendra Namundi.

5 Financial Institution.

payments services. Co-opetition is a business strategy based on a combination of cooperation and competition, derived from an understanding that business competitors can benefit when they work together.

9.2 Imperative 2: Developing the Infrastructure to Correct the Market's Structural Imbalance

Situation in card issuance and payment acceptance is reflected in the imbalance between the number of payment cards in circulation and the number of acceptance point's merchants with POS⁶ terminals and ATMs - in India. This is a fundamental hurdle to growth in electronic payment usage and per-card transaction volume in the Indian market today. With approximately 10 bank branches per 100,000 adults, accessibility to banking services in India is extremely low in comparison to other emerging markets. In the near term, the country's largest bank, State Bank of India (SBI), plans to install more than 500,000 POS terminals within the next few years, nearly doubling the country's units. The vast majority of debit card transactions occur as ATM withdrawals as it are still easier to withdraw cash from ATMs than use cards at the myriad outlets operating without POS terminals. Even though today's POS card usage is low, spending with payment cards - credit and debit - is expected to continue climbing.

Prepaid cards alone are estimated to reach at least \$9.9 billion by 2013 with Visa and Master Card size estimates projected at \$65-90 billion over the next 4-5 years. This is a true testament to the strength of the market size and an indicator of its growth trajectory. Modernizing the infrastructure will help spur a growth cycle for the entire ecosystem in which the supply side of card accepting merchants develops in tandem with the demand side of consumers' increased appetite for electronic banking transactions.

6 Point of sale (POS) (also sometimes referred to as point of purchase (POP)) or checkout is the location where a transaction occurs. A "checkout" refers to a POS terminal or more generally to the hardware and software used for checkouts, the equivalent of an electronic cash register.

9.3 Imperative 3: Government's Role in Creating Accessibility to Payment Services for All

Today, a significant discrepancy exists between customer demand and payments acceptance infrastructure in India, which entails distinguishing between usage and accessibility. The proactive role the Indian government is taking to help build the payments infrastructure is instrumental in bringing about change. Recognizing banking's infrastructure challenges; the government approved the Payments and Settlement Systems Act (2007), which provided the RBI's explicit regulatory control of all payments and settlement systems in India. The RBI's Payment Systems Vision Document outlines six key tasks required to position the country for growth in payments, which will in turn spur economic growth. Its stated mission is "to ensure that all the payment and settlement systems operating in the country are safe, secure, sound, efficient, accessible and authorized."

To this lofty vision, RBI created the National Payment Corporation of India (NPCI). The NPCI's mandate is to be the primary agency for retail payments development: "to build-state-of-the-art, world class, customer-friendly electronic payments retail systems available and affordable to all around the clock. Evidence of progress toward NPCI's mission abounds, from government schemes, programs that encourage electronic payments and financial systems and products that reach beyond the metropolitan markets. One such example is the *kisan card*,⁷ which provides farmers with access to credit for their agricultural operation expenses, such as production and cultivation.

India's geographic landscape, with all its limitations in physical and technological infrastructure, creates challenges for electronic payment systems providers in reaching a range of customer segments. In order to expand banks' traditional and alternative distribution channels beyond bank branches, an ATM and POS terminal, the RBI supports the recruitment of *Business Correspondents* (BC) by banks. BC's handle the delivery of cash and accept cash deposits, open new accounts and provide other services for rural populations where bank branch access is either limited or non-existent.

⁷ <http://www.nabard.org/development&promotional/kisancreditcardmore.asp>

9.4 Imperative 4: Educating Indian Consumers about the Benefits of Electronic Payments

Consumers' existing cultural values and beliefs toward cash and debt could present challenges to the development of a mature electronic payments industry. Deriving from these traditional values is a persistent belief that non-cash based transactions bear a high-level of risk. However, there's evidence of changing consumer behaviour toward increasing adoption of prepaid and electronic payment mechanisms among Indian consumers, with consumers growing increasingly comfortable with the benefits of electronic payments. In fact, India's e-commerce market is growing by leaps and bounds — about 30 percent annually — with online auction company eBay alone experiencing 60 percent year-over-year growth. In order for consumers to participate, online purchases must be made with either a prepaid, debit or credit card; or through PayPal which is linked to either a payment card or a bank account.

Consumer education focused on the value of electronic payment mechanisms could facilitate the adoption of card based transactions. Education would promote and increase awareness about the benefits of card usage, including security, convenience and loyalty and reward programs. Ultimately, these efforts could encourage adoption of payment instruments, drive card activation rates and increase usage volume — all critical for realizing electronic payment transactions' potential.

10. THE WAY FORWARD

- i. C2G (Consumer to Government) & G2C (Government to Consumer) Payments should remain the focus area for the regulator and government alike both to drive inclusion and increase efficiencies in payment processing and collections.
- ii. With increasing penetration of ATMs and POS terminals in the country and with the explosion in debit card usage, banks are seeing the business opportunity in the issuance of prepaid cards, so there should be a systematic framework of card issuance according to RBI guidelines and development to balance infrastructure with card issuance.

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- iii. Multiple product formats being explored including card based, paper based and mobile wallets. With the regulations clearly permitting mobile wallet based payments in the closed formats for other players and in the open formats for banks & NBFCs, there should be considerable promise and work underway in this domain.
- iv. Educating consumers about the new format of payment and increasing awareness about its potential benefits and bringing all section of society toward this new innovative as well as easy payment system.
- v. There should be a proper authority or online central bank that can keep an eye on the online cyberspace transaction and money flow that can effectively handle the cyber world of electronic money effectively to avoid any financial breakdown or illegal transfer.

11. CONCLUSION

There is no doubt that smart cards have an immense potential to become the largest method for payment in the world, eventually replacing physical currency. The law would appear to be taking this seriously enough in some countries, and it is encouraging that there are already enough regulatory efforts to attempt to make legal sense of this payment method. The potential advantages for consumers, merchants and financial services make electronic money the way to go in the future. Nevertheless, there cannot be any sort of complacency when trying to make this system as secure as humanly possible, the consequences otherwise would be terrible to consider.

India's population is one of the world's largest, but its sheer volume of consumers alone cannot create a market without the proper infrastructure. From the outlined evidence and studies, it should be clear that electronic payments will experience exponential growth as India's technological and communications infrastructure begins to achieve higher standards.

It is critical for the government to play a proactive role in advancing infrastructure and regulatory improvements in order to open up the

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market. India's payment infrastructure would ease access, promote card usage and trigger a much needed transformation of banking and payment services, enhancing the country's competitiveness as a global player and elevating the living standards of its citizens.



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9

PROMOTING SUSTAINABLE CONSUMPTION IN INDIA: PROBLEMS AND PERSPECTIVES

*C. Rajashekhar**

1. INTRODUCTION

Consumption is crucial to human survival, but every consumption will have direct or indirect impact on environment. Humankind consumed more natural resources in the second half of the year's 20th Century than in all of previous human history.¹ The human consumption has both positive and negative effects. Thus on the one hand the growth in consumption has given fillip to both economic growth and on the other hand it has caused environmental degradation. However, the consumption pattern differs markedly between developed and developing

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1 "Mathew Bentley, Sustainable Consumption: A vital ESD of theme", www.curriculum.edu.au/leader/sustianble-consumpoito-a-vit, p.1 visited on 9.7.2012.

nations. People living in developed countries are among the largest consumers of natural resources and their production and consumption patterns have major environmental, social and economic impact around the world.² This could be aptly termed as unsustainable consumption.

The unsustainable consumption has caused the degradation of agricultural land, which in turn has caused serious damage to food production, soil salinity, deforestation, pollution and global warming. Unhealthy eating habits have created more obese people in developed countries.³ In developing countries like India, the consumer spending has increased significantly in the recent years and correspondingly the consumer markets are also growing. This growing market has been fuelled by multiple factors such as rapid growth in GDP, growth conducive change in demographics higher number of people under 30 years of age and rising middle class, changing consumption habits of people, increasing urbanisation as well as higher purchasing in rural areas, due to planned expenditure in developmental activities.⁴ All this has contributed to a pattern of unsustainable consumption. The unsustainable consumption as a global phenomenon has reached a frightening proportion and it is high time that nations must make a concerted effort to achieve the goal of sustainable consumption to save the planet.

2. THE CONCEPT OF SUSTAINABLE CONSUMPTION

Sustainable consumption is the consumption of goods and services that have minimal impact upon the environment.⁵ Sustainable consumption gives consumers the opportunity to consume products and

2 The 1998 Human Development Report (UNDP 1998) indicated that the 20 percent of the world's population living in OECD countries (i) earn 85 percent of the world's annual income; (ii) Consume 75 percent of global energy and over 80 percent of other resources annually; and (iii) generate 75 percent of annual global pollution, *ibid*, p.2.

3 Over 50% of people in countries such as Australia and U.S. are overweight. *Ibid*.

4 Diveshkumar, Praveen Goyal, et.al, "Sustainable Consumption in India; Challenges and opportunities," *IJMBS* vol.1, Issue 3, September 2011, p.28, www.jmbs.com. Visited on 7.7.2012.

5 "Sustainable Consumption" <http://www.gdrc.org/sustdev/concept/22-s-consumer.html>. p.1, visited on 11.6.2012.

services that meet their needs in an efficient and effective way, while minimising the negative environmental, social, and economic impact. The ultimate goal of sustainable consumption is to improve quality of life for all consumers in present and future generations, while minimising associated environmental impacts.⁶ From this it is very clear that sustainable consumption builds on the concept of sustainable development.⁷ Similarly, sustainable consumption is related to responsible consumption. Thus according to Martin Frid of Swedish Consumer Coalition, “Responsible consumption is a logical development of the concept of sustainable consumption, as responsible consumers demand that their rights be respected, including the right to “consumer better,” that is, in a more ethical, ecological or socially -responsible way.”⁸

Sustainable consumption is not a new concept. Thus, Ernest Bani, Director, Environment Unit, Vanuata opines, “even though the concept of sustainable consumption may sound new, the concept is something that has been practiced by our ancestors. Traditionally our society and the people lived and used their natural resources sustainably. They were healthy because they consumed only what was required for living. With the current situation it is different because people become so dependent on imported goods and they produce for commercial trade, unlike the traditional practices and consumption patterns.”⁹ Bani insists that the traditional knowledge on consumption should be encouraged because it will assist to maintain sustainable patterns of consumption.¹⁰

The traditional pattern of sustainable consumption has been changing in the developing countries due to the influence of developed countries. Thus sustainable consumption is relevant for both developed and

6 “About Sustainable Consumption,” www.unetp.fr/shared/publicaiton/pdf/dti, p.1, visited on 9.7.2012.

7 “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” Brundtland Commission, (1987), *Ibid*.

8 “Tracking Progress: Implementing Sustainable Polices,” www.unep.fr/shared/publications/pdf, p.9 visited on 10.7.2012.

9 *Ibid*.

10 *Ibid*.

developing countries. The need to promote sustainable consumption is already apparent in most developed countries. But, developing countries tending to follow the path of developed countries still have the opportunity to avoid many of the problems associated with affluent consumption by addressing their consumption issued now.¹¹ But, the influence of western societies, where the life style of the people involves unsustainable consumption, on the developed countries has increased manifold due to liberalisation, globalisation and privatisation. This is vividly visible in India.

3. GLOBAL RESPONSE TO UNSUSTAINABLE CONSUMPTION

Sustainable consumption first secured international prominence at the Rio Earth Summit (UNCED) in 1992. At this summit the Agenda 21 action plan was adopted, which is a collection of detailed goals and policies aimed at making sustainable development a reality by eliminating poverty and by eradicating the serious threat to global and local environment.¹² Chapter 4 of this Document – “changing consumption patterns” high lights the need for reorienting consumption pattern towards sustainability, and presents strategies for achieving the goals. Further chapter 4 of Agenda 21 recognised that the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly industrialised countries and called for action to promote patterns of consumption and production that reduce environmental stress and will meet the basic needs of humanity.¹³

Agenda 21 encourages the implementation of national polices, including the utilisation of economic instruments, such as taxes and deposit/refund systems that can influence consumer behaviour towards sustainability. Government procurement is outlined as a critical requirement, as was the need for environmental labelling schemes.¹⁴ The increased consumer awareness and interest in sustainability worldwide, the international consumer movement led the drive to incorporate

11 *Ibid.* p.8

12 *Ibid.*

13 *Ibid.*

14 *Ibid*

environmental criteria into the United Nations Guidelines for Consumer Protection. In 1993, Consumers International organised a Conference about sustainable consumption, 'Beyond the Year 2000: The transition to sustainable consumption. As a result of pressure exerted by consumer groups, in 1995, the United Nations Economic and Social Council (ECOSOC) agreed to request the Secretary-General to expand the guidelines to include elements of sustainable consumption.¹⁵

The UN Commission on Sustainable Development (CSD) co-ordinated many international activities regarding sustainable consumption activities in the mid to late 1990s after setting up an International Work Programme on Changing Consumption and Production Patterns (IWPCCPP) in 1995. Similarly Consumer International was active in organising several sustainable consumption campaigns.¹⁶ UNEP's sustainable consumption programme was launched in 1999, and its objective was to better understand the forces that drive consumption and use the findings to inspire governments, business and NGOs to take action, creating the conditions for consumers to consume more efficiently and it has therefore become the main focus of work of UNEP's sustainable consumption activities. Efficient consumption means using fewer natural resources and causing less pollution and negative social consequences.

The UN Guidelines for consumer protection is an international framework for governments to use in formulating and strengthening consumer protection policies and legislation. They are not formal obligations or even recommendations but rather a set of elements governments can draw in developing such policies.¹⁷ In 1999 the UN Guidelines for consumer protection were expanded to include elements on sustainable consumption through the insertion of section G. The expanded guidelines provide an important opportunity to include environmental protection and sustainable development and to strengthen the linkage between consumer interests and sustainable consumption,

15 *Ibid.*, p.9.

16 *Ibid.*, p.10.

17 "Tracking Progress," *supra* note 8, p.11.

thereby stimulating national policy making to promote more sustainable consumption.¹⁸ The guidelines recommend governments to take action in nine specific areas: (a) Environmentally sound products, services and technologies; (b) Recycling programmes for waste products; (c) Regulatory mechanism; (d) Economic instruments; (e) Public (product) information; (f) Impartial testing of products (g) Research on consumer behaviour (h) sustainable practices; (i) Awareness and information campaigns.

It was hoped that the extended guidelines would stimulate governments, businesses and consumer organisation and ultimately, individual consumers, to consider the environmental impacts of the production, marketing, consumption and disposal of goods and materials.¹⁹

In June 2002 UNEP and Consumer International released the study “*Tracking Progress: Implementing Sustainable Consumption Policies*” which concluded that while the guidelines are widely recognised as an important tool to support sustainable development, there is still an important lack of understanding of how to actually implement the guidelines, especially in developing countries.²⁰ It has been opined that a drawback of the UN guidelines for consumer protection, section G on sustainable consumption, is that recommended actions are presented without clarifying how they may contribute to sustainable consumption, how they relate to other “building blocks” not specifically mentioned in the guidelines.²¹

The SC Asia project²² elaborated as to how sustainable consumption may be understood in the Asian context: “the main goal for sustainable consumption is to achieve a better quality of life for everyone. To

18 “Introduction to sustainable consumption in Europe and Asia,” www.unep.fr/scp/nap/pdf/backgroundsc.pdf, p.4

19 *Supra* note 8, p.11.

20 *Supra* note 18, p.4.

21 *Supra* note 6.

22 SC Asia is the short name for the project “Capacity Building for Implementation of UN Guidelines on Consumer Protection” (Sustainable Consumption) in Asia.

achieve this certain key areas need to be improved. These vary from country to country but normally include at least sustainable economic development, access to shelters, food, health and sanitation, and access to environmentally sound and safe product.”²³ This two year project was financially supported by the European Union, through its Asia Pro Eco Programme.²⁴

The SC Asia Project study was conducted with three objectives: (1) Evaluate the status of sustainable consumption achievements in Asia; (2) Identify the readiness to implementing “Best Practices of sustainable consumption” in Asia context; (3) Identify “Best practices of sustainable consumption” in Asian countries.²⁵

Under the project, information was collected about the level of adoption of the nine specific sustainable consumption elements mentioned in the UN guidelines on sustainable consumption.²⁶ The important findings of the study are:

- 1) As in most other parts of the world, environmentally sound products, services and technologies are more often an exception than a rule;
- 2) Waste recycling is high on the political agenda in all the 12 countries, especially in larger cities, but the means to implement recycling schemes are often lacking;
- 3) Many countries have consumer protection legislation and regulation, but legislation that directly targets sustainable consumption does hardly exist in them;
- 4) Most of the Asian governments tend to stay away from providing economic incentives for supporting sustainable

23 *Supra* note 18.

24 Project is a collaborative effort between the United Nations Environment Programme, Consumers International, the Centre for Environment and Development, and the Danish Consumer Council. The project involved Six European Countries and 12 Asian countries including India. See *supra* note 18, p.5

25 *Ibid.*, p.7.a.

26 *Supra* note 18.

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consumption, be it positive incentives (eg. Subsidies for sustainable products) or negative (e.g. taxes on waste);

- 5) Legislation for product information does exist in most countries but is not well enforced;
- 6) Testing of products for standards etc. Are conducted to some extent in almost all countries, truly impartial testing is by and large lacking in the region;
- 7) Most consumer behaviour research is not focussed on how to make consumption sustainable;
- 8) Some countries have made decisions on sustainable government practices like, public green procurement practices, recycling of paper in government offices and making use of electronic filing system;
- 9) Regarding public awareness and information campaign the countries present a diverse picture. In poor countries, the prevailing economic conditions prevent people from practicing sustainable consumption.

4. SUSTAINING CONSUMPTION IN INDIA

The following analysis focuses on the governmental efforts in India to adopt the elements of sustainable consumption as envisaged by UN in its guidelines for consumer protection.

4.1 Developing environmentally sound products and services

The environmentally sound products and services have dual advantage of meeting the needs of the consumer and reducing negative impact on the environment.

4.1.1 Public Transport System

There is rapid growth of India's urban population, and this has generated enormous need for efficient public transport services for meeting the needs of high volume of passengers. The problem is very acute in cities like Mumbai, Kolkata, Delhi, Bangalore, Hyderabad. The sharply rising demands for public transport have overwhelmed the

existing public transport systems in these cities.²⁷ Buses in Indian cities have to contend with congested conditions. Buses themselves are seriously overcrowded and they have to negotiate extremely congested, narrow streets where they have to move along with bullock carts, vans, cars, taxis, large number two wheelers. One consequence of terrible service quality of public transport system is that more and more passengers are increasingly turning to private cars and two wheelers.²⁸ As a result there is more consumption of fuel and this has eventually caused increase in environmental pollution. Public transport system should be streamlined to avoid further deterioration of air quality, traffic safety, congestion and noise.²⁹

4.1.2 Recycling of Waste paper

In India, paper is used for wide variety of purposes and after its use it becomes waste paper and makes its way to trash bins. Post-consumer paper, or waste paper, is an important renewable raw material source for the paper industry and can contribute considerably towards reduction in its imports.³⁰ Further, the removal of post-consumer paper from the garbage cycle would considerably reduce environmental load on the ecosystem. The present recovery and utilization of waste paper by paper mills in India is 3.0 million tons annually, which translates to a recovery of 27% of the total papers and paper board consumed. This recovery rate is very low when compared to developed countries like Germany 73%, Sweden 63% Japan 60% USA 49% Western Europe 56% and Italy 45%.³¹

Hence, in India there is immediate need to increase the effective recycling of waste paper for manufacturing.

27 "The crisis of public transport in India: overwhelming Needs but limited Resources," cistup.iisc.ernet.in/crisis-1 last visited on 30.8.2012, p.7.

28 The total number of private cars and motorised two-wheelers increased roughly four times faster than the number of buses over recent years. *Ibid* p.8.

29 *Ibid.*, p. 15

30 www.dipp.gov.in/english/discuss-paper-recycling-wastepaper21oct2011.pdf, visited on 30.8.2010.

31 Indian Paper Manufacturers Association (IPMA) 2010 *Ibid.*, p.3.

4.1.3 Energy Conservation

Due to rapid economic expansion in India there is growing demand for energy. About 70% of India's energy generation capacity is from fossil fuels, with coal accounting for 4% of India's total energy consumption followed by crude oil and natural gas at 24% and 6% respectively.³² India is largely dependent on fossil fuel imports to meet its energy demands. Energy conservation has assumed crucial importance and has emerged as a major policy objective. In pursuance of this, the Energy Conservation Act, 2001 was passed. This Act requires large energy consumers to adhere to energy consumption norms; new building to follow the Energy Conservation Building code; and appliances energy consumption labels. The Act also created the Bureau of Energy Efficiency to implement the provisions of the Act.³³

India is encouraging the development of other renewable sources of energy like Nuclear Energy, Solar Energy, Wind Power and Bio-Fuels, which are environment friendly. A long-term energy policy perspective is provide by the Integrated Energy Policy Report 2006. The consumers need to be adequately educated to choose products which are energy efficient and the same should be made available at subsidised rates.

4.2 Certification and product information

Certification and product information facilitate the giving of reliable and easily accessible information to the consumers about the environmental impact of that product. To increase consumer awareness, the Government of India launched the eco-labelling scheme known as 'Ecomark' in 1991 for easy identification of environment friendly products.³⁴ The Ecomark label is awarded to consumer goods which meet the specified environmental criteria and the quality requirements of Indian standards. The criteria are based on the cradle-to-grave approach, i.e., from raw material extraction to manufacturing and to

32 "Energy Policy of India" <http://en.wikipedia.org/w/index.php?title=energy-policy-of-india&pr>.visited on 29.8.2012, p.1.

33 *Ibid.*, p.2.

34 "Ecomark Schemes of India", <http://www.ceeraindia.org/documents/ecomarkindia.htm>, visited on 29.8.2012, p.1.

disposal. A product is examined in terms of the following main environmental impact; (1) that they have substantially less potential for pollution than other comparable products in production, usage and disposal; (2) that they are recycled, recyclable made from recycled products of bio-degradable, where comparable products are not; (3) that they make significant contribution to saving non-renewable resources including non-renewable energy sources and natural sources compared with comparable products; (4) that the product must contribute to reduction of the adverse primary criteria which has the highest environmental impact associated with the use of the product and which will be specifically set for each of the product categories.³⁵

Similarly Food labels on the packages of products are useful to the consumers, as they provide information about nutritional value of the product. Following the labels helps one in choosing right product having the necessary nutrition value.³⁶

4.3 Impartial Testing of Products

Impartial testing of products is crucial for ensuring the maintenance of product standards. In India product standards are prescribed and implemented by Bureau of India Standards (BIS). BIS is involved in multifarious activities like standards formulation, certification, product/ schemes, Laboratory services, Consumer related activities, etc.³⁷ BIS product certification scheme is basically voluntary in nature. However, keeping in view the health and safety of the consumer, it has been made mandatory for 68 items by the Government through various statutory measures.³⁸ To support the activities of product certification, BIS has a chain of 8 Laboratories. These laboratories have established testing facilities for products of chemical, food, electrical, and mechanical disciplines. In certain cases where it is economically not feasible to develop test facilities in BIS Laboratories or other reasons, the services

35 *Ibid.*, p.3.

36 "Why Food Labels are important for Consumers?" <http://www.dnaindia.com/print710.php?cid-1325219>. visited on 15-6-2012.

37 <http://india.gov.in/sectors/consumer-affairs/index.php?.id.13> visited on 30.8.2012,p.1.

38 *Ibid.*

of outside approved laboratories are also being availed. BIS has recognised about 116 laboratories for product testing and certification purpose.³⁹ From the point of consumer and sustainable consumption, promotion of Indian standards assumes great significance and has been a prime objective of BIS.

4.4 Economic instruments

Economic instruments can be used to promote the cause of sustainable consumption. For most consumers the price of product is the single most factor in deciding what product they purchase. For this reason, it is important that sustainable products and services are at least competitively priced compared to other products and services which have adverse impact on environment. Such products harmful to the ecology may be subjected higher or extra taxation. This is what is called as Environment Tax or Green Tax or Eco Tax. Eco Tax is a policy that introduces taxes that promote ecologically sustainable activities via economic incentives.⁴⁰ Eco Tax on pollution or pollution causing inputs and out puts increases the costs of using environmental resources and thereby internalise the negative externalities in decision making by producers and consumers.⁴¹ Thus, Eco tax on a polluting product will increase the market price of the product and thereby decreases its demand and production.

In India, there is lot of scope for initiating measures like increasing the tax on motor fuel to encourage people to use more energy efficient cars, taxing the dumping of waste and land fill sites to encourage recycling and alternative ways for dealing with disposal, etc.⁴² The Uttarkhand Government has decided to introduce eco tax upon entry of vehicles into the hill station of Mussoorie. The Shimla Municipal Corporation has decided to impose green tax on vehicles bearing registration number of other states.⁴³ Thus, eco tax could be used as a

39 *Ibid.*, p.2.

40 Gincy Susan Jose, Ecotax and the Indian Scenario, <http://www.mindtext.org/view/77>, visited on 30.8.2012, p.1.

41 *Ibid.*

42 *Ibid.*

43 Shyam Divan, Amin Rosencrantz, "Environmental Law and Policy in India," 2nd ed. Oxford University Press, P.373.

tool to make the products and services which adversely affect environment costlier, so that use of such products could be reduced.

4.5 Waste management through the reduce, reuse, recover and recycle approach

In India, the modern style of living accompanied by urbanization and industrialization has led to the production of large quantity of waste. Men use wide variety of organic and inorganic materials from the environment and transform them into a very much wider variety of economic goods, consume them and later discard them as waste materials. Unwanted materials, solid, liquid or gaseous are generated and discarded into the environment. Management of waste is a stupendous task for the authorities in India. In most of the cities nearly half of the municipal solid waste remains unattended. There is no effective system of segregation of organic inorganic and recyclable wastes at the house hold level. Municipal waste is generally carried to the city periphery where it is dumped in the open landfills on neighbouring village lands. These dump sites are poorly managed and are swarmed by vermin and mosquitoes causing severe health risk to the people living nearby.⁴⁴ The Municipal Solid Waste Rules in Karnataka provide for utilization of useful waste. Thus, the biodegradable wastes shall be separated and processed by composting, vermi-composting or any other appropriate biological processing for stabilization of wastes. Similarly plastic may be recycled into different forms of products. India is to still evolve a wider recycling system for specific materials. Solid waste management can be successful if public also participate in the process. The people's participation is helpful in reducing, recycling and reusing of waste. Public should not throw the waste /litter on the streets, drains, open space, water bodies, etc. They should store organic/bio degradable and recyclable wastes separately at sources.⁴⁵ Thus, ultimately the cooperation of consumer is quite essential in the solid waste management. There is need for creating greater awareness among the people.

44 "Community Participation," <http://localbodies.up.nic.in/swm/chap18.pdf>.visited 30.8.2012.

45 "Promoting Sustainable Consumption," www.oecd.org, visited on 11.6.2012, p.45.

4.6 Understanding consumer behaviour

Understanding of consumer behaviour and attitudes is required for promoting sustainable consumption. The people have varying attitudes towards any public issue. In designing effective sustainable consumption policies general consumer behaviour, awareness, rationality as well as attitudinal variables should be taken into account.⁴⁶ Consumer behaviour in India, as in other Asian countries however, probably rather diverse, ranging from rather western style modelled patterns of urban rich to more traditional, possibly also more sustainable pattern among low-income consumers. An NGO, MATRADE, Chennai has conducted product market study wherein it has analysed the consumer behaviour.⁴⁷ According to the study, the environmental awareness in India has started affecting marketing of products based upon their eco-friendliness. In general, Indian consumers are likely to buy environmentally responsible products and packs. The future key for marketing could be to select more ethical and ecologically responsible products and packaging, which is also convenient for consumers, thus, balancing environmental concerns with commercial consideration.⁴⁸

4.7 Awareness and information campaigns

Awareness about sustainable consumption among the general public is very essential. The general level of such awareness is quite low in Asian countries, including India. Their knowledge about sustainable consumption can be improved through education, information and marketing campaigns. Education and information help the consumers in adopting sustainable pattern of consumption. In India, educating more than 100 crore of people of various categories on the need to adopt sustainable consumption pattern is a gigantic task. The programme cannot be sustained unless necessary funds are committed by the government. The issue of sustainable consumption can be clubbed with

46 "Product Market Study: Consumer Behaviour in India," www.edms.matrade.gov.my/.../pmscchennaio5-consumerbehaviour, visited on 1.9.2012.

47 *Ibid.*, p.8.

48 *Ibid.*, p.8.

consumer awareness programmes of the Department of consumer Affairs.

The right to consumer education is recognized under the Consumer Protection Act, 1986. The Department of Consumer Affairs has allocated huge sums for the promoting consumer awareness programmes over the years. The campaign for creating awareness has used all possible media that may be required to reach out consumers. Consumer clubs have been set up in schools and colleges for creating awareness about the rights of consumers. Unfortunately so far the issue of sustainable consumption has not figured specifically in the consumer awareness programmes of the government.

From the above analysis it is revealed that in India the issue of sustainable consumption has not received the attention due to it from the government and the consumers. Though UN adopted the elements of sustainable consumption in its guidelines, for the protection of consumers in 1999, no attempt has been made to incorporate it in the Consumer Protection Act. There is an immediate need for amending the Act for the purpose of its inclusion and making it a part of consumer awareness and education programs of the government.



25 YEARS OF CONSUMER PROTECTION ACT : CHALLENGES AND THE WAY FORWARD

10

A CLOISTERED CONCEPT IN CONSUMER LAWS

*T. Vidya Kumari**

All commodities of trade consumable or otherwise are subject to scrutiny by various regulatory authorities to examine its impact on health, environment, safety and the well being of the consumers.

The Consumer Protection Act is not a stand alone legislation that protects consumers. There are several consumer welfare legislations that are equally effective and provide suitable remedies against unfair trade practices that impinge the rights of the consumers. An important aspect in the Consumer Laws is the obligation of Labelling.

Labelling has gained legal significance as Statutes insist on mandatory labelling process as a protective measure to safeguard the interests of the consumers. Labelling is insisted in each Legislation with a specific objective that can be termed as a Fundamental right of Freedom of choice, the freedom to seek information and make independent decisions.

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Labelling a product has several advantages. It has a three prong effect-1. it creates a rightful claim to the owner against all deceptive practices that impinges his right of control over the product, 2. it provides clarity to the consumer on the contents of the product 3. It provides a legal identity to the product.

Labelling is monitored under Common Law and in various Statutes, and even has a religious connotation as seen in the case of halal foods that insist on the display of a label to identify the origin and process of slaughter in tune with the religious tenets.

Several consumer welfare legislations have imposed a statutory obligation on the manufacturer to label their products. Interestingly the legal regimes involving labelling are diverse based on the products and have been a subject of litigation as the provisions lack clarity and precision.

International Regime

The genesis of Consumer Rights involving Labelling can be traced to the International Conventions that lay a basic foundation for bringing forth a level playing field with standard rules and obligations in consonance with the needs of the global community catering to diverse sentiments and practices.

The Universal Declaration of Human Rights, 1948 in its Article 19.¹ The International Covenant on Civil and Political Rights 1966 in its Article 19² makes an indirect reference to labelling.

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- 1 The Universal Declaration of Human Rights, 1948 Article 19; Everyone has the right to freedom of opinion and expression; this right includes freedom to form opinions without interference and to seek , receive and impart information and ideas through any media and regardless of frontiers
 - 2 The International Covenant on Civil and Political Rights 1966, Article 19:1. Everyone has the right to hold opinions without interference. 2. Everyone has the right to freedom of opinion and expression; this right shall include freedom to seek , receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

Role of the WTO

The global trade is monitored by the World Trade Organisation under its covered Agreements. The issue of labelling the products has reached its crescendo in the much awaited Appellate decision³ on the US COOL provisions –The Country of Origin Labelling that came into effecting US in March 16-2009.⁴ The objective of the COOL provisions is to provide to the consumers the right to know the country of origin of imported perishable commodities.

Key Provisions of COOL

Mandatory country-of-origin labelling

1. Applies to ground and muscle cuts of beef, lamb and pork, farm-raised and wild fish and shellfish, peanuts, goat meat, chicken, macadamia nuts and ginseng (these are referred to as “covered commodities”);
2. Exempts these items if they are an ingredient in a processed food;
3. Covers only those retailers that annually purchase at least \$230,000 of perishable
4. And requires them to inform consumers of origin
5. Is imposed by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale;” and
6. Exempts from these labelling requirements such “food service establishments” as restaurants, cafeterias, bars and similar facilities that prepare and sell foods to the public.

3 Appellate Body Report, United States-Certain Country of Origin Labelling (cool)s Requirements, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [hereinafter AB U.S.—COOL].

4 The challenged U.S. laws are the 1946 Agricultural Marketing Act (as amended by the 2002 Farm Bill and the 2008 Farm Bill), the Agricultural Marketing Service Interim Rule and Final Rule 2009.

Defining and Labelling Origin for Meats

In designating country of origin, difficulties arise when products—particularly meats—are produced in multiple countries. For example, beef might be from an animal that was born and fed in Canada, but slaughtered and processed in the United States. This amounts to mixed origin.

The COOL law

1. The U.S. origin label is used only on meats from animals that were exclusively born, raised, and slaughtered in the United States.
2. Multiple origin label is provided for meats or chicken if the animals are born, raised, or slaughtered in different countries;
3. If the meat or chicken is of animals imported for immediate U.S. slaughter they are labelled as from both the country the animal came from and the United States;
4. Products from animals not born, raised or slaughtered in the United States are labelled with their correct country(ies) of origin; and
5. For ground meat and chicken products, the label shall list all countries of origin or all “reasonably possible” countries of origin.

Meat Labelling

The meat labelling requirements have proven to be among the most complex and controversial areas of rulemaking, as retailers found means to escape the strict Categorization of imported and domestic product, many retailers and meat processors used the “catch-all” multiple countries of origin label on as much meat as Possible—even products that would qualify for the U.S.-only label, because it was both permitted and the easiest requirement to meet. COOL requirement.

Background of the WTO Dispute on meat labelling

Canada and Mexico are the major suppliers of meat to United States The two States expressed their anguish on the COOL provisions that were proposed to be in force from 2009. Their plea was that the laws would tend to segregate imported products from the main stream market

and would be detrimental to the interest of foreign suppliers. The two States alleged that the COOL Laws were inconsistent with the provisions of GATT 1994, The Agreement on technical Barriers to Trade and the Agreement on Rules of Origin.

The above said Agreements do not favour discrimination between States in global trade, the National Treatment of imports is essential for “like products,” National measures should not be trade restrictive unless there is a legitimate public policy to justify the restrictions. The rules and procedures on country of origin are not permitted to damage imports, reduce their value or increase their costs.

The negotiations failed and the matter was brought before the WTO panel.

On November 18, 2011, the WTO dispute settlement (DS) panel ruled that certain COOL requirements violate two articles of the WTO Agreement on Technical Barriers to Trade (TBT) and are not in consonance with the requirement for impartial administration of Import Regulations laid out in the General Agreement On Tariff and Trade 1994.

The three main findings of the Panel⁵ are :

1. The COOL provisions have treated imported livestock less favorably than “like domestic livestock,” particularly in the labelling of muscle cut meats (beef and pork), in violation of the national treatment obligation in the TBT’s Article 2.1;
2. It failed to meet the legitimate objective of providing information to consumers on the origin of meat products, and thus violated the TBT’s Article 2.2.
3. “Suggestions for voluntary action” went beyond COOL’s obligations, thus violating Article X:3(a) of the GATT 1994.

To determine whether a measure accords less favorable treatment to imported products under Article 2.1 of the TBT Agreement, the Panel should have followed past Appellate Body and panel reports.⁶

5 Panel Reports, United States-Certain Country of Origin Labelling (cool)s Requirements/ WT/DS386/R, circulated to WTO Members 18 November 2011

6 Thailand-Cigarettes (Philippines), Korea-Various Measures on Beef, and Dominican Republic-Import and sale of Cigarettes.

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The US went in Appeal. The Appellate Body has made a weak attempt to rectify the National Laws. It moved cautiously despite its acceptance of the Panel Report. It did not make sincere efforts to impose any particular standard in terms of quality or clarity in the information required in the labelling of meat –domestic and otherwise.

Thus ball has now rolled back to the offenders – the US government is required to amend its Laws balancing its National interest with the global rules of trade.

Regime of Intellectual Property Rights

It involves several welfare legislations. It presents a paradox- at first glance the Regime carries the expression that the rights granted therein are monopoly interests that give indeterminate exclusive control to the holder of rights to use their rights to the detriment of the consumers. This apprehension is unfounded. In a democratic set up this is not feasible nor permitted. There are legitimate well-grounded exceptions to the rights of the holders of IP Rights.

It is necessary to note that the rights claimed are on objects of social utility. They are of immense value to the society. They are value added products for the benefit of the society. This can be wiped out by any legislation.

International Covenants have explicitly provided a balance of interests between the knowledge holders and the ultimate consumers as the rights therein are fundamental human rights individually and collectively.⁷

In fact the Trips Agreement has specifically laid down the objectives of the Intellectual Property System in clear terms that the interest of

7 The Universal Declaration of Human Rights, 1948. Article 27 : [2] Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. However the limitations to the right follow in the later provisions..... Article 29 [2] In the exercise of his rights and freedoms, everyone shall be subject only to such limitations[that are] just requirements of morality, public order and the general welfare in a democratic society.

third parties including competitors and consumers falls within the premise of Intellectual Property Laws.⁸

Trademarks and the consumer rights

Protection of Labels as a Trade Mark is insisted under the Common Law and continues despite specific Laws as registration of marks is not mandatory.

The innocuous mark has been a subject of controversy with a trail of litigations for past century yet the disputes continue and the court examine on case by basis as the goods covered are varied and the situations differ involving complex issues. Glimpses of some disputes reveal the complexities involved therein.

Use of part of A word of the trademark word, a name, a distinctive label is a trade mark that is protected within its statute. The issue is whether such registration can possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole Lord Esher in *Pinto v. Badman*⁹ opined that where a distinctive label is registered as a whole such registration cannot possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name.

The Trademarks Act is an elaborate legislation that explicitly describes a mark and sets out the grounds for registration, validation and infringement of the Marks.¹⁰

8 Article 7 of the TRIPS Agreement. The protection and enforcement of Intellectual Property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to the balance of rights and obligations.

9 8 RPC 181

10 Indian Trade Marks Act,1999,Section 2(m) "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof; Section 2(zb) "trade mark" means a mark capable of distinguishing the goods or services of one person from those of others mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade

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Every dispute relating to a registered mark is tested on the anvil of the legislation. Section 17 of the Trade and Merchandise Marks Act, 1958 explicitly states that the registration of a trade mark confers exclusive right to the use of the trade mark taken as a whole and not separately to each of its constituent part, while Section 15 of the Trade Marks Act, 1999 permits a proprietor of a trade mark to apply for parts of a trade mark, if he claims to be entitled to the exclusive use of any part thereof separately. This implies that use of a part of the word does not amount to infringement of the mark.

There is another legal dimension in this situation. There is another clause that is equally important –any act that is deceptive and causes confusion is not permitted in the Trade Marks Act. It infers that the use of a part that causes confusion amounts to violation of the trademark. Both the situations have been examined by the Courts.

A series of cases have affirmed the notion that use of part of the word is not a deceptive practice :

1. USV Limited v. Systopic Laboratories,¹¹ the marks PIO and PIOZ were held to be not deceptively similar.
2. Cadila Laboratories Ltd. v. Dabur IndiaLtd.,¹² the marks ZEXATE and MEXATE were held to be not deceptively similar.
3. Unichem Laboratories Ltd. Ipca Laboratories Ltd.,¹³ the marks LORAM and SELORAM were held to be not deceptively similar.

between the goods or services,..... as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person. Section 9. Absolute grounds for refusal of registration.-..... (2) A mark shall not be registered as a trade mark if- (a) it is of such nature as to deceive the public or cause confusion; Section 12. Registration in the case of honest concurrent use, etc.- In the case of honest concurrent use or of other special circumstances which in the opinion of the Registrar, make it proper so to do, he may permit the registration by more than one proprietor of the trade marks which are identical or similar.

11 (2004 (1) CLT 418.

12 1997 PTC (17) 417.

13 2011 (45) PTC 488 (Bom.).

4. Reckitt d Colman of India Ltd. v. Medicross Pharmaceuticals Pvt. Ltd.,¹⁴ the marks DISPRIN and MEDISPRIN were held to be not deceptively similar.
5. Astrazeneca UK Ltd. v. Orchid Chemicals & Pharmaceuticals Ltd.,¹⁵ the marks MEROMER and MERONEM were held to be not deceptively similar. Affirmed in Astrazeneca UK Ltd. Vs. Orchid Chemicals & Pharmaceuticals Ltd.¹⁶
6. Aviat Chemicals Pvt. Ltd. v. Intas Pharmaceuticals Ltd.,¹⁷ the marks LIPICARD and LIPICOR were held to be not deceptively similar.
7. Indo-Pharma Pharmaceuticals Works Ltd. v. Citadel Fine Pharmaceuticals Ltd.,¹⁸ the marks ENERJEX and ENERJASE were held to be not deceptively similar.
8. Kalindi Medicare Pvt. Ltd. v. Intas Pharmaceuticals Ltd.,¹⁹ the marks LOPRIN and LOPARIN were held to be not deceptively similar.
9. Ranbaxy Laboratories Ltd. v. Intas Pharmaceuticals Ltd.,²⁰ the marks NIFTAS and NIFTRAN were held to be not deceptively similar.
10. Schering Corporation v. United Biotech Pvt. Ltd., that the marks NETROMYCIN and NETMICIN were held to be not deceptively similar.

Despite the above said well-established rulings a new test was applied to pharma products under the “Cadila Health Care Test.” The use of part of the words may not amount to deceptive practice yet any confusion caused by using a part of the words that causes detriment to the health of the consumers is not permitted.

14 1992 (3) Bom Cr 408.

15 2006 (32) PTC 733 (Del.).

16 2007(34) PTC 469 (DB) (Del.)

17 2001 PTC 601 (Del.).

18 1998 (18) PTC 775 (DB) (Mad.).

19 2006 (33) PTC 477 (Del.).

20 2011 (47) PTC 433 (Del.).

United Biotech Pvt. Ltd. v. Orchid Chemicals and Pharmaceuticals Ltd & Ors.²⁰ The case relates to use of the marks Forzid and Orzid. The use of similar marks was not permitted using the Cadila test. The trademarks FORZID and ORZID are used for prescription drugs. The dosages of FORZID and ORZID are not the same.

The Cadila Test is applied for drugs and medicines.

The Court held that the use of part of the word amounts to infringement of the trade mark on the following grounds.

“It would pose a grave risk to health if a person who has been prescribed a dosage of 250mg CEFTAZIDIME injection (ORZID) is administered a 1000 mg dosage (FORZID). These are injections administered intravenously and can have a direct and immediate impact. In the circumstances, the mere fact that they are priced differently is not sufficient to hold that the unwary average purchaser of the drugs will not be confused into thinking one is as good as the other or in fact both are the same drug. Then there is the other real danger that a prescription written for ORZID may be mistaken by the dispenser at the pharmacy shop to be FORZID or vice versa. If it is asked for verbally the phonetic similarity is likely to cause confusion. The health of a person for whom the medicine is prescribed cannot possibly be put to such great risk. Use of part of the word can be a deceptive practice in a given situation.”

The Geographical Indications Act,²¹ The protection of Plants variety Act,²² The Competition Act²³ are all consumer welfare Legislations. A sui generis approach has been adopted catering to both the rights of the holder of rights with the consumer rights.

Too many flavors spoil the dish

In an anxiety to enforce with vigor the rules on labelling it is observed that panic and agony is caused to an unwary manufacturer lost in the melee of legislations that affect the sale of their products.

21 Decided on July 14, 2006

22 MANU/DE/2526/2012

23 The Geographical Indications of Goods (Registration)and Protection Act, 1999.

A recent case decided in June by the High Court of Himachal Pradesh brings to light the effect of so called “misbranding” of the goods for sale.²⁴

The Facts: The petitioners were the manufacturers of country liquor [Patiala Orange] A sample of the product was bought by the Food Inspectors and the analyst declared that the product is “misbranded” as there was no reference to the source of origin/the batch number ,month and year of manufacture or packing, month and year up to which product is best for consumption and symbol to indicate that the product is vegetarian food has not been mentioned in the label. Criminal proceedings were initiated and the Authorities in charge of the Company were summoned to the criminal Court. To quash the criminal proceedings this case was filed by the manufacturers.

Points in issue: The main contention of the petitioner is that the country liquor manufactured by petitioner is required to be packed in the form and as per norms prescribed and approved by the State Excise Department. Adhering to the statutory guidelines the petitioner had been manufacturing and selling country liquor as per statutory guidelines. Therefore their plea was that the provisions of the Prevention of Food Adulteration Act are not applicable to the sale of country liquor,initiating criminal action being a serious matter ,the proceedings are liable to be quashed applying the inherent powers of the High Court.

In its reply the Govt. submitted that the petitioner is wrong to suggest that the Food Adulteration

Act is not applicable to the present case. The word ‘food’ has been defined in Section 2(v) of the Act. It means any article used as food or drink for human consumption other than drugs and water and includes (a) any Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act. In State of Himachal Pradesh vs Raja Ram and another,²⁵ the Division Bench has held that for purposes of

24 M/s. Patiala Distillers and Manufacturers Ltd v. State of Himachal Pradesh,MANU/HP/0907/2012 Cr. MMO No. 207 of 2011 Decided On: 11.06.2012.

25 (1990) 2 FAC 231.

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the provisions of the Prevention of Food Adulteration Act, 'liquor' (including 'country liquor') is included in the definition of 'food' as contained in Section 2(v) of the Act. Therefore, contention of the petitioner that liquor is not 'food' under the Act has no force and is rejected.

This controversy deepened as the subsequent legislation on Food Safety in its Rule 32(i) fourth proviso exempted the declaration 'best before date' for consumption to wines and liquors. It has been submitted by learned counsel for the petitioner that now proviso to Regulation 2.2.2(4) of Food Safety and Standards (Packing and labelling) Regulation, 2011 (for short 'Regulation'), exempts declaration regarding veg or non-veg to alcoholic drinks, similarly, according to first proviso to regulation 22.2(10) best before and use by date, declaration shall not be applicable to wines and liquors. It has been contended that on the basis of new Act and regulations, the petitioner is entitled to benefit of new Act and Regulations and petitioner cannot be prosecuted under the Act and the Rules.

Decision The High Court dismissed the petition as the savings clause in the new Act Under Section 97 has clearly permitted any such investigation, legal proceedings or remedy to be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

As the labelling was not in accordance with the Act the omission of required information was established as "misbranding" of the product.



11

CONSUMER PROTECTION AMENDMENT BILL, 2011: AN ANALYSIS

*Ashok R. Patil**

INTRODUCTION

The consumer movement in India is as old as trade and commerce. In Kautilya's Arthashastra, there are references to the concept of consumer protection against exploitation by the trade and industry, short weight and measures, adulteration and punishment for these offences. The chapter II, "The Removal of Thorn" in Book IV, of the Kautilya's Arthashastra deals with Consumers Protection against Merchants.¹ When a trader sells or mortgages inferior as superior commodities, Adulteration of grains, oils, salts, scents, and medical articles with similar articles of no quality shall not only be punished with a fine but also be compelled to make good the loss.

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1 Kautilya's "Arthasastra" (R. Shamasastri, Trans. Mysore Printing and Publishing house, Mysore, 8thed, 1967) p.115.

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The Indian Constitution came into force on Jan 26, 1950. Though the word consumer is not to be found in the constitution, the consumer breathes and peeps out through many of the blood vessels of the constitution. The constitution of India is a social document. It is not made only to provide a machinery of government to maintain law and order and to defend the country. The founding fathers of the constitution had a glorious vision of the establishment of a new society in India imbued with high ideals for guaranteeing the multi-dimensional welfare of all the people.² The aspirations of the people of India found an explicit expression mainly in the preamble, the fundamental rights and the directive principles of the state policy.

It is the state's duty to give guarantee of everyone in this country has a right to live with human dignity, free from exploitation. This right to live with human dignity enshrined in this article derives its life breath from the directive principles of state policy.³ The state shall secure a social order for the promotion of welfare of the people and shall effectively work to achieve a social order in which justice, economic and political shall inform all the institutions of the national life.⁴ State has a duty to raise the level of nutrition and the standard of living to improve public health and to prohibit consumption of intoxicating drinks or drugs, which are injurious to health.⁵ This is considered as a primary duty of the State. In the sense, every state has to protect the rights of the consumer and ensure the use of public utility in the best possible manner. In every nation, there are large segments of the people who have insufficient resources to live under reasonably good conditions of health and decency. Therefore, the society in which they live has obligations to provide support and that support is not a charity to the citizen but as of a right.⁶ Therefore, they must be brought within the scope of any law, which can be envisaged for the consumer's promotion.

2 Rao Koteswar P, "Constitution, State and Consumer Welfare," Consumer Protection and Legal Control (Leelakrishnan. ed., Eastern Book Company. Lucknow, 1981) p.81.

3 Constitution of India, art. 21.

4 *Ibid* art. 38.

5 *Ibid* art. 47.

6 Charles A. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 Yale.L.J.(1965).1245, 1256.

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At the International level the United Nations General Assembly adopted guidelines for consumer protection by consensus on 9th April 1985. The guidelines provide a framework for Governments, particularly those of developing countries, to use in elaborating and strengthening consumer protection policies and legislation. They are also intended to encourage international co-operation in this field.

Therefore Indian Government enacted the Consumer Protection Act, 1986 (COPRA), which was an important milestone in the field of consumer protection. The main object of COPRA, Consumer Protection Rules, 1987, Consumer Protection Regulations, 2005 are to promote basic rights to consumers, namely the right to safety, to be informed of quality, potency and purity of products, to access to variety of goods of competitive prices, to redress grievances and to consumer education.

Under COPRA, Consumer Disputes Redressal Agencies have been set up at the 629 District, 35 State and National levels to render simple, inexpensive and speedy justice to consumers in respect of complaints against defective goods, deficient services and unfair/restrictive trade practices. With a view to faster redressal of complaints and to rationalize procedure of appointments in consumer disputes redressal agencies, it has been felt necessary to amend the Act.

The provisions of COPRA shall be in addition to and not in derogation of the provisions of any other law, for the time being in force.⁷ The remedies available to a consumer⁸ under this Act constitute an additional dispensation. These are supplementary in nature and have no overriding effects so far as the existing laws are concerned. Therefore, a consumer may initiate proceedings in a civil court under the law of contract or sale of goods or law of torts or any other existing law. The provisions of the COPRA do not debar a consumer from going to a civil court for compensation for loss or damage which might have been caused to him due to defect in the goods purchased by him. The COPRA provides for a separate enforcement machinery and redressal forum with the aim to provide the consumers, a simple and expeditious solution to consumer problems.

7 Consumer Protection Act, 1986: s.3.

8 *Ibid* s.2 (1) (d).

The COPRA has amended three times in the year 1991, 1993 and 2002 to bridge the gap. On 16th December 2011 Central Government has introduced a Consumer Protection Amendment Bill, 2011, before the Loka Sabha to facilitate quicker disposal of cases and to widen and amplify the scope of some of the provisions of the Act. Some of the Important Proposed Amendments under Consumer Protection Amendment Bill, 2011 are as follows:

I) Online filing/Electronic form of consumer complaints⁹

Proposed amendment is for registering complaint by electronic form (on line filing complaint). Since the Consumer Forums are being computerized it is proposed to make provision in the law to permit consumers to file complaints as well as pay fee online, which would make the consumer for a move towards e-governance/time bound redressal. The 'Electronic form' shall have the meaning assigned to it under clause(r)of sub-section (1) of section 2 of the Information Technology Act, 2000.

II) Withholding of Relevant Information is Deficiency¹⁰

The Proposed Amendment added one more clause in the 'Deficiency' definition. According to new definition Deficiency includes any act of omission or commission which causes any damage to the consumer on account of negligence or consciously withholding of relevant information to the consumer;

III) Unfair Trade Practice¹¹

The Proposed Amendment added three more clauses to Unfair Trade Practice definition. According new definition unfair trade practice includes: after selling such goods or rendering of such services, fails to issue bill or cash memo or receipt for the goods sold or service rendered; after selling such goods or rendering of such services, refuses to take back or withdraw the goods or withdraw or discontinue the service and refuses to refund the

9 Consumer Amendment Protection Bill, 2011: Sec.2 (1)(ha) and Sec.12(2).

10 *Ibid* s.2(1)(g).

11 *Ibid* s.2(1)(r).

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consideration thereof, if paid, within a period of thirty days after the receipt of goods or availing of services it is so requested by the consumer; discloses to any other person any personal information given in confidence by the consumer: Provided that disclosure of personal information given with express or implied consent of the consumer or under provisions of any law in force or in 30 public interest shall not be constructed as a deficiency of service.

IV) Unfair Contract¹²

The Proposed Amendment inserted new definition on “unfair contract.” Unfair Contract means a contract which contains any one or more of the following clauses (i) requires excessive security deposits to be given by a party to the contract for the performance of contractual obligations; or (ii) impose any penalty on a party to the contract for the breach thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or (iii)refuses to accept early repayment of debts on payment of applicable penalty; (iv) entitles a party to the contract to terminate without reasonable cause the contract unilaterally.

V) Execution of orders as a Decree of Civil Court¹³

Proposed amendment is that an order of the District Forum / State Commission/ National Commission will be enforced as a Decree of a Civil Court. This modification is considered essential in view of the experiences gained during implementation of the amended Act and is intended to deter willful offenders and also to ensure speedy and proper execution of the order of the consumer forums, so that justice to the aggrieved consumers is not frustrated.

VII) Penalty for Non-compliance of the Order¹⁴

Proposed amendment for payment by every person for not complying of the order of District Forum / State Commission/ National Commission of an amount of not less than Rs.500 or 1½

12 *Ibid* s.2(1)(s).

13 *Ibid* s.25.

14 *Ibid*.

percent of the value of the amount awarded- whichever is higher, for each day of delay of such non-compliance of the order. This modification is considered essential in view of the experiences gained during implementation of the amended Act and is intended to deter will ful offenders and also to ensure speedy and proper execution of the orders of the consumer forums, so that justice to the aggrieved consumers is not frustrated.

VII) District Forum Benches at Taluka¹⁵

Proposed amendment for empowering District Forum to function in any other place apart from District HQ, in consultation with State Government / State Commission - This provision is considered necessary to allow State Governments the flexibility to club neighbouring Districts Forum as also give additional charge to President/Members to hear cases in more than one District Forum so as to effectively deal with the non - functionality of Districts Forum caused due to vacancy of President/ Member.

Conferring powers to District Forum to issue order to the opposite party to pay reasonable rate of interest on such price or charges as may be decided by the District Forum- This provision is considered necessary to empower the consumer forum to award interest where the consumer has suffered due to protracted litigation.

VII) Governments Power in selection process¹⁶

Proposed amendment is for empowering Central/State Governments to refer back the recommendation of the Selection Committee for making fresh recommendation in order to avoid any delay in the Selection process. This is felt necessary to facilitate quicker filling up of the posts in the Consumer Forums and to avoid the consumer Forum remaining non-functional for long due to such vacancy thereby adversely affecting consumers interest. For re-appointment of members, the selection committee shall take into consideration of the observations or performance appraisal report prepared by President or State Commission.

15 *Ibid* s.11(3).

16 *Ibid* s.10(2).

VIII) Increase of Minimum Age to become a Member¹⁷

Proposed amendment is for increasing the minimum age for appointment as a Member in the case of State Commissions from 35 to 45 years, and in case of National Commission from 35 to 55 years. This is proposed to improve the quality of persons applying for these posts.

IX) Increase of Experience period for Members¹⁸

Proposed amendment is for increasing the period of experience for appointment as a Member in the case of State Commission from 10 years to 20 years and in the case of National Commission from 10 years to 30 years. This is proposed in order to improve the quality of persons applying for these posts.

X) National Commission / State Commission can ask Expert's opinion¹⁹

The Proposed amendment is for conferring powers to National Commission / State Commission to direct any individual or organization or expert to assist National Commission / State Commission in the cases of large interest of the consumers. This provision would enable the National Commission or the State Commission, in cases involving the larger interests of the consumers, an opportunity to *suo moto* enlist the services of an expert or an outside party, in an ongoing case, in the interest of justice.

XI) Central Govt. and State Govt. can Monitor Pending Cases²⁰

The Proposed amendment is for conferring powers to Central Government to call upon periodical reports of pending cases from National Commission and to State Government from State Commission or any District Forum. The provision is considered necessary to enable easy availability of data regarding filing and

17 *Ibid* s.16 and s.20

18 *Ibid*.

19 *Ibid* s.22E.

20 *Ibid* s.28B and s.28C.

disposal of consumer complaints, which would help in monitoring the functioning of the consumer forum and effectiveness of the law.

XII) Members can't Practice before Consumer Agencies²¹

The Proposed Amendment inserted for members shall not practice before Consumer Agencies. According new subsection the President or member of the State Commission, on ceasing to hold office as such, shall not appear, act or plead before the State Commission or any District Forum in that State in which he had been as the President or member, as the case may be, of the State Commission.

CONCLUSION

We hope as early as possible the Amendment to Consumer Protection Act, 1986, for the effective and sturdy protection of consumers. Even after this amendment, it is known fact that without people's active participation the Government alone cannot protect consumers from defective products. There are plenty of laws to take care of the consumers and their number is also increasing. But their effectiveness lies in the alertness of consumers and sincerity of the authorities in their implementation.



21 *Ibid* s.16(5); 20(5).

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RELAXING RULE 36 IN THE ERA OF GLOBALISATION

*Shampa I Dev**

I. INTRODUCTION

Cicero called the law ‘a noble profession,’ but Frederick the Great described lawyers as ‘leeches,’¹ It is through the advocate that justice could be fetched, but the conduct of the advocate, soliciting briefs in particular tarnished this image.

Legal practitioners emerged when the complexity in the legal profession was difficult to understand by those affected. It also became difficult to apply law and follow the procedures of the court to get justice. The persons, who possessed the necessary skills, learnt law and offered their skills for hire. Prior to the twentieth century lawyer advertising was generally considered acceptable.² There were neither regulations

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1 The Bar Council of Maharashtra v. M.V. Dabholkar and Ors. AIR 1976 SC 242

2 Hazard Geoffrey C. Jr.; Pearce, Russel; and Stempel Jeffrey, “Why Lawyers should be allowed to advertise: A market analysis of legal services” (1983) Faculty Scholarship Series. Paper 2398. http://digitalcommons.law.yale.edu/fss_papers/2398.

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governing the entry into the profession nor were there rules regarding the conduct of the lawyers in the profession. The dishonest, unscrupulous of the lot exploited their customer by charging exorbitant fees and not providing satisfactory services. Hence legislations governing the legal profession cropped up. They prescribed qualifications for entry into the profession and also regulated the conduct of the lawyers in their profession. Various sanctions like expulsion from practice and criminal penalties were introduced for misconduct.

The social importance of the profession soon came to be recognised and accepted by the people. The advocate was the means to get justice. A consciousness also developed among the legal professionals for the need for protecting the dignity of the profession and developing a standard code of conduct. The power of the institution that is the courts grows when all have respect for the judiciary and rely on them to get justice. It pre-necessitates that the members of the profession follow standards of professional conduct and conduct themselves in a dignified way at all times. Rules' barring advertisement and solicitation finds its origin in the very first rules relating to self-imposed ethical standards of conduct.

The *Bates v. State of Arizona* ruling of the United States Supreme Court in 1977 overturned the American Bar Associations 69 year old prohibition on attorney advertising. It held that displaying price of legal services was protected speech under the first amendment. It was held that false and misleading advertisements could be curtailed. This set in motion the debate on whether attorney advertising should at all be allowed and if yes to what extent. Later codes on professional ethics though, disregarded the *Bates* ruling allowing only name, address and specialization in advertising. This debate becomes all the more relevant today with globalization and liberalization taking the world by a storm and challenging and changing the pre-existing socially accepted norms.

Soliciting by lawyers as opposed to advertising is forbidden almost everywhere. It was a long-standing principle of legal ethics in Anglo-American countries that an attorney must not seek professional employment through advertising or solicitation, direct or indirect.

The reasons commonly given were that seeking employment through such means lowers the image of the profession. It undermines the dignity

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of the profession. It lowers the image of the lawyer in his own view as well as in the view of the public. Moreover it does not serve any public purpose as a lawyer will have to spend more on overheads. That will be a deterrent to new entrants. Only the monetarily strong can survive driving out the weak. Since supply would be less the cost of legal services would steeply rise, making it out of reach of the needy.

A more basic reason appears to have been the social necessity of restraining the motive of personal gain and of stressing the objective of service.³ Other reasons offered are that competition will increase in offering lower prices for legal services thereby making legal services within easy reach. Consumer will be able to make informed decision. He will be able to chose and select the type of service as per his wants.

II. LEGAL PROFESSION IN THE ERA OF GLOBALISATION

In the recent years globalisation has not left legal profession untouched. Major issues like the objectives of legal profession, consumerism, Indian commitment to the WTO regime, competition law etc. have cropped up. Globalisation has brought the world closer. It has also brought in more competition. India is a part of WTO and legal services are listed as a subsection of Business Services in WTO Services Sectoral Classification list,⁴ thereby subjecting it to trade laws around the world. Globalization has expanded the internal and external demand for legal services.⁵ Currently legal services off shoring from India generate \$ 61 million in revenues. This is expected to grow nearly 10 times to reach \$ 605 million by 2010 and cross \$ 1 billion by 2015.⁶ LPO's have opened up providing legal services to people residing in different corners of the world. Law firms have arrived. In foreign

3 Legal ethics.(2011). In Encyclopedia Britannica. Retrieved from <http://www.britannica.com/EBchecked/topic/334853/legal-ethics>.

4 Rajiv Dutta, "World Trade Organization and Legal Services: The Indian Scenario," at [www.insolindia.com/shimlaPDFs/world Trade Org.pdf](http://www.insolindia.com/shimlaPDFs/world%20Trade%20Org.pdf) (last visited on 23rd July, 2011).

5 Singh Lalitha Kumar I., "A View on Legal Profession," AIR 2006 (Jour.) 1.

6 Sahai Neha & Bharihoke Karan, International Trade Law Service under the GATT and the Indian Legal Service Sector (Issue 19, Vol.6 The World Trade Review, 2006).

countries partnerships have cropped up. All in all competition has increased manifold.

In China for e.g. the steep growth in the legal services market has attracted legal professionals from other countries. Such instances would only rise with liberalisation of the international legal market. The ideas and norms relating to professional conduct differ from one state to the other. These pose major challenges. With the development of technology lawyers are now able to give legal advice from their offices to clients that are far in different jurisdictions altogether. In order to survive in this fast changing order one has to be thoroughly equipped, academically as well as otherwise. Unfortunately though, most countries have failed to respond to these fast changes with proactive laws equipping their legal professionals with the cutting edge to face stiff competition.

III. ANALYSING LEGAL SERVICES IN INDIA

The Indian Courts in many cases⁷ have classified legal profession as a 'service' for the purpose of the consumer protection. Lawyers are therefore accountable to their clients in cases of deficiency of services.⁸ Section 2 (u) of Competition Act, 2002 defines the term 'service' along the lines of Consumer Protection Act, 1986. Thus legal services are becoming subject of trade related laws where consumerism and market forces should be given adequate space.

Having said that it is important to identify how a consumer makes a decision to go to a certain advocate. As on date the best method is personal experience of the service. But he also must know about the other range of services which he has not experienced. For he may be satisfied with what he has experienced but there might be better services

7 K Vishnu v. National Consumer Disputes Redressal Commission, in *Srimathi v. Union of India*, Madras High Court held that in view of Section 3 of Consumer Protection Act, 1986 Consumer Redressal Forums have jurisdiction to deal with claims against advocates, *Bangalore Water Supply and Sewerage Board v. A. Rajappa* AIR 1978 SC 969; 1978 LabIC 778.

8 Justice D. P. Wadhwa & N. L. Rajah, *The Law of Consumer Protection: An exhaustive Commentary on the Consumer Protection Act* (1sted. Wadhwa and Company, Nagpur 2006).

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on offer. Moreover a person does not experience much of court cases in his life time.

It is also necessary to analyse the type of services generally offered. Some lawyers have on offer standardizable services whereas some have on offer highly individualised services. Highly specialised services are where the services of particular, highly experienced and skilled attorney in the relevant area are required. Whereas routine services may be those for e.g. where an affidavit needs to be sworn or simple wills or uncontested divorces. “Whether a legal service is individualized or standardizable depends primarily on the degree of risk that the particular legal problem poses for the client. Individualized legal services are most responsive to situations that involve a relatively high risk for the client and that therefore require direct and sophisticated involvement by an attorney. Conversely, standardizable services are most responsive to relatively routine situations that involve low risk to the client and that therefore require comparatively little direct attorney participation.”⁹ So far as standardizable services are concerned the more the volume the more cost effective it would be. Advertisements in such cases will attract consumers towards these standardized services. The quality of the services would be better as routinely the same would be done with whatever improvements can be brought into it. Consumers will have more choices. “Providers of primarily individualized services have little use for advertising of any kind and no use for mass advertising. Providers of individualized services are not likely to advertise, and consumers of individualized services are not likely to rely on advertising information. Permitting advertising will thus neither facilitate nor interfere with the operation of the market for individualized legal services. On the other hand, advertising will enable producers of standardizable services to increase business volume, to achieve economies of scale and to lower prices.”¹⁰

In this era of competition it is very necessary for the legal professional to reach out his services to as many consumers as possible.

9 *Supra* note 2.

10 *Ibid.*

To inform the consumer that such services are available he must advertise his services. That will enable him to disseminate information regarding the nature of the work he specialises in. Advertising is considered to be the cornerstone of our economic system.¹¹ The consumer then is also at an advantage. He can make an informed choice. If the lawyer is able to advertise it will facilitate competition. It would be in the consumer's interest as well as in the interest of justice.

IV. PURPOSE OF ADVERTISEMENTS AND ITS IMPLICATIONS

Advertisements serve many purposes. The objectives behind advertising vary. One of the functions of advertising is solely to inform, to raise awareness. People can't make informed choices if they're not aware of the options available to them. They can't utilize resources that are not known to them.

Consumers have a right to be informed of the nature of the services available to them. George Akerloff's paper on 'the Market for Lemons' pointed out something called 'information asymmetry' wherein there is an imbalance between the information of the quality of services available to the consumer and the range of services actually available by the professional; therefore the consumer considers this asymmetry and settles with the average quality of the services; proposing a tendency to drive out better quality service providers out of the market. Better information is an added incentive to the consumers and involves improving the overall standards of the profession as opposed to the general notion that the quality of ones work is sufficient to create awareness.

The bar on advertising is actually opposing public good. It also makes the legal professional in India weak in the face of competition. Some countries have actually enacted laws against solicitation and have regulated the right to advertise. Competing with Indian legal professionals are foreign legal professionals who are allowed by the laws of their land to advertise, form partnerships, reach information regarding the services they render to the potential consumers. Nobility of profession is being justified at the cost of consumer's awareness about available options.

11 Tata Press Ltd. v. Mahanagar Tel Ltd, MANU/SC/0745/1995.

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Public Policy must ensure good to all the people, not just a class of professionals. It must ensure good to the consumer. If consumers are aware of the wide range of available services then he can have the power to choose. It is in his interest that he is made known of the above.

V. RULE 36 OF THE BAR COUNCIL OF INDIA RULES, 1975

Section IV: Duty to Colleagues:

Rule 36: States as under, “An Advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communication, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or produce his photographs to be published in connection with cases in which he is engaged or concerned. His sign-board or name-plate should be of reasonable size. The sign-board or name-plate or stationery should not indicate that he is or has been President or Member of Bar Council or any of association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of worker or that he has been a Judge or an Advocate General.”

This Rule 36 falls under the head Duty to Colleagues in Section IV. Being so posited it draws our attention to another objective behind the rule i.e. to prevent advocates, law firms and other law offices from enticing away the clients of the other and thereby adversely affect the interests of the Colleagues. It is an established rule of interpretation that the provision has to be interpreted keeping in mind the heading or the title given to that group.

Recently a resolution was passed by the Bar Council of India on 30th April 2008 to amend Rule 36 in section IV, Chapter II, Part VI of the Bar Council of India Rules to incorporate a proviso –

“PROVIDED that this rule will not stand in the way of advocates furnishing website information as prescribed in the Schedule under intimation to and as approved by the Bar Council of India. Any additional other input in the particulars than approved by the Bar Council of India will be deemed to be violation of Rule 36 and such advocates are liable to be proceeded with misconduct under section 35 of the Advocates Act, 1961.”

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Under the amended rule, advocates can mention in their chosen websites, their names, telephone numbers, email id, professional qualification and areas of specialisation. The last criterion was added on suggestion of Justice S.H. Kapadia who was part of the bench perusing the amendment.

Analysing this rule, it may be safely concluded that the legal professionals in India can now have some presence on the net. Well that would certainly be of some solace. Having a 'presence on the web' is now de rigueur. Conversely, not having a presence on the internet is a professional embarrassment, an instant loss of credibility, particularly as to business clients having email culture.¹²

But the rule is sure to pose some tricky questions. When it comes to advocate presence on the net the real challenge is to determine the limits keeping in mind the ban on advertising and solicitation under Rule 36. The term 'chosen website' is ambiguous. Does it mean that a lawyer can be a part of a common website of lawyers or can he have his own website? If so what should be choice of the domain name? Can for e.g. 'winninglawyers.com' be the domain name of the chosen website? Will it raise unjustified expectations? A website is almost as if it is a brochure. Hence whether or not website content constitutes advertising depends on the content. Beyond the website there are emails, real time interactive chat rooms, different groups etc. in various applications, which pose questions like whether seeking new clients over chat rooms on the web would be considered advertising or solicitation. Is it very much like in person talking or conversing over the phone?

A website may be considered neither advertising nor solicitation. It is analogous to a fact sheet sent to a prospective client who seeks to know about the availability of particular kinds of services. Many countries have allowed attorney advertising though it has strictly regulated it by putting up boundaries. Some states have even allowed commercial advertising on the television, albeit restricted.¹³ Presence

12 Ethics in Attorney Advertising and Solicitation (c) 1997 Charles F Luce Junior.

13 In one commercial an advocate and his partner was seen looming as giants over buildings with great speed, almost in a blur. To battle injustice in high places they were shown to be leaping over hurdles (roof). Exaggerated visual depictions did not bother the court who set aside the relevant law.

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on the web is also carefully regulated with restrictions in trade names and content regulations.

VI. VIEWS OF THE APEX COURT

The Supreme Court in *Bar Council of India v. M. Dhabolkar*¹⁴ ruled -"the law is not a trade, not briefs, not merchandise and so the heaven of commercial competition or procurement should not vulgarise the profession." To be amenable to disciplinary jurisdiction, the Advocates must have (1) solicited work (2) from a particular person (3) with respect to a case. In order to be within the mischief of Rule 36, merely canvassing is not enough, but canvassing must be for a case with the person who had not till then engaged a lawyer. Neither judge, nor lawyer will be in doubt, even without study of case-law, that snatching briefs by standing at the door of the court house and infighting for this purpose is too dishonourable, disgraceful and unbecoming to be approved even for other professions.¹⁵ Self-advertising tends to lower the dignity of this honourable profession and is undoubtedly akin to touting.¹⁶ Sending a circular postcard is an improper conduct by the Advocate.¹⁷ Sign board or a name-plate should be of a moderate size.¹⁸ Writing of articles for publication in newspapers under signature, where the writer describes himself as an Advocate practicing in the court as a flagrant breach of professional etiquette.¹⁹ From the above case laws it becomes very clear that the Courts are against any form of soliciting for briefs. Not much has been said about advertising though the term has been generally used.

14 *Supra* note 1.

15 Refer rulings in *In the matter of 'P' an Advocate* AIR 1963 SC 1313; *In re: Shri. M. Advocate of Supreme Court of India* MANU/SC/0015/1956:1957CriLJ300; *In the matter of an Advocate* MANU/WB/0123/1936:AIR1936Cal158; *Govt. Pleader v, Siddick* MANU/MH/0222/1929 : AIR1929Bom335.

16 See (Thirteen) *Advocates, Allahabad, In the matter of*, AIR 1934 All. 1067.

17 AIR 1929 Bom. 335.

18 (1967) 80 Mad. LW 153 at 154.

19 See *In the matter of A, an Advocate*, AIR 1962 SC 1337; See also (Thirteen) *Advocates, Allahabad, In the matter of*, AIR 1934 All. 1067.

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In *V.B. Joshi v. Union of India*,²⁰ the Supreme Court has given some relaxation to advertise on the internet. It is also limited in nature, where law firms can only advertise about name, address, telephone number, email id, enrolment number, name of State Bar Council where originally enrolled, date of enrolment, name of State Bar Council where name stands currently, name of the Bar association of which member, professional qualification and academic qualifications, area of practice..., etc.

In the case of *In re Sanjiv Datta*,²¹ Secretary, Ministry of Information and Broadcasting, the Supreme Court observed – ‘Some of the members of the profession have been adopting prospectively casual approach to the practice of the profession.....this not only amounts to contempt of court but also positive disservice to the litigants. In our country most often consumers are at the mercy of advocates and the system and they resort to any other service provider in absence of choice.’

Attention is called to the plight of the consumer who is at the mercy of the advocate! Most consumers are in need of standardizable legal services. By word of the mouth he does not come to know of all the variety of services available and the quality of those on offer. Thus he does not have much choice of advocate, on account of the fact that the services of the other advocates are not known to him. Advertisements are informative and help the consumer to make an intelligent and informed decision. This gap can be bridged by allowing a relaxation in the Rule 36 so far as advertising services is concerned.

VII. RAGHAVAN COMMITTEE

The Raghavan Committee has summed up the effect of the existing regulatory system in professional services as “.....the legislative restrictions in terms of law and self-regulation have the combined effect of denying opportunities and growth of professional firms, restricting their desire and ability to compete globally, preventing the country from obtaining advantage of India’s considerable expertise and precluding consumers from opportunity of free and informed choice.”

20 Writ Petition No. 499 of 2008.

21 MANU/SC/0697/1995

VIII. CONCLUSION

It has been rightly identified by the Raghavan Committee the desire and the ability to compete globally exist, the necessary expertise also exist. There is a need to tap this potential and allow the necessary freedom essential to survive and flourish. This will not only benefit Indian economy but will also empower India to face the challenges of globalisation. The WTO requires each of its member states to throw open its market, signifying that only the best will survive. Indian legal professionals require the support of the law (relaxation in Rule 36) to survive in the present world that's filled with competition.

Amartya Sen has consistently maintained that in a democratic state the ruling government cannot be unresponsive to the needs of the population at large. Competitive markets and democratic governments are, therefore, considered complementary and need to interact in a manner that maximizes the larger public interest.²²

The emerging legal service sector would then be equally beneficial to all the consumers of legal services, without discrimination. In the age of consumerism and competition law, consumer's right to free and fair competition is of paramount importance and cannot be denied against any other consideration.²³ Relaxing Rule 36 will immensely benefit the consumers in that they will have a freedom of choice as well as will be able to make an informed decision.

Soliciting as compared to advertising is a direct approach made to a potential client with the intention of asking for brief and it is no doubt undignified. It lowers the image of the advocate in the eyes of the society. In such cases the honour of the profession must be maintained in such dignified and deterrent a manner that public confidence in this arm of the justice-system is neither shaken nor shocked.²⁴

22 Dreze, Jean & Sen, Amartya, (1995) "India- Economic Development and Social Opportunity," Oxford University Press.

23 World Bank Report on Emerging Service Sector, 1999 quoted in The Raghavan Committee Report on Competition Law, 2000.

24 The Bar Council of Maharashtra v. M.V. Dabholkar and Ors. AIR 1976 SC 242.

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Advertising on the other hand is an indirect method of making the availability of the services known. If relaxation in advertising is given, then the consumer will have a distinct advantage. It will be in the interest of fair competition and will improve the overall quality of the profession. It will equip the legal professional in India to compete with his counterpart in other countries. The stringent norms of Rule 36 must be relaxed and regulated in the interest of maintaining the dignity and the honour of the profession.

If it is not monitored and regulated in the below mentioned way, there would be lot of malpractices of misrepresentation, deceptiveness and false advertisements which would affect the society and degrade the nobility of this profession. For example,

- Inaccurate, false or misleading statements must be avoided.
- Material misrepresentation of fact or law or omitting a necessary fact is misleading and untruthful.
- Creating unjustified expectations of the potential results must be avoided.
- Factually correct statements about prior successes may create unjustified expectations. Such advertisements should include precautionary disclaimers regarding the uniqueness of each case and its outcome.
- A lawyer should not give anything of value to anyone for a positive recommendation.
- Comparing the services with others offers unless factually true must be avoided.
- In person solicitation where a significant motive for the lawyer is pecuniary gain must be avoided.
- This should be applicable even in the cyber world.
- Where the prospective client does not seek information on legal services it should not be imposed.
- Must disclose to the recipient that he is about to be subjected to “legal advertising.”

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The era of globalization demands a readjustment to survive, otherwise drawbacks in the present system as highlighted in the In re Sanjiv Datta Case²⁵ and in the Raghavan report will be the reason of fall. An attorney's presence on the net needs to be regulated in the light of the discussions made above. Relaxing Rule 36 and close monitoring of it can alone produce a win-win situation where the interests of the profession, the professional and the consumer is given due care.



25 MANU/SC/0697/1995

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INTERFACE BETWEEN CONSUMER PROTECTION AND TRADEMARK DILUTION

*Gargi Chakrabarti**

1. INTRODUCTION

Trademark law is based on the aim of protection of strong and well known marks of any reputed company from misuse, infringement and passing off. This is the idea of protection of a 'mark' from the manufacturing company's point of view. On the other hand, another theme of trade mark law is to protect the prospective consumer from any kind of falsification or deception. Any reputed company makes their goodwill in the market by providing good quality products, constant supply in the market and proper post production services (if applicable). According to time frame, it will take good lot of time for a company to make this goodwill among the consumers. 'Trademark' is the identification of that goodwill of that specific company for specific products and/or services, which assures good quality of that product and service. Common consumer used to rely on specific quality through the specific

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Trademark but they don't have that much expertise to differentiate between fake and original product, thus consumer protection is effected by misleading products. Trademark infringement will lead not only to the loss of business of the specific company, it will also hamper the goodwill of that company, as a result the consumer ultimately will be provided with low quality product or service and they will lose the trust on the actual trademark holder company. Consumer protection law is available in almost each and every country to take care of the issues of consumer related various aspects of fraud and wrong-doing. This article will analyze the issues of consumer deception and consumer protection which is happening due to trademark dilution and trademark infringement. It will also analyze the legal perspectives of both Trademark Act and Consumer Protection Act of India, their interface and provisions for the protection of consumers.

2. PROVISIONS OF TRADEMARK LAW REGARDING CONSUMER PROTECTION

Rose as a flower adorable by everyone, but any other flower name by rose can't be a rose or rose made by plastic can't be a rose. According to the consumer names and other identifiers such as slogans and logos can be very important. Brands are one of the main motivators for people's decisions to buy specific goods or services. Example: Levis, Nike, Gucci etc. Trademark is a sign or symbol used to distinguish the products or services of an enterprise; trademark confers to its owner exclusivity of exploitation of the said mark. Trademark serves four functions – identification, source, quality and advertising symbols – justifying its legal protection.

2.1 Justification of Trademark – Consumer Protection

Justification of trademark can be explained from economic, quality and advertising point of view.

2.1.1.Economic Justification

One of the objectives of the trademark protection is to protect the interest of the consumers. The consumer will be able to identify the required product with very little search cost. Protection of trademark facilitate consumers from being deceived by the counterfeiting marks

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selling low quality products, at the same time trademark protection aims at ensuring interest of trademark owner by rewarding him for investment and creates a goodwill for his product.

2.1.2 Quality Justification

A consumer identifies the product and the quality of the product through the brand name associated with it. The quality experienced by the consumer, often referred to as “felt quality,” this leads him to the same brand and to the same product with expectation of experiencing the same quality – “expected quality.” Thus a trademark ensures consistency in quality of the product and retains the patronage of the loyal customers.

2.1.3 Advertising Justification

Trademark is a merchandising shortcut to inform, educate and persuade customers to buy certain products. Trademark serves the function of an advertising symbol by providing information about the origin, nature and quality of the product. The trademark owner invests advertisement for persuading the consumers. The advertisement may be informational or persuasive, although persuasive advertisements as well as comparative advertisement create a lasting impression in the mind of the consumers.

2.2 Passing Off and Misrepresentation

In case of infringement of unregistered trademark the passing off can be used a common law remedy of torts. The plaintiff has to prove that his goods or services have a reputation and goodwill in the market. The basis of passing off is false representation. The basis for an action is consumer deception and false representation, thus it is considering consumer protection.¹ There has to be direct false representation, adoption of trademark which is the same or colourable imitation of the trademark of the rival traders, adoption of an essential part of the rival trader’s name, copying the get-up or colour scheme of the label used by the trader, imitating the design or shape of the goods and adopting the word or name by which the rival trader’s goods or business is known in the market.

¹ Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., (2001) 5 SCC 73.

The concept now has changed from protecting the manufacture's goodwill and reputation to the concept of protecting the manufacture's monetary benefit and to bar unfair reaping by others of what has been sowed by the manufacturer. The crucial concept remains same that is to protect the consumers from the ultimate confusion while buying the goods, services etc. In the early nineteenth century tort as a remedy was available for name, trademark or product or business but now it is inclusive of television, radio programme and other non-trading activities like professional associations, business of looking after children, organizing exhibitions, beauty contests, so on and so forth.

In the English case of *Erven Warnink*,² which is also known as the *Advocate case*, the essential characteristics which must be presented in order to create a valid cause of action for passing off are: (1) misrepresentation, (2) that is made by a person in the course of trade, (3) to prospective customers or ultimate consumers of goods or services, (4) supplied by him which is calculated to injure the business or goodwill of another trader and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought.

2.2.1 General Principles

Misrepresentation – No one is entitled to represent his goods or business as being the goods or business of another whether such representation is made by the use of any mark, name, sign, or symbol, device or other means.³ It is therefore an actionable wrong to pass off by whatever means that result is achieved.⁴ Where the ultimate purchasers get confused from the overall getup of the unregistered mark, it is sufficient to claim for passing off though a prerequisite is to have goodwill in an unregistered trademark.⁵ It is an invasion of the proprietary rights vested in the plaintiff. The misrepresentation should also have deceived or is likely to deceive and that the plaintiff is likely to suffer damage by such deception, also the consumer will be affected by such

2 Erven Warnink v. Towned 1980 RPC 31.

3 Singer v. Loog (1881) 18 Ch D 395 at 412.

4 Rogers v. Rogers (1924) 41 RPC 277.

5 (1842) 6 Beav 66 at 73.

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deception. This is a condition precedent to success in an action for passing off where the alleged representation consists of the use of a name in connection with the goods, that the name should have become distinctive of the plaintiff's goods.⁶

2.2.2 Essential Elements of Passing Off

There are three elements of the tort of passing off which are as follows: (1) Reputation, (2) Deception and (3) Damage. In the recent case of *Reckitt & Colman*⁷ it was stated that according to the law of passing off no man could pass off his goods as those of another. It may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. Firstly goodwill has to be established or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labeling or packaging) under which his particular goods or services are offered to the public, such that the get up is recognized by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public leading or likely to lead the public into believing that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, so long as they are identified with a particular source which is in fact the plaintiff's. Thirdly, he must demonstrate that he suffers or that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff. It is however very difficult to classify all the possible ways in which a man may make the false representation relied on.⁸

6 *Oertli v. Bowman* (1959) RPC 1 at 4 (HL).

7 (1990) RPC 341 at p.406 (HL).

8 *Spalding v. Gamage* (1915) 32 RPC 273 at 284.

2.3 Trademark Act Provisions for Trademark Dilution in India

Trademark dilution is a trademark law concept giving the owner of a famous trademark standing to forbid others from using that mark in a way that would lessen its uniqueness. In most cases, trademark dilution involves an unauthorized use of another's trademark on products that do not compete with, and have little connection with, those of the trademark owner. The goodwill associated with both registered and unregistered trademarks is protected by way of a passing off action in India. It was held in Parker Knoll case⁹ that the marks have to be very similar marks have so as to "nearly resemble" the registered mark and "likely" to deceive or cause confusion among consumers. It is not a necessity that it should be intended to deceive or intended to cause confusion. It is the probable effect on ordinary people that have to be taken into consideration for determining deception or confusion. The question of similarity between two trademarks and the likelihood of deception or confusion arising from their use is not to be decided as such but to be determined always in the background of the surrounding circumstances.

On several occasions the Indian Supreme Court has overtly acknowledged this rule. One such recent affirmation states that "*The doctrine of passing off is a common law remedy whereby a person is prevented from trying to wrongfully utilize the reputation and goodwill of another by trying to deceive the public through passing off his goods.*"¹⁰ Trademark dilution and passing off is intricately related. Trademark dilution concept in India was not there at the Trade and Merchandise Marks Act, 1958 but Section 29(4)¹¹ of Indian

9 Parker-Knoll v Knoll International (1962) RPC 265 at 273-274.

10 Ramdev Food Prod. Pvt. Ltd. v. Arvindbhai Rambhai Patel & Ors., A.I.R. 2006 S.C. 3304.

11 Section 29 (4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which-(a) is identical with or similar to the registered trade mark; and (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and (c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

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Trademark Act 1999 provides the provision for trademark dilution. The Act is not explicit about dilution, as it does not refer specifically to that term. But Section 29(4) lays the foundation for the ‘likelihood of confusion test’ in case of similar trademark used in relation with similar or even dissimilar goods or products. The test of infringement was laid down elaborately in *Durga Dutt’s* case,¹² as follows: (1) The onus would be on the plaintiff; (2) Where the two marks are identical, no further question to establish that there is infringement arises; (3) Where the two marks are not identical the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff’s registered trademark as is likely to deceive or cause confusion in relation to goods in respect of which it is registered; (4) The court has to compare the two marks in terms of the degree of resemblance. The purpose of the comparison is for determining whether the essential features of the plaintiff’s trademark are to be found used by the defendant. The base is to find out if the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff; (5) The identification of the essential features of the mark is the essence of fact and depends on the judgment of the court based on evidence led before it as regards the usage of it in the trade.

Based on that, the principle of dilution is developed by courts after taking into concern the internationally recognized standards for the need to protect ‘well known’ marks, whose exploitation, without any good cause in relation to diverse and dissimilar products or services could injure and “dilute” its applicability.

Regarding dilution of same mark for dissimilar products, Court’s contention for ‘likelihood of confusion test’ is elaborated in *Daimler Benzaktiegesellschaft & Anr. v. Eagle Flask Industries Ltd.*¹³ case. In this case it was held that the name ‘Mercedes’ for a car is a “well known” mark and has a unique place in the world. So, it is not possible for any company to dilute that mark by use of the name ‘Mercedes’ in relation to a product like a thermos or a casserole. But one fact is omitted here, that is the common general people with average or low intellect

12 *Durga Dutt Sharma v. Navratna Pharmy Laboratories* AIR 1965 SC 980.

13 *ILR (1995) 2 Del 817.*

and judging capacity might think of ‘association’ or ‘link’ between the “well known” Mercedes mark even with the altogether dissimilar products and thus their decision might be influenced by the thought that they will receive an extra-ordinary good quality product if they buy thermos or casserole named ‘Mercedes.’ In this way chance of passing off is existing in this type of cases. So, during judging the ‘likelihood of confusion’ it has to be taken into account what kind of consumers are going to buy the product in concern; whether their judgmental ability clearly differentiate the distinction between the actual trademark holder company and the product and whether they are likely to be confused just by the mere use of a very “well known mark.” In the definition of “well known mark”¹⁴ these factors are attributed and thus they are to be judged very cautiously with proper consideration.

2.4 Remedies for Trademark Infringement

The Act provides a penalty for falsifying any trademark or for falsely applying to any goods or services any trade mark or for making, disposing, possessing any die, block, machine, plate or other instrument for the purpose of falsifying or of being used for falsifying, a trade mark or for applying any false trade description to goods or services or for applying to any goods any false indication of country, place, name or address or for tampering with, or altering or effacing an indication of origin which has been applied to any goods, of an imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees.¹⁵

Penalty for selling, hiring or exposing for sale goods or providing services to which false trade mark or false trade description is applied shall be imprisonment for a term, which shall not be less than six months but which may extend to three years and with fine which shall not be

14 Section 2(zg) “well known trade mark,” in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.”

15 Section 103 of the Trademarks Act, 1999.

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less than fifty thousand rupees but which may extend to two lakh rupees.¹⁶

3. POTENTIAL CONFUSION TEST AND CONSUMER CONCERN IN USA

American Trademark (Langham) Act¹⁷ required the proof of actual dilution of trademark to establish the infringement. In 1995 Federal Trademark Dilution Act (FTDA) had been implemented specifically to consider the trademark dilution and issues related with it; and thus it provided federal protection against trademark dilution. According to FTDA, actual dilution has to be proved by empirical evidences like consumer's responses to the later mark or proof of loss of revenue. In 2006, Trademark Dilution Revision Act (TDRA) had been passed which replaced the 'actual dilution' standard by 'likelihood of dilution' standard. The tests for dilution standard is multifactorial in nature and this multifactorial test is provided initially in *Mead Data Central Inc. v. Toyota Motor Sales, USA, Inc.*¹⁸ *Mead* test clarified a number of conceptual factors for determination of presence or absence of blurring to judge the dilution. Judge Sweet formulated the *Mead* test during his judgment in a separate concurring opinion; he described the following factors to be evaluated: (i) similarity of the marks, (ii) similarity of the products to be covered, (iii) sophistication of consumers, (iv) predatory intent, (v) renown of senior mark and (vi) renown of junior mark.¹⁹ Third relevant factor for evaluation is mentioned as the "sophistication of consumer;" which is a very important matter to judge whether a certain group of consumer might get confused after a specific trademark dilution. 'Sophistication' according to its literal meaning is the quality of refinement by which one would display 'good taste and wisdom' rather than 'stupidity and vulgarity.' In the perception of social structure, 'sophistication' is linked with 'privileged class of people and superior social status.' According to the observation of the social composition in any country, socio-economic status is related with the levels of education

16 Section 104 of the Trademarks Act, 1999.

17 Trademark (Langham) Act 1946 (Codified at 15 U.S.C. S1051-1072).

18 875 F.2d 1026, 1035 (2nd Cir. 1989).

19 *Mead*, 875 F.2d at 1035.

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and intellect which provides more awareness, insight and powerful thinking and judgment; the higher is the degree of 'sophistication' more will be the proper thinking and judgment. Consequently, more will be the degree of sophistication, less likely is the chances of deception and falsification even if there is existing trademark dilution. For actual dilution to be proved the actual harm caused by it is to be shown, but when the issue of likelihood of confusion to be proved, it has to be shown whether the latter mark will have a dilution effect on the earlier mark. According to *Nabisco test* also the consumer is an important factor in the 'likelihood of confusion' test.²⁰ The text of Section 43(c) of FTDA refers to the cause of dilution of the distinctive quality of the well-known trademark. 'Cause of dilution' obviously is related with the similarity of the marks causing actual or potential confusion in the mind of consumers. As discussed earlier, the confusion will be actually evident if the infringing mark can successfully pass off the goodwill of the well known trade mark; this will lead finally to consumer deception. From consumer protection point of view this is a very important legal issue which needs proper concern and solution.

4. ISSUES OF CONSUMER DECEPTION

There are two perspectives regarding the consumer confusion and deception. Some consumers are present in the society who can't afford internationally well-known company's product, but they have a dream to use the famous products having well known trademark. In such case



²⁰ *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208 (2nd Cir. 1999).

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if similar fake products are available in the market in much cheaper rate, they will be influenced by those fake products. Following are some images of worldwide famous products mostly accessory items:

Everybody wants to own the world famous brands of shoes like Nike, Adidas, Crocs or hand bags or belts like Gucci for their own use. But those items are not affordable for all. So easily available cheaper fake versions are used but the quality of these fake products are not at all comparable with the original products. The producers of these fake products used to use the desire of common people and can easily falsify them; this kind of practice is not only harmful for the business of the original company but also highly non-acceptable for consumers as this is deception and cheating.

There is another perspective in relation with this matter. There are consumers who can afford the original brands but they are not aware of the originality of the products or how to identify the original products. The producers of false products usually use this lack of awareness and dilute the trademark.



Another problem for consumer is when they are buying items from the supermarkets/departmental stores, where lots of brands are available under the same roof and where the sales persons are promoting various types of products irrespective of their originality; in that case 'likelihood of confusion' is obvious. If this factor is assessed in conjunction with the desire of the common people, the cheap price of the fake products and the same or similar trademarks attached with fake products trying to pass off the goodwill of the famous companies; it will be apparent that this will lead to unfortunate way of consumer falsification and deception.

1. Provisions in Consumer Protection Act in India

Provisions related to 'unfair trade practices' are directly related with trademark dilution. Definition of 'unfair trade practice'²¹ as per Consumer Protection Act means '*a trade practice which for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.*'²² This includes the '*representation which may falsely represent that the goods are of a particular standard, quality;*'.....²³ or may '*falsely represent that the services are of a particular standard, quality or grade;*'²⁴ or '*gives the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on any adequate or proper test;*'...²⁵ or '*makes to the public a representation in a form that purports to be – a warranty or guarantee of a product or of any goods or services;*'...²⁶ or '*gives false or misleading facts disparaging the goods, services or trade of another person.*'²⁷ Trademark dilution will surely match all this criteria of false representation and thus will fall under the unfair trade practice as per the definition. Any consumer can make a complaint to the National Commission by the way of written allegation against any trader or service provider if they adopt an unfair trade practice under Consumer Protection Act.²⁸ Remedies available under Consumer Protection Act which might be applicable regarding unfair trade practice, or more specifically for the trademark dilution or deception cases, are, (i) discontinuance of unfair trade practices or restrictive trade practices or direction not to repeat

21 Section 2(r) of Consumer Protection Act 1986.

22 Section 2(r) of Consumer Protection Act 1986.

23 Section 2(r)(1)(i) of Consumer Protection Act 1986.

24 Section 2(r)(1)(ii) of Consumer Protection Act 1986.

25 Section 2(r)(1)(vii) of Consumer Protection Act 1986.

26 Section 2(r)(1)(viii) of Consumer Protection Act 1986.

27 Section 2(r)(1)(x) of Consumer Protection Act 1986.

28 Definition of complaint is provided in Section 2(1)(b) of Consumer Protection Act 1986.

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them; and (ii) award of compensation for the loss or injury suffered. Trademark law is under central jurisdiction and consumer protection law is under control of state jurisdiction. With reference of trademark law each and every state should take initiative to protect the consumer rights under their jurisdiction.

2. Need for Cross-Referencing

As far it is discussed here, there exist a clear interface between trademark law and consumer protection law. Moreover the basic aim of both the legislation is to give consumer protection. In the statute of Trademark Law consumer issues have been mentioned many times, but no cross reference have been done; similarly in the statutory provisions of Consumer Protection Act no cross reference is found regarding trademark issues, though notes under Section 14 said '*any reference in this Act to any other Act or provision thereof which is not in force in any area to which this Act applies shall be construed to have a reference to the corresponding Act or provision thereof in force in such area.*'²⁹ Even Section 3 mentioned '*the provision of this Act shall be in addition to and not in derogation of any other law for the time being in force.*' So, provisions are there for cross referencing with other laws in India whichever is applicable, but there is no specific mention of interaction with the Trademark Law with proper section reference either in the statute or in any explanations. Trademark is a intellectual property right, so as per trademark law intellectual property right for the right holder is well protected, rather consumer issues are mentioned but no proper legal remedies are given under the Trademark Law. Taking into consideration the scope of the Trademark Law, it is worth if Consumer Protection Act will mention about trademark dilution and related consumer confusion and deception cases and thus will come up with proper solution. As there is a huge overlap in practical sense regarding trademark dilution and consumer protection, so law making authority should revise both the statute with proper consideration of each other's point of view, then only the interest of trademark holder companies as well as consumer will be properly protected.

²⁹ Notes of Section 14 of Consumer Protection Act 1969.

3. CONCLUSION: The Way Forward

According to the Consumer Protection Statute, Consumer Protection Act and Trademark Act can work harmoniously and not contrary to each other. Inherent focus of Consumer Protection Act and Trademark Act is consumer protection. Trademark Act provides exclusive property rights to the right holders, here consumer protection is a salient feature but rights, infringement and remedies are vested on property holder only. Whereas Consumer Protection Act explicitly concentrates on adverse effect on consumer protection, thus there is an interface between trademark law and consumer protection law. Wherever consumer protection is affected by trademark dilution or passing off, consumer protection law needs to cross refer the trademark law as well and highest penalty is adequate to protect the consumer right. This issue is very sensitive, because there is a need to consider different group of consumers.

Firstly sophisticated consumers are there, who are aware of specific brands, their label, packaging and other details of the product and they have the expertise to identify the original products. Exact company authorized outlet is much more dependable for authenticated original products, but where the similar products of many companies are in sell under the same roof then the likelihood of confusion may arise. So, bonafied customers, who are capable of purchasing original products with exact price, are paying exact money but deprived of original product. Second category consumers are not regular buyers of branded products, have knowledge about them but don't have expertise to differentiate between original and fake goods; so there are ample chances of easy falsification because of lack of awareness, so similar kinds of deception happens to them. Third category consumers are below average economic group who wants to purchase the branded products but looking for cheaper price with the brand name. Sometimes they are aware that they are purchasing fake products having similar types of brand name or trademark just to satisfy their desire. Now complication arises when due to globalization reputed brands are coming for the business worldwide, but their businesses are affected by the fake products; so, they are losing confidence on the particular market. On the other hand small business groups who are engaged in manufacturing and selling of

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fake products, can also be affected by the strict rules and regulation; they require proper education and awareness regarding rules and regulations and criminal liabilities of trademark infringement, so that they can stop manufacturing counterfeit goods, instead can continue manufacturing and selling of products under different names/brands. There is a need of intervention of consumer protection law as well for the protection of consumer rights. In the note of interface between trademark law and consumer protection law, they should work hand-in-hand, not in a different way, to protect consumer rights as well as intellectual property rights.

Consumer protection is not only related to trademark law, but extended to geographical indication as well, which is very close to trademark concept. But GI protection is related with protection of geographic origin and community involvement is the unique feature of GI. In case of GI products, fake and misrepresented products are very much detrimental for both the producer communities as well as consumers at large. Economic condition of the producing communities of the specific geographical region will be badly affected, for example, 'Benarasi Sari' weavers are dying because of misrepresentation and fake products, now original weavers are out of their job and compelled to die as they can't compete with fake and counterfeit products. Irony is, the customers, even after paying the high prices still deprived from the original products.

The recommendation is therefore, there is an urgent need to make proper machinery where experts from each relevant sector of law will come forward to execute the solution of protection of consumers' interest and right holders' interest by proper infrastructure and understanding of the interface among different laws.



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CONSUMER PROTECTION AND SOLUTIONS

*Tanvi Dubey**

INTRODUCTION

When the world was younger and communities smaller, consumer resistance was virtually unnecessary to ensure fair trade practices. Unfair trade was almost impossible in the lifestyle of those items. One could not comfortably cheat someone in the market place in the morning and break bread with him the same evening. The industrial revolution and the shift in population from rural areas to towns and the anonymity of urban living gave plenty of scope for malpractices. Consumer came to mean more than just eating, drinking and wearing clothes. It extended to cover the whole business life and living.

In America formal consumer education started in 1930's – a result of depression. With the falling money income the customers looked for ways and means to get the best value for his money.¹ It was in the

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1 2009: "Action plan: Keeping your money safe and sound." Suze orman, page 22.

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60's, however, that consumerism became a vital social movement. It began to encompass the evolving set of activities of government, business, independent organizations and concerned citizens designed to protect the rights of the consumers in the market place. We participate in the market both as producers and consumers. Consumers participate in the market when they purchase goods and services that they need. Each one of us is a consumer. While buying goods and services we are concerned with our money, health, safety, environment etc., however generally feel that we are always in a seller's market it's because the sellers attitude towards the consumer is take it or leave it. Consumer being the weaker party in the commercial dealing is ether taken for granted or taken for a ride. So far the anonymity of urban living has been responsible for large scale unfair trade practices.

Hypothesis

Through my paper I would like to draw the attention towards the deprived interests of the consumers and also the responsibility on part of the common man to act as a responsible consumer in a totally changed business scenario due to urbanization and globalization. Legislation protecting the interest of consumers' needs modifications and enhancement.

False and Misleading Advertisement and representations make us victims in one way or the other knowingly or unknowingly. Packaging has gained precedence over the product. Sales tactics have become more important than quality, consumer psychology is now analyzed for the benefit of the producers and the sellers. Advertising is now used not as a means of promoting availability, but it is used ironically for indulging in false claims and fraudulent trade practices. Advertising means selling concepts and not products. All these false practices, suppressing the interest of the innocent consumers, which calls for immediate and integrated action, which is in turn possible through a comprehensive legislation.

CONSUMER WELFARE AND CONSUMER RIGHTS

By consumer rights we mean those rights which are or which is argued should be provided legally to protect consumer interest. In legal terms protection of consumer interests by provision of rights also mean,

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imposition of duties on the seller and manufacturer of goods and services. Therefore, the violation of these rights and duties may entail legal action or punishment. The idea of consumer rights is a product of the modern times. In India, the credit for starting the consumer awareness movement goes to C. Rajgopalachari.² In 1950, he formed the first Consumer protection council at Madras.

Fleeing the consumers has become so widespread that no share remains untouched by this malady. False or misleading advertisements or representation, bargain price, offering of gifts, prizes, contest, etc., non-compliance of product safety standards, hoarding of goods, etc., make us victim in one way or other knowingly or unknowingly. But, there is other side of the picture also, that is, lack of awareness, lack of a sense of responsibility and undue feeling of helplessness on our part.

Most of us believe that we act rationally. We see ourselves as being well informed by social trends or commercial tactics. But in reality it is not so our buying is often irrational, influenced by social trends, salesmanship and advertisements. As a result, we often purchase goods or services without paying sufficient attention to price and quality. Many of us do not realize the environmental consequences of our consumption. The anonymity of urban living has been responsible for large scale unfair trade practices on the part of the unscrupulous manufacturers and traders.

For the first time in the history of consumer legislation in India, the Consumer Protection Act, 1986 extended a statutory recognition to the rights of consumers. Section 6 of the Act recognizes the rights of consumers.

Modern consumers are under pressure from all quarters – from governments, environment, activists, and industry and even at the market place. The consumer is accused of over consumption and of causing environmental destruction. Consumers are also under pressure to behave responsibly. In the consumer/ seller relationship, duties and responsibilities of producers as well as consumers have begun to be clearly defined. Consumers are now expected to assume responsibility

² www.consumer.tn.gov.in/pdf/Teachers_Reference_Book.pdf, last visited 18-8-2012.

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not only for exerting their individual and collective rights, but also show through their attitudes and behaviour patterns, responsibility towards the environment, other consumers and future generations.

Till very recently, the market forces have decided the direction and spread of consumerism, reducing the consumer to a more or less passive role. Along the way not only has the consumer been defrauded, manipulated and exploited by the industry but the environment has also been damaged. Progressive urbanization has been used by the market forces to delink the consumer from the environment. Urbanization has also destroyed accountability in community living and forced people to lead anonymous lives. This has eroded the code of responsible behaviour in society.

Consumerism in its modern manifestation is a by-product of western lifestyles. The spread of media and communication networks has, however, helped it to spread to the less developed nations, in more insidious and destructive ways. Keeping all this in view, the concept of consumer responsibility should be introduced to the Indian consumer immediately. This should have a salutary impact on the growing market economy in India as well as on its environment.

CONSUMER RESPONSIBILITY

Consumer responsibility can be divided into three phases. Initially, the consumer was supposed to be concerned only with value for money, information and production of consumer goods.

In the second phase, the aware consumer challenged the large corporations and their marketing strategies and advocated consumer cause. In the third and current phase, the consumer is expected to be aware of the environmental implications of each product on the market shelf and be aware of his/her duties and responsibilities as a consumer and as a citizen.

Currently, the crucial area of concern is the question of consumer priority. In other words, this means what the consumer should look for: Whether to purchase cheaper and more easily available products or to look out for fair trade practices, environmental costs and public health.

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The ethical and ecological facts of consumer behaviour have helped to evolve the concept of consumer responsibility. A responsible consumer is a person who exercises his/her right to choice and is accountable or answerable to other consumers and to the environment for his/her purchase decisions. A consumer also has ample amount of responsibilities as a citizen. As a citizen, the area of his/her activity expands to encompass not only what he/she can carry from the market to his/her home for personal use, but what he/she can give in return to society and to the environment. This involves not only action but also the decision not to act in a certain established manner. For example, as a user of market commodities he/she takes partial responsibility for garbage disposal. Or if he/she is a car owner, he/she automatically assumes responsibility for reduction of pollution as far as possible, by either choosing to use it only when absolutely necessary or by using lead-free (unleaded petrol).

Following are some of the areas where consumer intervention can influence the market to act responsibly towards the consumer. For that the consumer should check correct weights and measures, dates of manufacture and expiry, pricing and ingredient labelling, inclusion of quality marks (ISI, Agmark, Eco-Mark), Warranties and guarantees etc., before making a purchase.

A consumer is also required to buy and invest ethically and appropriately. Price should not be the only priority for him/her; ethical behavior means one is doing what is right and good in most situations for most people. An ethical consumer is also known as a **GREEN CONSUMER**.

SPREAD OF CONSUMERISM

As long as social and civilized modes of existence have been in operation, consumer behavior was characterized by mutual trust which was reflected in the barter system. As the market economies began to develop and spread, consumer behaviour also altered. Consumer began to be progressively distanced from the details of production process, the environment or the natural resources. Developments, Industrialization, technological advancement have all used natural resources mercilessly. In short, Man's relationship with nature has not been sustainable. The

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more a society has shown evidence of 'advancement' the more it has exploited and manipulated nature. The best way to get the industry and the market to act responsibly to changing consumer demands is to tailor these demands to environmental realities and diminishing energy resources. The emergence of a green profile in the industry is directly related to consumer awareness in this regard. Development of ethical norms is being undertaken by consumer organizations at local, national and international levels.

The greatest tool of consumerism has been aggressive advertising. Its development and spread has been parallel to industrial and technological progress of society. Aggressive advertising invades almost every aspect of urban living, creating needs where none exists. The current Indian scenario has seen an increase in commercial advertising. As information and commercial technologies have grown so has advertising. Hand bills, hoardings, print media, TV commercials, telemarketing are a few such means. Today's consumer is more acted upon than acting. Today's consumer's current profile is that of a passive, helpless, hapless, gullible individual who owes responsibility to himself or herself. The market forces exploit and manipulate his/her desire for a good life and convenience by translating them into materialistic greed. Hence, it is necessary for a consumer and the society at large, to be aware of these practices.

There exist a high degree of consumer unawareness in India; thus, the effective implementation of the consumer rights still remains a dream. Consumer legislations have not fully succeeded in curbing the exploiters. Consumer education is of a low level in India. Businesses, normally, have a repressive reaction. A consumer is considered to be an inevitable phase of a socio economic political system, where the exchange initiated and transaction realized between two parties namely, buyers and sellers has an impact on a third party, i.e., society. Such a response has been necessitated because of failure of businesses to meet certain standards. The businesses worldwide have failed in providing product information, product safety and product pricing under conditions acceptable and fair to the consumers. The emergence and growth of consumer movement in India and elsewhere is largely due to broad cultural changes, consumer's discontents and frustrations. The providers of goods and

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services whose major aim is to maximize their profits often do so at the cost of the consumers either by selling defective or substandard goods or provide services which are not up to expectations.

EMPOWERING THE CONSUMERS

The world has undergone drastic social, economical and environmental changes in the last half century. It is now increasingly being realized that no nation, people or strata of society can distance itself from his rights and responsibilities as consumers. A situation is developed where by the growing middle class consumers of southern developing nations have began replicating wasteful and excessive consumption patterns of their northern counter parts. Every human is a natural consumer. The identity as the consumers has attend special significance as people start leaving bigger consumer footprints with heightened wasteful consumption patterns taking root. Consumer empowerment becomes imperative not just to check such deleterious development but also advocate less harmful techniques of production and consumption. Consumer empowerment also serves the purpose of bringing consumers to the foreground of the decision making process so that they play a proactive role in the drawing up of legislation, regulations and policy matters which in effect, would directly have bearing on their rights and choices as consumers. The consumers need to be protected from the onslaught of clever and deceptive technology-savvy man oeuvres of market interests like advertising, packaging, misleading labelling, etc. Consumer empowerment is a systematic and comprehensive acquiring of authority and knowledge by the consumer to attain and follow sustainable consumption patterns. Consumer right strengthens consumer empowerment.

CONSUMER MOVEMENT

Consumer movement came into being only in the 1930's in the west and only in the 60's in India. The basic objectives of consumer movement worldwide are as follows:-

1. To provide opportunity to the consumers to buy intelligently.
2. Recognition of reasonable consumer requests.
3. Protection against fraud, misrepresentation, unsanitary and unjust products.

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4. Participation of consumer representatives in management of affecting consumers.
5. Promoting consumer interests.³

The developments of consumer movements in India is due to the shortage of consumer products; inflation, adulteration and black-marketing, lack of product choices due to lack of development in technology. Thrust of consumer movement in India has been on availability, purity and prices. The consumer movement in India is going a silent revolution. The movement is bringing qualitative and quantitative changes in the lives of the people enabling them to organize themselves as an effective force to reckon with. The nineties saw the fulfillment of efforts towards a unified approach. In March, 1990 the Federation of consumer organization (FEDCOT) was established in Tamilnadu to bring as many consumer groups as possible in the state less than one umbrella. In 1992, consumer groups of Gujarat joined hands to form a federation, Gujarat State Federation of Consumer Organization (GUSFECO). Now 9 states in the country have federations. Besides Tamil Nadu and Gujarat they are Kerala, Karnataka, Andhra Pradesh, Maharashtra, Rajasthan, Orissa and Uttar Pradesh. Besides at the apex level, there is Confederation of Indian Consumer Organization (CICO), New Delhi, formed in Feb, 1991 and Consumer Coordination Council (CCC), New Delhi, formed in April 1992. The primary reason of forming these apex bodies is networking of consumer groups coming together for a common cause.

LEGISLATION PROTECTING CONSUMER RIGHTS

Consumer protection is bilateral. In fact, aware consumers, consumer groups and self-regulation by business groups can avoid consumer legislation. Consumer legislation is a rough substitutive for self-regulation of business. It provides insurance against unfair businesses and restrictive trade malpractices and ensures distributive justice to amateur consumers. The Government has now enacted around 24 pro-consumer acts to control buyer-seller relations in the market place and now

³ [www.consumer.tn.gov.in/ pdf/ Teachers_Reference_Book.pdf](http://www.consumer.tn.gov.in/pdf/Teachers_Reference_Book.pdf), last visited 18-8-2012.

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regulates production, supply, quality, quantity, price and so on. We have a plethora of statutory weapons to protect the self interests of the Indian consumer's. However, there is no proper coordination and integration among various consumer protection acts. Implementation machinery is poor and inadequate. Besides, there is rampant corruption and bribery with regard to the implementation of these laws. The Important Consumer Protection Acts are as follows:

1. The Essential Commodities Act, 1955.
2. Prevention of Black Marketing and Maintenance of supplies of Essential Commodities Act, 1980.
3. Prevention of Food Adulteration Act, 1954.
4. Prevention of Food Rules, 1955, 1962.
5. The Packaged Commodity regulation order, 1975.
6. Essential Commodities (Special Provision) Act, 1981.
7. Monopolies and Restrictive Trade Practices Act, 1969.
8. The Hire-Purchase Act, 1972.
9. The Consumer Protection Act, 1986.

THE CONSUMER PROTECTION ACT, 1986

The Consumer Protection Act, 1986 is enacted with a provision to provide a reasonable protection to consumers against unfair trade practices of a trader, producer or manufacturer. The Consumer Protection Act, 1986 made provisions for the setting up of proper machinery for the quick settlement of consumer disputes and redressal of grievances.⁴ Under the Consumer Protection Act, 1986 quasi-judicial machinery functioning at three levels is established.

Some of the terms used in the Act mean the following:

Complainant means a consumer, a voluntary consumer association, the central or the state government and any company of India.

⁴ Dr. R.K. Bangia, Law of Torts, Allahabad law agency 22nd edition, page 608.

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Complaint means any allegation in writing made by a complainant that goods are defective, defective services by the traders, defective packages, undue or excessive prices charged by a trader other than that fixed under law.⁵ The CPA, 1986 deals with unfair practices, defects, deficiency of goods, services and ideas exchanged between buyers and sellers. Under the CPA, 1986 we have quasi-judicial machinery functioning at three levels.

These are:

- District Forum (First tier)
- State Commission (Second Tier)
- National Tier(Third tier)⁶

The Consumer Protection Act, 1986 is a consumer specific legislation designed to provide for speedy and inexpensive remedy to the consumers. The Act for the first time gives statutory recognition to the rights of the consumers. The Act offers remedies to consumers not only in respect of defects in goods or deficiencies in services but also for overcharging and a host of unfair and restrictive practices.

It is an Act which also provides for inexpensive method of seeking relief. No court fee or any other charge is to be paid. Moreover, the consumer can argue his own case. Engaging an advocate is not necessary

LIMITATIONS OF CONSUMER PROTECTION ACT, 1986

No doubt, the CPA, 1986 meets most of the demands of consumer activists. It will also go a long way in giving a boost to the consumer movement in the country. But, still there is much to be done in this direction. A close scrutiny reveals many limitations which will render it incapable of affording the harassed consumer the protection he sorely needs. Also, there are some problems in the implementation of the Act. The CPA, 1986 is now in operation for more than a decade. The Act was amended in 1993 for enlarging its scope. However, there are certain shortcomings in the act.

5 Consumer Protection Act, 1986, Sec 12.

6 *Supra* 4, p. 609.

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They are:

1. Presently, the position is that only those services come within this Act for which specific payment is made, such as electricity, telephones, banking, etc. Thus the doctors as well as hospitals including those where treatment is given free such as governmental hospitals do not come within the ambit of the act.
2. The Consumer Protection Amendment Act, 1993 incorporated two clauses regarding supply of hazardous goods, but it does not impose a strict liability on those who supply such goods.
3. Further the CPA, 1986, does not give any definition of safety requirements and permitted hazards level. Whatever safety regulations are already prescribed under some law or the other would have to be gone into as to whether they have been violated or not. In fact, the Act itself should incorporate certain product safety requirements.
4. Under the Act, a consumer can seek redressal only if he has suffered a loss or damage as a result of the unfair trade or deficiency in service or the unfair trade practices resorted to by a trader. However, the *per se* rule is not invoked. The *per se* rule ensures that any act or practice which *prima facie* appears to be unfair shall be regarded as unfair and against consumer interests as such, pending its justifications by the opposite party.
5. The Act does not empower consumer fora to take up cases *suo motto*.
6. The Act does not empower consumer fora to publish the names of manufacturers, traders and dealers whose goods are found to be hazardous to public safety. This empowerment if made will work as a deterrent to the erring business community and make the consumers informed.
7. The Act does not permit a consumer to lodge a complaint with the Consumer Fora if an alternative remedy is available under some other law. In many cases of complaints brought before the consumer forums, the complainants were directed to seek relief in a Civil Court, on the ground that the complaints were of such

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a nature that they involved recording of voluminous evidence and expert opinion. The mere fact that witnesses may have to be examined and their cross-examination may also be necessary cannot by itself be a valid ground for refusing adjudication of a dispute before the Consumer Courts.

8. The Act concedes 6 rights of the consumers but these rights have not been made justiciable.
9. The Consumer redressal agencies do not have requisite infrastructure; as a result they are hamstrung functioning effectively.

Experience of functioning of consumer courts by and large has been that the organizations against which decisions is given by the Court, including organizations such as electric supply company or banks, there is almost invariably a tendency on its part to file an appeal. This adds to the problems of the consumer and inevitably delays the application of sought remedy and payment of adjudicated compensation.

GOVERNMENT AND THE CONSUMER PROTECTION ACT, 1986

The consumer protection act formulated in December, 1986, has ensured by providing for better “Protection of Consumers Interests” and “Establishment of Consumer Councils and other Authorities” to settle consumers disputes, that the interests of Consumers are taken due cognizance of. Redressal forums in certain districts record the clearance of six cases each day on an average. In others, the forums, through in place are not functional. In Delhi’s Tis Hazari Court, the consumer forums have redressed over 15,000 complaints, almost 70 percent of those filed in nine years.

Shri H.D. Shouri, consumer activist has observed that “The Consumers Forums have ensured that the onus of responsibility shifts from the buyers to the sellers.”

The implementation or the CPA, 1986 has been beset with problems from the start. For one, the Supreme Court had to intervene to setup consumers forums in all districts. Despite this, however, several districts still do not have effective redressal forums. As Justice V. Balkrishan

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Eradi [President, National Consumer Disputes Redressal Forum (NCDRF)] noted: “For nearly two years after the CPA, 1986 was promulgated, very few districts had been covered. Meanwhile, restless consumers started filling complaints. Hence the net outcome is piling up of cases. Recent survey by the NCDRF revealed that 50 percent of districts forums in Maharashtra were non-functional. Similarly, no cases were being taken up in several forums in Haryana and Punjab. There was no place to hold sittings, no staff and funds were inadequate. In several districts, there are no time judges. The consumer court is offered an additional charge. Considering that more than hundred cases are listed each day in some of these courts, the CPA, 1986 provision that a complaint be disposed of in 90 days is virtually impossible to add her to.”

Again, it was a Supreme Court intervention ordering the appointment of full time Presidents for all forums with a backlog of more than 150 cases that improved matters. Till day, several forums are not receiving funds even to play honorariums to its members. The absence of adequate support staff hampers were in several courts “if the Government wants the consumer courts to play a large role, service conditions of members have to be improved. Nearly six lacks cases have gone to the court in the last six years and the pressure is expected to increase.” (Justice Eradi).

According to Consumer Court Judges, the jurisdiction of district courts and the state commission was enhanced by the 1993 amendment to the CPA, 1986.⁷ They have to handle those cases with a compensation limit of Rs.10 lacks. These can be taken up in district forums and up rupees 20 lacks, in state commissions. Consumer activists also feel the CPA, 1986 should be under constant review. Cases of deaths due to open manholes or loose electric wires, and those evolving negligence on the part of civil authorities should also be brought under the ambit of the Act. According to Justice A.P. Chowdhri, President, Delhi State commission; “The Central Consumer Protection Council, which regularly need to determine definite action could play a vital role here. There

⁷ Consumer Protection Amendment Act, 1993.

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should also be a provision to check false and fictitious complaints.” The greatest challenge is to create awareness about the CPA in rural areas. Women in villages are the real consumers who should benefit from the CPA. The government’s audio-visuals media should concentrate on such assignment. A some of Rs.426 lacks has been spent on consumer awareness in the last three years.

To conclude, the CPA, 1986 should provide an impetus to the process of in stilling confidence in the consumers.

NEED FOR AN EFFECTIVE CONSUMER EDUCATION SYSTEM

Consumer education is the most productive long-range strategy. The consumer can be taught how to detect the presence of deception and other abuses and made aware of the remedies that exist and the opportunities for redress. Also, everyone can benefit from insight into money saving buying strategies. Consumer education is now becoming common in educational programmes offered by management educational schools and through community organizations of various types. In doing so, the consumer is taught to evaluate product offerings and appeals in a much more sophisticated manner. What are needed perhaps are not more regulations but more intelligence on the part of the consumers.⁸

A deregulated or market regulated economy probably requires more consumer information and education by both business and government. More, responsibility for consumer information flows to the individual consumer to consumer organizations as well. Micheal Mazis, Recharad stealin, Howard Beales and Steven Salop have attempted to develop a framework for evaluating consumer information regulation published in the ‘Journal of Marketing’⁹

According to their framework, government intervention has both benefit and costs, and the purpose of consumer research is to determine each of these before regulations are enacted or promulgated. It is

8 Consumer Protection Amendment Act, 1993.

9 ‘Journal of Marketing’ (Winter 1981, page 11 to 21).

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important to note the following points concluded by Jagdish N. Sheth and Nicholas J. Mamma. ¹⁰

Formal knowledge about the criteria with which to evaluate complex technical products and services and choose rationally among them.

Managerial and decision making skills as consumers that are comparable to the type of skills we inculcate in people to become professional workers in industry or government.

Values and consciousness that will encourage respect and concern for other consumers in their pursuit of collective consumption. ¹¹

CHALLENGES AHEAD

The new issues that are emerging every where due to quick changes in technology, communications and globalization of commerce and trade and need to be tackled by various consumer groups call for specialization, professional skills, back-up information and sustained work on a long term and a continuous basis. To meet the challenges of growth in the 21st century the consumer movement in India will have to develop a 'Think Tank' to plan ahead and identify issues and develop strategies towards fulfillment of 'Consumer Manifesto 2000.' This manifesto was adopted by the member of Consumer International (IOCU) representing all parts of the glob who met in New York in 1986. The market place and public authorities should become more responsive to the needs of the consumers. Such responsiveness would include the participation by consumer organization on an equal footing with other corporate groups and society. The basic needs of all consumers, including the need regarding adequate food, clothing, shelter and health care must be met. The most important way to develop consumer awareness is through consumer education in order to ensure that all people may acquire the knowledge and skills necessary to be informed and active consumers exercising their right and unfulfilling their economic role, special attention

10 Hans Throelli, The Future for Consumer Information Systems published in 'Advances in Consumer Research' (1980 page no. 222 to 232)

11 "Recent failures in consumer protection" published in the California Management Review (Spring 1974).

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must be given to the needs of vulnerable groups such as children, handicapped and the elderly. The guidelines for consumer protection, adapted by a resolution of the General assembly, map out a future to be advocated and realized for all consumers. By all, we mean 5 billion consumers, organized and unorganized in richer countries and in poor countries who wish to dwell in peace and safety enjoying goods and services that are fair reward for honest work.

The CPA, 1986 has many limitations which will render it incapable of affording the harassed consumer the protection he sorely needs. In order to meet the current challenges regarding consumer problems there is a need to step forward and tackle the consumer's problems through:

Section 2(1)(d) and 2(1)(o) of the Act should be suitably amended to modify the definition of the terms consumer and services to make it clear that consideration shall not be a condition precedent in case of wailing medical and municipal services provided by the government.¹² A victim of medical negligence in a government hospital should be entitled to compensation by enlarging the definition of consumer and bringing free services provided to the public by the government.

The consumer redressal Fora should be vested with powers to issue interim injunctions restraining and undertaking a person from carrying on any unfair trade as defined in the Act. In this connection, section 12A of the M.R.T.P. Act, 1969 is worth noting under the section the M.R.T.P. commission is empowered to grant temporary injunction restraining an undertaking or person from carrying on any monopolistic, restrictive or any unfair trade practices until the conclusion of an inquiry.¹³

The consumer redressal Fora should be empowered to take up the cases *Suo Moto*.

The consumer redressal agencies should be equipped with the personnel for execution of their orders, and in this way the necessity of depending on Civil or Criminal Courts would be obviated.

12 Consumer Protection (Amendment) Act, 1993

13 M.R.T.P. Act, 1969, Section 12A.

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The consumers should be allowed to lodge complaints with the Consumer Forums even where an alternative remedy is available under another enactment.

The Act should be modified to recognize a very important right of consumer's viz. the right to a healthy environment.

Some other measures to develop a consumer friendly environment include:

Elimination of economic practices which inhibit the equitable distribution of food and encouragement of national and international food policies aimed at meeting peoples need for safe and nutritious food.

Implementation of policies on new information technology which ensure on one hand, the fair protection of consumers and on the other, that they make full use of the technology for their own benefit.

Development or testing and research with particular reference to the needs of third world countries building on the experiences, skills and resources of IOCU testing organization.

The reduction and ultimately dismantling of trade barriers which have a negative impact on consumer and establishment of national bodies with consumer representation to analyze and publish relevant information concerning the cost and benefit of proposed and existing trade controls.

Establishment of national and international law that prohibits trade in hazardous.

CONCLUSION

The most crucial areas in the realm of consumer affairs are consumer protection, education and information. There exists a high degree of consumer unawareness in India. Consumer legislation has not full succeeded in curbing the exploiters. Consumer education is of a low level in India. Businesses normally have a repressive reaction. Hence, a lasting solution lies in self protection by consumers and the effectiveness of voluntary organizations.

It no longer holds true that "What is good for business is good for country." Now it should be truly, "What is good for the country is good for business." Consumer legislation should provide an impetus to the

process of instilling confidence in the consumer. Today, most of the consumers believe that companies have a responsibility to the society. The environmental changes and challenges have questioned the classical assumptions about the roles of both business and government in the economy. The classic statement of ‘Corporate Social Responsibility’ was given by Andrew Carnegie.¹⁴ In the 1960’s the American economist Milton Friedman asserted that a business’s only social responsibility was to maximize profits, within the limits of the law. Friedman’s critics tried to replace this with the concept of ‘Corporate Social Responsibility’ but could not find out practical guidelines for choosing one value over another.

A consumer is considered to be an inevitable phase of socio-economic-political system, where the exchange initiated and transaction realized between two parties namely, buyers and sellers has an impact on a third party; that is, society. Such a response has been necessitated because of the businesses to meet certain standards. The businesses worldwide have failed to a great extent in providing product information, product safety, product performance and product pricing under conditions acceptable and fair to the consumer. The emergence and growth of consumer movement in India and elsewhere is largely due to broad cultural changes, consumer discontents and frustrations. The other reasons include: the presence of inflation, the existence of a better informed society, product complexity and proliferation, a high pressure market system, large and impersonal businesses, increased affluence and availability of credit.



14 Andrew Carnegie : “The Gospel of Wealth” (1899).

15

A CRITICAL APPRAISAL OF THE FOOD SAFETY AND STANDARDS ACT, 2006

*Farooq Ahmad Mir **

INTRODUCTION

Indian Parliament has taken a step of seminal importance by enacting the FSS Act with an object to consolidate the laws relating to food and to establish the food safety and standards Authority of Indian and has repealed Food Adulteration Act, 1954. The FSS Act has laudable objectives to protect the interest of consumers of food by ensuring availability of safe and wholesome food for human consumption. This legislation focuses on food related issues only and quite understandably does not travel beyond that and leaves other areas of consumer interest to be dealt with by the statutes meant for this purpose.

This Act has come up with novel concepts that will be debated before the adjudicating machinery in days to come and their ambit, scope and above all their compatibility with other provisions will be appraised.

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I. DEFINING FOOD

The FSS Act has defined the term “Food”¹ by incorporating words of widest amplitude. The definition, on close examinations, reveals that it has three parts. The first part represents catch all situation. It means any substance whether processed, partially processed or unprocessed intended to be used for human consumption. It will include any substance and every substance provided it is meant for human consumption and not for animal consumption. Thus, if a person has purchased poultry food or animal food and has suffered loss either because of the death or injury of his cattle or pet, he has no remedy under the FSS Act but has to invoke Sale of Goods Act.

The second part of the definition is illustrative in nature and further enlarges the scope of the definition by adding the word “includes.” The definition thus includes primary food, genetically modified food or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum and any substance, including water used into the food during its manufacture, preparation or treatment.

The third part of the definition excludes any animal feed, live animals unless they are prepared or processed for placing in the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances from the operation of the FSS Act. The exclusion of the drugs and medicinal products, cosmetics, narcotic or psychotropic substances from the operation of the Act are quite understandable as these articles, likely to be used for human consumption, are governed by their respective laws² but exclusion of animal feed from the purview of the FSS Act demonstrates myopic vision of the legislatures who are not still prepared to find space for ensuring supply of wholesome food to the animals in a legislation essentially protecting the interest of human beings. The provision to this effect is required not only to protect the health of animals but also to protect the interest of human beings in animal beings.

1 Section 2(j) of the FSS Act

2 See Drugs and Cosmetics Act,1940; Drugs Act,1971;and Narcotic Drugs and Psychotropic Substances Act,1985

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The food has to be free from contamination which means that it should be free from any substance, whether or not added to food, but which is present in such food as a result of production, manufacture, processing, preparation, treatment, packing, transport or handling of such food or as a result of environmental contamination but does not include insect fragments, rodent hairs and other extraneous matter.³ The contamination during production includes operations carried out in crop husbandry, animal husbandry or veterinary medicine. The extraneous matter means any matter contained in an article of food which may be carried from the raw material, packaging materials or process systems used for its manufacture or which is added to it, but such matter does not render such article of food unsafe.⁴

The FSS Act makes it quite clear that extraneous matter will not be considered a contaminant if it is not unsafe but surprisingly this condition has not been laid for insect fragments or rodent hairs presuming that they will be always safe. The insect fragments can be at times injurious to health and presence of insect fragments or rodent hairs may lead to serious health hazards because of presence of such elements may not be at times per se injurious nevertheless they affect psyche of the consumers and have not been traditionally accepted as a part of wholesome food.

The food articles may contain food additives which means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not it has nutritive value. The addition of food additive may be permitted if its addition is required for technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results or may be reasonably expected to result directly or indirectly in it or its by-products becoming a component of or otherwise affecting the characteristics of such food but does not include contaminants or substances added to food for maintaining or improving nutritional qualities.⁵

3 Sec 3(g)

4 Sec 3(i)

5 Sec 2(K)

II. UNSAFE FOOD

The unsafe food means an article of food whose nature, substance or quality is so affected as to render it injurious to health. This may be the article itself or its package thereof which is composed, whether wholly or in part, of poisonous or deleterious substance. The article of food shall be unsafe if its constituents are composed of either wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance or by virtue of its unhygienic processing or the presence in that article of any harmful substance or by addition of or substitution of any inferior or cheaper substance whether wholly or in part; or by addition of a substance directly or as an ingredient which is not permitted or by the abstraction, wholly or in part of any of its constituents; or by the article being so coloured, flavoured or coated, powdered or polished as to damage or conceal the article or to make it appear better or of greater value than it really is; or by the presence of any colouring matter or preservatives other than that specified in respect thereof; or by the article having been infected or infested with worms, we evils, or insects; or by virtue of its being prepared , packed or kept under insanitary conditions, or by virtue of its being mis-branding or sub-standard or food containing extraneous matter; or by virtue of containing pesticides and other containments in excess of the prescribed quantities.⁶

III. FOOD SAFETY AND STANDARDS AUTHORITY OF INDIA

The Central Government shall by notification establish a body to be known as the Food Safety and Standards Authority of India (FSSA) to exercise the powers conferred on it and to perform the functions assigned to it under this Act. The Food Authority shall be a body corporate having perpetual succession and a seal with power to acquire, hold and dispose of property, both movable and immovable and to contract and shall sue or be sued.⁷

6 Sec. 26

7 Sec. 4

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The head office of FSSA shall be at Delhi with the power to establish its office at any other place in India. It shall consist of a chairperson and twenty members out of which one third shall be women.⁸

The Chairperson and other Members of the Food Authority shall be appointed to such a manner so as to secure the highest standards of competence, broad range of relevant expertise and shall represent the broadest possible geographical distribution within the country.

The Chairperson shall be appointed by the Central Government from amongst the persons of eminence in the field of food science or from amongst the persons from the administration who have been associated with the subject and is either holding or has held the position of not below the rank of secretary to the Government of India.

IV. SPECIAL RESPONSIBILITIES AS TO FOOD SAFETY

‘Responsibilities of the ‘Food Business Operator’

The FSS Act has coined new terms which, it appears, are overlapping and may result into confusion. The Act, to begin with, imposes duty on the “Food Business Operator” to ensure that the article of food satisfies the requirements of the Act and the rules and regulations made there under at all stages of production, processing, import, distribution and sale within the businesses under his control. The “Food Business Operator” shall not either himself or by any other person on his behalf manufacture, store, sell or distribute any article of food which is unsafe or which is mis-branded or sub-standard or contains

8 Sec. (A) 7 Seven Members, not below the rank of a Joint Secretary to the Government of India to be appointed by the Central Government, to respectively represent the Ministries or Departments of the Central Government dealing with (i) Agriculture(ii) Commerce (Consumer Affairs (iv) Food Processing (v) health (vi) Legislative Affairs (vii) Small Scale Industries who shall be ex officio members (b) two representatives from food industry of which one shall be from small scale industries; (c) two representatives from consumer organizations; (d) three eminent food technologists or scientists; (e) five members to be appointed by rotation every three years, one each in seriatim from the zones as specified in the first scheduled to represent the states and the union territories; (f) two persons to represent farmers organizations; (g) one person to represent retailers organizations.

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extraneous matter or for which license is required or which is prohibited by the Food Authority or the Central Government or the State Government in the interest of the public health, or in contravention of any other provisions of this Act or any rule or regulation there under. It shall be the responsibility of the 'Food Business Operator' not to employ any person who is suffering from infectious, contagious or loathsome disease. It shall be the responsibility of the 'Food Business Operator' to give guarantee in writing in the prescribed form about the nature and quality of such article to the vendor. The Act has travelled beyond the principles of law of contract by laying down that cash memo, bill or invoice given by the 'Food Business Operator' shall be deemed to be guarantee even if a guarantee in the specified form is not included in the bill, cash memo or invoice.

Where any Food which is unsafe is a part of a batch, or lot or consignment of Food of the same description, it shall be presumed that all the Food in that batch, lot or consignment is also unsafe unless it is proved otherwise within the specified time.⁹

The FSS Act gives dubious discretion to competent authorities to take appropriate measures to impose restrictions on the Food which is being placed on the market or require its withdrawal from the market in spite of the fact that the goods conform with specific provisions applicable to that Food. This discretion can be exercised where such authorities suspect, for reasons to be recorded in writing that despite the conformity with the provisions of the FSS Act and the rules and regulations thereunder, the Food is unsafe.¹⁰

'Food Business Operator' in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations there under.¹¹ Food Business means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage,

9 Sec.26

10 Proviso to Sec.26(5)

11 Sec.2(o)

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transportation, distribution of food, import and includes food services, catering services, sale of food or food ingredients.¹²

The FSS Act holds responsible even an undertaking carrying out its business on no profit no loss basis and spreads liability to all stages of manufacture and not only to the person manufacturing or distributing end product but also to any one selling food ingredients. The definition of the food business, it appears is farfetched. This definition encompasses not only those who are directly associated with food business like manufacturer, distributor but also those who are indirectly associated with food business like food ingredient seller or the undertaking involved with transportation of the food. This definition is bound to overlap with the liability provisions of the manufacturer.

V. LIABILITY OF THE MANUFACTURERS, PACKERS, WHOLESALERS, DISTRIBUTORS AND SELLERS

The FSS Act creates a multilayer liability. Section 27 makes manufacturer or packer of an article of food liable if such article of food does not meet the requirements of this Act and the rules and regulations made thereunder.

The wholesaler or distributor shall be liable under this Act for any article of food which is -

- (1) (a) supplied after the date of its expiry; or (b) stored or supplied in violation of the safety instruction of the manufacturer; or (c) unsafe or misbranded; or (d) unidentified manufacturer from whom the article of food has been received; or (e) stored or handled or kept in violation of the provisions of this Act, the rules and regulations made thereunder; or (f) received by him with knowledge of being unsafe.
- (2) The seller shall be liable under this Act for any article of food which is (a) supplied after the date of its expiry; or (b) handled or kept in unhygienic conditions; or (c) misbranded; or (d) identifiable of manufacturer or the distributors from whom such articles of food were received; or (e) received by him with knowledge of being unsafe.¹³

12 Sec(m)

13 Sec.27

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The above provisions distribute liability in different stages but is not quite clearly demarcated which is bound to prolong delivery of justice and may result in to confusion. These provisions make liability of the manufacturer and packer primary and the liability of the wholesale dealer commences once the article of “Food” comes in to his possession. However, the above provisions make wholesale dealer liable inter alia for unsafe or misbranded food. Does this mean that the manufacturer together with the wholesale dealer will be liable for unsafe or misbranded food?

The wholesale dealer is made liable if he stores or supplies articles of food in violation of the safety instruction of the manufacturer. The FSS Act imposes, at the same time, duty on ‘Food Business Operator’ to ensure that the articles of food meet the requirements of this Act and the rules and regulations thereunder. The definition of “Food Business Operator” read with the definition of “Food Business” would include manufacturer as well as wholesale dealer. Then the moot questions are: will the wholesale dealer be liable under section 26 which essentially imposes liability on “Food Business Operator” which would by implication include wholesale dealer? Or will wholesale dealer be made liable only under section 27 which makes mention of “whole sale dealer” expressly? If it is so, he will be then liable only for storing or supplying “Food” in violation of the safety instructions of the manufacturer and not beyond that for instance for not meeting the safety standards prescribed by the FSS Act and rules and regulations there under and if the manufacturer has not given such instructions, then he will not be liable at all.

VI. FOOD RECALL PROCEDURE

The FSS Act has incorporated a novel concept of food recall and thus gives an erring ‘Food Business Operator’ an opportunity to recall food when he considers or has reason to believe that a food which he has processed, manufactured or distributed is not in compliance with this Act, or the rules or regulations, made thereunder. The ‘Food Business Operator’ has to initiate immediately action to withdraw the food in question from the market. He has to inform consumer about the reasons for the withdrawal of the food and inform the competent authorities thereof. He has to cooperate with the authorities and has to

inform them about the action which he has taken to prevent risks to the consumer and shall not prevent or discourage any person from cooperating, in accordance with this Act, with the competent authorities, where this may prevent, reduce or eliminate a risk arising from a food. Every 'Food Business Operator' shall follow such conditions and guidelines relating to food recall procedure as the Food Authority may specify.¹⁴

VII. ENFORCEMENT OF THE FSS ACT

Authorities Responsible for the Enforcement of the Act

The FSS Act creates two tier machinery, one administrative and another judicial, to ensure strict and efficient implementation of the Act. The administrative machinery is itself a two tier, one at the national level called the Food Authority and another in each State, called as State Food Safety Authority. These authorities shall monitor and verify that the relevant requirements of law are fulfilled by 'Food Business Operator's at all stages of food business. They shall maintain a system of control and other activities as appropriate to the circumstances, including public communication on food safety and risk, food safety surveillance and other monitoring activities covering all stages of food business.

The Food Safety Officers shall enforce and execute within their area the provisions of this Act with respect to which the duty is not imposed expressly or by necessary implication on some authority. Similar powers shall be exercised by the Commissioner of Food safety and Designated Officer.¹⁵

VIII. COMMISSIONER OF THE FOOD SAFETY OF THE STATE

The State Government shall appoint the Commissioner of Food Safety for the efficient implementation of food safety and standards and other requirements laid down under the FSS Act and the rules and regulations made thereunder. The functions of the Commissioner of Food Safety are (a) prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food in the whole state or any of its

14 Sec.28

15 Sec.29.

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part for a maximum period of one year which should be published in the official Gazette. (b) carry out survey of the industrial units engaged in the manufacture or processing of food in the state to monitor compliance of the standards notified by the Food Authority. (c) conduct or organize training programmes for the personnel of the office of the Commissioner of Food Safety for generating awareness on food safety. (d) ensure an efficient and uniform implementation of the standards and other requirements as specified and also ensure a high standard of objectivity, accountability, practicability, transparency and credibility. (e) he can sanction prosecution for offences punishable under this Act. (f) any other function as the State Government may prescribe. The Commissioner of Food Safety is the final authority to sanction prosecution and there is no scope for appeal to his decision. Even the consumer who has been the victim of unsafe food cannot make an appeal to the decision of Commissioner of the Food Safety.

He can delegate his powers or functions subject to such conditions and restrictions as may be mentioned. However, he cannot delegate his power to appoint designated officer, Food Safety Officer and Food Analyst.¹⁶

IX. LICENSING AND REGISTRATION OF FOOD BUSINESS

The Food business cannot be carried on except under a licence. This does not, however, apply to petty manufacturer who himself manufactures or sells any article of food or a petty retailer, hawker, itinerant vendor or temporary stall holder or small scale or cottage or such other industry relating to food business or tiny 'Food Business Operator' but they have to register themselves with such authority as may be prescribed by the regulations. The non-registration of these petty manufactures or petty retailers should not in any way prejudice to the availability of safe and wholesome food for human consumption or affect the interest of the consumers.¹⁷Who is a petty manufacturer or retailer is a moot point. There should have been an explanation appended to the provision explaining these concepts otherwise there is no sharp

16 Sec.30

17 Sec.31(2)

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dividing line between the petty manufacturer or petty retailer and the manufacturer or retailer who will straight way come within the clutches of the FSS Act. Where to draw a line will always be a question to be answered in absence of the explanation which should have been appended to the above provision for judicial guidance.

The Designated office has been invested with a power to issue licence. He may either issue licence or refuse to issue it in the interest of public health. If he decides not to issue licence, he can do so only after hearing the applicant and after recoding reasons in writing. The Designated Officer has to issue licence within a period of two months from the date of making application but if the application has not be decided within the stipulated time, then the applicant may start his food business after the expiry of the said period and in such a case , the Designated Officer shall not refuse to issue licence but may, if he considers necessary, issue an 'improvement notice.' A single licence may be issued for one or more articles of food and also for different establishments or the premises in the same area.

Where the articles of food are manufactured, stored, sold or exhibited for sale at different premises situated in more than one area, separate applications shall have to be made and separate licence shall be issued in respect of such premises not falling within the same area. Why a separate licence is not required for processing or packaging or supplying food at different places is not clear.

A licence shall remain valid for such a period as may be prescribed under the regulations unless suspended earlier. Where an application for a renewal of licence is made before the expiry of the period of validity of the licence, the licence shall continue to be in force until orders are passed on the application. The licence is heritable but only for a period of three months beginning with the death of the licence holder or for such a longer period as the designated officer may allow.

Where an application for licence is rejected, an appeal shall lie to the Commissioner of Food Safety.¹⁸

18 Sec.31(4-10)

X. IMPROVEMENT NOTICE

The designated officer has power to issue what is called as an improvement notice. This notice can be issued where the Designated Officer has reasonable ground to believe that the 'Food Business Operator' in question has failed to comply with any regulation. The notice must state the grounds for believing that the 'Food Business Operator' has failed to comply with the regulations and specify the matter which constitute the Food Business Operator's failure so to comply. The notice must spell out the measures which the 'Food Business Operator' must take in order to secure compliance. These measures or the measures at least equivalent to them shall have to be taken within a reasonable time not being less than fourteen days. If the 'Food Business Operator' fails to comply with an improvement notice, his licence may be suspended. If he still fails to comply with the improvement notice, the Designated Officer may cancel his licence but only after the licence is given an opportunity of being heard. The Designated Officer is empowered to suspend any licence forthwith in the interest of public health for which he has to record reasons.

Where a person is aggrieved by the decision of the Designated Officer, be it service of Improvement notice or refusal to issue a certificate as to improvement; or cancellation or suspension or revocation of licence, he may prefer an appeal to the Commissioner of Food Safety whose decision shall be final. The appeal shall lie within a period of 15 days from the date on which the notice of the decision of suspension, cancellation or revocation was served but against the decision of service of improvement notice an appeal shall lie either within 15 days or within the period mentioned in the notice itself, whichever is earlier.¹⁹

XI. PROHIBITION ORDERS

The court of competent jurisdiction has a power to prohibit the use of the process or treatment for the purposes of the food business and may prohibit the use of premises or equipment for the purposes of the food business or any other food business of the same class or description or prohibit the use of the premises or equipment for the purposes of

¹⁹ Sec.32

any food business. This prohibition can be imposed by the court when it is satisfied that the health risk exists with respect to that food business. This prohibition can be imposed only after the 'Food Business Operator' has been given an opportunity of being heard.

The court can prohibit 'Food Business Operator' from participating in the management of any food business or any food business of a class or description specified in the order. This order shall be served, as soon as is practicable, by the Food Safety officer, to the 'Food Business Operator' and where the order prohibits the use of an premises, then the order of the copy shall be affixed at a conspicuous place on such premises used for the purposes of the food business and a person who knowingly contravenes such an order shall be guilty of an offence and be punishable with a fine which may extend to five lakh rupees.

The concerned Food Safety Officer shall, with the approval of the Designated Officer, on the basis of the application made by the 'Food Business Operator,' issue a Certificate to the effect that the 'Food Business Operator' has taken sufficient measures justifying lifting of the prohibition order. This application of the 'Food Business Operator' has to be decided as soon as is reasonably practicable and in any event within fourteen days whether or not he is so satisfied and the certificate is to be issued within weeks' time after Food Safety Officer is so satisfied. Where the Food safety officer is not so satisfied, he can give notice to the 'Food Business Operator' of the reasons for that determination.²⁰ The purpose of this exercise is not quite clear nor is it made clear what would be the fall- out if the Food Safety Officer is or is not satisfied with the measures taken by the 'Food Business Operator.' Will the Prohibition continue if the Food Safety officer is not satisfied with the measures undertaken by the 'Food Business Operator?' Would ban be lifted by the same officer or with approval of the Designated Officer when the Food Safety Officer is satisfied with the measures undertaken by the 'Food Business Operator' warranting lifting of the Ban? However, this whole exercise has been render futile by the subsequent provision. The relevant provision states that a prohibition order shall cease to have effect when the court is satisfied that the

²⁰ Sec. 33

‘Food Business Operator’ has taken sufficient measures justifying the lifting of the prohibition order. The application can be moved by the ‘Food Business Operator’ six months after the prohibition order has been passed or within three months after the similar application made by the ‘Food Business Operator’ *has been turned down*.²¹ This provision does not state that the court has to take in to account the certificate issued by the Food Safety Officer.²² The ‘Food Business Operator’ is free to rely on the certificate of the Food Safety officer if that favours him but courts are not bound to take note of the certificate issued by the Food Safety Officer together with the Designated Officer whether for or against the ‘Food Business Operator.’

It is submitted that Section 33 (5-6) is to be fine-tuned so as to make use of the exercise undertaken by the Food Safety Officer together with the Designated officer under Section 33(4). The amendment should be made in such a way that the court is required to take into account the certificate issued by the Food Safety Officer in consultation with Designated Officer in arriving to the conclusion whether prohibition order be lifted or not, otherwise the exercise undertaken under Section 33(4) has no purpose.

XII. EMERGENCY PROHIBITION NOTICES AND ORDERS

The FSS Act envisages an emergency situation where public health interest demands immediate action. In such a situation, a notice may be served on the ‘Food Business Operator’ if the Designated officer is satisfied that the health risk condition exists with respect to any food business. The Designated officer may then apply to the Commissioner of the Food Safety for imposing the prohibition who shall by an order impose the prohibition, if he is satisfied that the health risk condition exists with respect to any food business. The satisfaction of the Commissioner of the Food Safety should be independent of the satisfaction of the Designated Officer which means he has to make or cause to make investigation to satisfy himself about the existence of health risk conditions.

21 Emphasis Supplied.

22 Sec.33(5-6)

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The Designated officer shall not apply for an emergency prohibition order unless, at least one day before the date of the application, he has served notice on the 'Food Business Operator' of his intention to apply for the order.

Once the emergency prohibition notice has been issued, the Designated Officer shall require the Food Safety Officer to serve a copy of the order on the 'Food Business Operator' of the business or affix a copy of the order at a conspicuous place on such premises used for the purposes of that business. Any person who knowingly contravenes such an order shall be guilty of an offence and shall be punishable with imprisonment for a term which may extend to two years and with fine which may extend to two lakh rupees.

This emergency prohibition order shall cease to have effect if the Designated Officer issues a certificate to the effect that he is satisfied that the 'Food Business Operator' has taken sufficient measures for justifying lifting of such order. This certificate shall be issued by the Designated Officer within seven days of an application by the 'Food Business Operator' for such a certificate but if the Designator officer is not convinced, he shall give notice to the 'Food Business Operator' within a period of ten days indicating the reasons for such decision.²³ The FSS Act gives power to the Commissioner of the Food Safety to impose prohibition on the 'Food Business Operator' but gives power to Designated Officer to lift the ban which does not fall within the usual scheme of things. The power to lift the ban should have been vested in the Commissioner of Food itself because he had imposed the ban and he would have been the best judge to determine whether the 'Food Business Operator' had taken sufficient measures warranting lifting of the ban.

XIII. APPOINTMENT OF DESIGNATED OFFICER

The Designated Officer shall be appointed by the Commissioner of Food Safety who shall be not below the rank of Sub-divisional officer. The Designated Officer shall be incharge of food safety administration within the specified area. There shall be one Designated Officer for

23 Sec.34

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each District. He has to perform multifarious functions including (a) to issue or cancel licence of 'Food Business Operator' (b) to prohibit the sale of any article of food which is being sold in contravention of the Provisions of the FSS Act (c) to receive report and sample of article of food from Food Safety Officer under his jurisdiction and get them analysed. (d) to make recommendation to the Commissioner of Food Safety for sanction launch of prosecutions in case of contraventions punishable with imprisonment (e) to sanction or launch prosecutions in case of contraventions punishable with fine (f) to maintain record of all inspections made by Food Safety Officers and action taken by them in the performance of their duties (g) to get investigated any complaint which may be made in writing in respect of any contravention of the provisions of the FSS Act (g) to get investigated any complaint which may be mad in writing in respect of any contravention of the provisions of the FSS Act (h) to investigate any complaint which may be made in writing against the Food Safety Officer and (i) to perform such other duties as may be entrusted by the Commissioner of Food Safety.²⁴ The approach of the Central and State Governments in this regard is very crucial and critical for the effective implementation of the FSS Act. If the officials already overburden with their routine works are appointed as Designated Officer or Commissioners of Food Safety on part time basis then this legislation will have no more than ornamental value. A separate hierarchy is to be created to deal exclusively with the issues surrounding the FSS Act.

XIV. NO ROLE TO VOLUNTARY CONSUMER ORGANIZATIONS

The Voluntary Consumer Organizations (VCO) have rendered invaluable service to the consumers and have proved a viable force to ensure justice to the consumers under the Consumer Protection Act, 1986. There is a growing realization that the Government functionaries entrusted with the required job seldom pursues it painstakingly. The alternative has been found in VCO. This fact has not been taken

Into account in the FSS Act. The VCO should have been accorded locus standi to file complaint either before the Adjudicating Officer or

²⁴ Sec.36

Court. An individual has been given right to file a complaint before the Designated Officer for further necessary action on his part and from the reading of the above provision, it is clear that any individual, not necessarily a consumer or purchaser, can file complaint before the Designated Officer but a Voluntary Consumer Organization in its own right cannot file such complaint.

XV. FOOD SAFETY OFFICER

The Food Safety Officer shall be appointed by the Commissioner of Food Safety who shall have such qualifications as may be prescribed by the Central Government. The State Government may authorize any officer of the State Government, having prescribed qualifications to perform the functions of the Food Safety Officer. He can exercise his powers within the specified area.

The Food Safety Officer has been given enormous powers right from taking sample, seize any article of food, enter and inspect any place where the article of food is manufactured or stored for sale, seize books of account useful or relevant to any investigation.²⁵

The misuse of these powers has been quite considerable checked. The Commissioner of the Food Safety may issue guidelines from time to time with regard to exercise of powers of the Food Safety Officer which shall be binding on him. Even the powers of the Food Safety Officer exercisable under the FSS Act can be revoked for a specified period by the Commissioner of Food Safety.

The Food Safety Officer shall be liable to a penalty which may extend to one lakh rupees if it has been found that such Food Safety Officer has vexatiously and without any reasonable ground seized any article of food or adulterant or has committed any other act to the injury of any person without having reason to believe that such an act is necessary for the execution of his duty.

The interest of the scrupulous Food Safety Officer has been safeguarded by imposing fine which shall not be less than Rupees fifty

25 Sec. 38

thousand but may extend to one Lakh rupees if it is proved that the complainant has filed a false complaint against the Food Safety Officer. This provision may deter honest complainants to go against the Food Safety Officers because of the fear that if their complaint is found false they will be punished. It is submitted that the penalty should have been for filing vexatious complaint by the complainant and not for filing false complaint as is the case at present where standard of proof will be different and much higher than the one required for proving that the complaint is false.

XVI. PURCHASER MAY HAVE FOOD ANALYZED

The FSS Act clothes purchaser with the power to get any article of food analyzed by the Food Analyst on payment of the prescribed fee and the report may be received by him within the time specified by regulations. This provision imposes two conditions namely; (a) only purchaser of the article of the food can seek report from the Food analyst which means that a public spirited individual or Voluntary Consumer Organization cannot seek such report which is itself a limitation and (b) the purchaser has to inform the 'Food Business Operator' at the time of the purchase of any food article that he is going to get this article analyzed by the Food Analyst. This condition is needless and may at times defeat the purpose for which this analysis may be undertaken.

Where the report of the Food analyst confirms that the article of the food does not meet the requirement of the Act or the rules or regulation made thereunder, the purchaser is entitled to refund of the fee paid by him for the analysis.²⁶ Who will direct this refund and who has to make payment. Can purchaser claim this amount from the seller, supplier, processor packer or manufacturer or can he claim it from any one responsible for circumventing the provisions of the FSS Act and then what about the loss which this purchaser has suffered by purchasing this article. There are no guidelines either for fixing or for remedying the loss.

The positive feature of this exercise is that where Food Analyst finds the sample in contravention of the provisions of this Act and rules and

26 Sec. 40

regulations made there under, he can forward the report to the Designated Officer who will in turn take action under the Act.²⁷

XVII. ADJUDICATION OF CASES

The FSS Act establishes separate machinery for adjudication of offences falling within the purview of this Act. The State Government shall notify an officer not below the rank of Additional District Magistrate as an adjudication officer for the adjudication of the offences in the manner prescribed by the Central Government. The adjudicating officer shall the powers of a civil court and all the proceedings before him shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the IPC and shall be deemed to be a court for the purposes of sections 345 and 346 of the Cr.PC.²⁸ While adjudicating the quantum of penalty, the adjudicating officer shall have due regard to the (a) amount of gain or unfair advantage, where quantifiable, made as a result of the contravention (b) amount of loss caused or likely to cause to any person as result of the contravention (c) the repetitive nature of the contravention. (d) whether the contravention is without his knowledge and (c) any other relevant factor.²⁹

XVIII. ESTABLISHMENT OF FOOD SAFETY APPELLATE TRIBUNAL

The FSS Act provides for the establishment of one or more tribunals to be known as the Food Safety Appellate Tribunal to hear appeals from the decisions of the Adjudicating Officer. The Central Government or the State Government, as the case may be, shall prescribe the matters and areas in relation to which the tribunal may exercise jurisdiction. The Tribunal shall consist of one person only called as the Presiding officer to be appointed by the Central Government or the State Government as the case may be. Any person who is or who has been a District Judge shall be appointed as the Presiding officer.³⁰

27 Sec. 40(2)

28 Sec. 68

29 Sec. 49

30 Sec. 70

XIX. PROCEDURE AND POWERS OF THE TRIBUNAL

The FSS Act has expressly provided that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice and subject to the other provisions of this Act and the rules made thereunder, the Tribunal shall have powers to regulate its own procedure including the place at which it shall have its sittings. The Tribunal shall have for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the CPC, 1908 in some matters like (a) summoning and enforcing the attendance of any person (b) requiring the discovery and production of documents or other electronic records (c) receiving evidence on affidavits (d) issuing commissions for the examination of witness or documents (e) reviewing its decisions (f) dismissing an application for default or deciding it ex parte (g) any other matter which may be prescribed by the Central Government.

Every proceedings before the Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code it shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the CrPC, 1973.

The appellant may either appear in person or authorize one or more legal practitioners or any of its officers to represent his case before the Tribunal. The provisions of the Limitation Act shall except as otherwise provided in this Act, apply to an appeal made to the Tribunal. Where a person is aggrieved by any decision or order of the Tribunal, he can file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Tribunal to him on any question of fact or law arising out of such order. However, he can file this appeal within a further period not exceeding sixty days where High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the prescribed period.³¹

XX. SPECIAL COURTS AND PUBLIC PROSECUTOR

The FSS Act gives choice to the Central Government or the State Government to constitute as many Special Courts with the concurrence

31 Sec. 72

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of the Chief Justice of the High Court as may be necessary in their respective jurisdictions, if it is expedient and necessary in the public interest. The Special Courts shall try offences relating to grievous injury or death of the consumer for which punishment of imprisonment for more than three years has been prescribed under this Act.

A Special Court may either on its own or on the application made by the Public Prosecutor may sit for any of its proceedings at any place other than its ordinary place of sitting if it is expedient and desirable to do so. The Central Government or the State Government as the case may be shall appoint Public Prosecutor and more than one additional Public Prosecutor for every Special Court. The Central Government may appoint a Special Public Prosecutor for any case or class or group of cases who shall have not less than seven years of Bar practice or has held a post under the Union or State requiring special knowledge of law.³²

XXI. POWER TO TRANSFER CASES TO REGULAR COURTS

Where a case has been filed before the Special Court which has taken its cognizance and has found that the offence is not triable by it, it shall transfer the case for trial of such offence to any court having jurisdiction under the Cr.PC and the court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.³³

XXII. APPEAL

An appeal can be filed by an aggrieved person against the decision or order of a Special Court. The appeal shall lie to the High Court on payment of such fee as may be prescribed by the Central Government and after depositing the amount, if any, imposed by way of penalty, compensation or damage under the FSS Act. The appeal shall lie within a period of forty five days on which the order was served. The appeal may however be entertained even after the expiry of the stipulated time if the High Court is satisfied that the appellant was prevented by sufficient cause for filing the appeal within the said period. The appeal

32 Sec. 74

33 Sec 75

shall be disposed of by the High Court by a Bench of not less than two judges.³⁴

XXIII. TIME LIMIT FOR PROSECUTIONS

The court shall not take cognizance of an offence under the FSS Act after the expiry of the period of one year from the date of commission of an offence. The Commissioner of Food Safety may approve prosecution within an extended period of up to three years, after recording reasons in writing.³⁵

XXIV. POWER OF COURT TO IMPLEAD

The FSS Act has expressly given power to the court to implead a party against whom prosecution has not been launched if the court is satisfied on the basis of the evidence adduced before it that such party is also associated with that offence. However, the provision has unnecessarily limited this power of the court to only importer, manufacturer, distributor or dealer of any article of food leaving for instance processor, packer etc without any apparent rationale. It is submitted that the term ‘Food Business Operator’ with necessary fine tuning should be used here instead of using the terms like importer, manufacturer, distributor or dealer of any article separately.

The above provision will take effect notwithstanding anything contained in sub-section (3) of Section 319 of the Cr.PC or section 71 of this Act. This provision has removed the technical bar which would have come at times in the way of bringing real culprit to book.³⁶

XXV. OFFENCES AND PENALTIES

General Provision Relating to Offences

The FSS Act in section 48(1) provides that a person may render any article of food injurious to health by means of one or more of the following operations namely (a) adding any article or substance to the food (b) using any article or substance as an ingredient in the preparation

34 Sec 76

35 Sec 77

36 Sec 78

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of the food (c) abstracting any constituents from the food or (d) subjecting the food to any other process or treatment, with the knowledge that it may be sold or offered for sale or distributed for human consumption. This provision may unnecessarily create confusion as it is not in resonance with section (2) zz that defines Unsafe Food and if it is strictly applied without reconciling that conflict then the scope of section (2) zz will be narrowed down. The term Unsafe Food has been comprehensively dealt under section (2) zz and it contains as many as twelve grounds including above mentioned four grounds in section 48(1) which have potential to make food unsafe for human consumption. It is submitted that if section 48 (1) is read with section (2) zz, it will undone the good work carried out through section (2) zz. The possible options are either to read section (2) zz independent of section 48(1) or to delete section 48(1)

Whether any food is unsafe or injurious to health regard shall be had to (i) normal conditions of use of the food by the consumer and its handling at each stage of production, processing and distribution (ii) information provided to the consumer including the information on the label and general information concerning the avoidance of specific adverse health effects on the person consuming it or on the subsequent generation (iii) to the probable cumulative toxic effects (iv) peculiar health sensitivities of a specific category of consumers who are intended to use that food and (v) the probable cumulative effect of food of substantially the same composition on the health of person consuming it in ordinary quantities.³⁷

An exception has been carved out for primary food article where its quality or purity has fallen below the specified standard or its constituents are present in quantities not within the specified limits of variability. Such food article shall not be deemed to be unsafe or substandard or food containing extraneous matter if this change in standard is solely due to natural causes and beyond the control of human agency.³⁸

37 Sec. 48(2) (a)

38 Sec. 48 (2)(b)

Specific Penalties

The FSS Act has carved out a good number of offences³⁹ to ensure that markets are free from unsafe food which includes penalty for

39 For instance: Section 50 imposes a penalty of rupees five lakh for selling food not of the nature or substance or quality demanded by the consumer or fails to meet the requirements of the FSS Act. Section 51 imposes a penalty of rupees five lakhs for manufacturing or storing or selling or distributing or importing any article of food which is sub-standard. Section 52 imposes a penalty of rupees three lakhs for manufacturing or storing or selling or distributing or importing any article of food which is mis-branded. Section 54 imposes a penalty of rupees one lakh for manufacturing or storing or selling or distributing or importing any article of food containing extraneous matter. Section 55 imposes penalty for failure to comply with the direction of food safety officer. Section 56 imposes a penalty of rupees one lakh for manufacturing or processing any article of food for human consumption under unhygienic or unsanitary conditions. Section 57 imposes penalty of rupees two lakh for possessing adulterant not injurious to health and rupees ten lakh for possessing adulterant that is injurious to health. Section 58 imposes penalty of rupees two lakh for any contravention for which no specific punishment has been laid down. Section 59 imposes a punishment for manufacturing or storing or selling or distributing or importing any article of food which is unsafe. The punishment may extend to six months and fine upto rupees one lakh where such contravention does not result in injury and where it results into a non-grievous injury then the punishment may extend to one year and fine which may extend to three lakh rupees. Where such failure or contravention results in a grievous injury, imprisonment for a term upto six months and fine upto rupees five lakhs may be imposed where it results into death, the imprisonment not less than seven years but may extend to imprisonment for life and fine upto rupees ten lakhs may be imposed. Section 60 imposes imprisonment of six months and fine of rupees two lakhs may be imposed for interfering with seized items. Section 61 imposes punishment upto 3 months and fine upto rupees two lakhs for providing false information. Section 62 provides punishment for obstructing or impersonating a food Safety Officer which may be upto three months and fine which may extend upto one lakh rupees. Section 63 imposes punishment for carrying out a business without licence which shall be imprisonment for a term upto six months and a fine which may extend to five lakh rupees. Section 64 imposes punishment for subsequent offences which shall be twice the punishment which might have imposed on a first conviction subject to the punishment being maximum provided for the same offence and a fine which may extend upto rupees one lakh where the offence is a continuing one and his licence shall be cancelled. Section 66 imposes punishment for contravening the provisions of the FSS Act on the person who was in charge of or responsible to the company for the conduct of the business of the company or on the person who was head or the person in-charge of such establishment or branch unit

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misleading advertisement. The FSS Act is the first legislation which has made publication of false or misleading advertisement a punishable offence and no matter that a label or advertisement relating to any article of food in respect of which the contravention is alleged to have been committed contained an accurate statement of the composition of the food. This shall not prevent the court from finding that the contravention was committed.⁴⁰ However, a person shall not be liable if he proves that he is carrying on business of publishing or arranging for the publication of the advertisement and that he published or arranged for publication of the advertisement in question in the ordinary course of business⁴¹ but he will be still liable if he should have reasonably known that the publication of the advertisement was an offence or had been previously been informed in writing by the relevant authority that publication of such an advertisement would constitute an offence or is the 'Food Business Operator' or is otherwise engaged in the conduct of a food business for which the advertisements concerned were published.⁴² The person who has shown reasonable precautions and exercised all due diligence to prevent the commission of offence by himself or by any other person shall not be liable under the FSS Act.⁴³

The FSS Act has quite comprehensively defined the term "advertisement" which means 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 through any notice, circular, label, wrapper, invoice or other documents.⁴⁴ This definition is the most modern one on the subject and includes Internet and websites as well which have proved over the period the time most effective and viable medium of advertising.

nominated by the company. Section 67 imposes penalty for contravention of provisions of the FSS Act in case of import of articles of food which shall be in addition to penalties provided under any other Act.

40 Sec. 53

41 Sec. 80A(1)

42 Sec. 80A(2)

43 Sec. 80B

44 Sec. 2(b)

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The FSS Act specifically provides that advertisement shall not be made of any food which is misleading or deceiving or contravenes the provisions of this Act, rules and regulations made there under but surprisingly this provision does not mention false advertisements⁴⁵ although punishment for false advertisement has been provided under section 80.

Similarly no person shall engage himself in any unfair trade practice for the purpose of promoting the sale, supply, use and consumption of articles of food or adopt any unfair or deceptive practice including the practice of making any statement whether orally or in writing or by visible representation which falsely represents that the foods are of a particular standard, quality, quantity or grade composition or which makes a false or misleading representation concerning the need for or the usefulness or gives to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof.⁴⁶ The FSS Act does not define the term unfair trade practice nor has it been defined with reference to the Consumer Protection Act, 1986 or Monopolies and Restrictive Trade Practices Act, 1969 which is a legislative lapse. The provision makes a reference of only three practices leaving aside the whole gamut of unfair trade practices. However, the practices mentioned can be called as illustrations only and would not in any way limit the scope of this provision which is otherwise comprehensive if read with reference to the above mentioned pro-consumer legislations.

XXVI. NO PROVISION FOR INTERIM RELIEF

The FSS Act does not provide any provision for interim injunction for preventing or ceasing any publication of false or misleading advertisement. The Act does make false, misleading and deceptive advertisement punishable but that is possible only when prosecution has been taken to logical conclusion which may take its own time. The interim injunction cannot be sought even from the civil court as the jurisdiction of the civil court to entertain any suit or proceeding in respect of any matter which an Adjudicating officer or the Tribunal is

45 Sec. 24

46 Sec. 24 (2)

empowered by or under this Act is barred.⁴⁷ To nip the evil in the bud, a provision for interim relief in the form of an injunction is suggested to prevent continuing of any false or misleading or deceptive advertisement.

XXVII. NO PROVISION FOR CORRECTIVE ADVERTISEMENT

There is no provision in the FSS Act empowering the authorities under this Act to ask the guilty person to issue corrective advertisement in case his food has been found unsafe or is found guilty of making false, misleading or deceptive advertisements. A limited recognition has been given to this power by allowing Adjudicating officer or the court as the case may be which has convicted any person of an offence leading to grievous injury or death to publish name and place of residence of such person at his expenses in such newspaper or in such manner as the Adjudicating officer or the court may direct. The corrective advertisements in developed nations have proved more deterrent than even physical punishment or fine. This is the reason that of late legislatures in Indian have realized potency of corrective advertisements that is way a provision to this effect has been now incorporated in the CP Act, 1986. The traders would never like negative publicity of their products that may work much more effectively than the positive campaign for the product. A comprehensive provision for corrective advertisements is suggested.

XXVIII. COMPENSATION FOR DEATH OR GRIEVOUS INJURY

Where a person either himself or by any other person on his behalf, manufactures or distributes or sells or imports any article of food causing injury to the consumer or his death then the adjudicating officer or the court, as the case may be, may direct him to pay compensation to the victim or the legal representative of the victim a sum (a) not less than five lakh rupees in case of death (b) not exceeding three lakh rupees in case of grievous injury and (c) not exceeding one lakh rupees in all other cases of injury. This definition does not expressly mention 'food processor' or 'food packer.' The best option.

Before the legislature was to use the term "Food Business Operator" as defined under the FSS Act. This Act has not maintained

⁴⁷ Sec. 72

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any difference between the grievous injury and grievous injury resulting permanent disablement for the purposes of compensation nor is there any provision for compensation to the consumer who has purchased unsafe food but suffered no injury because he did not consume it.

The compensation shall be paid at the earliest and in no case later than six months from the date of occurrence of the incident. In case of death, an interim relief shall be paid to the next of the kin within thirty days of the incident. It is not, however, clear whether this statutory time limit should be met in spite of the fact that adjudicating officer or the court, as the case may be, is yet to pronounce its verdict and it is yet to identify guilty. If it is argued that the compensation has to be paid within the prescribed time, then the liability will be based on no faulty liability principle which will run against the basic scheme of the Act. The alternative interpretation would be then that the adjudicating officer or the court as the case may be should decide the case within the period of six months which may not be possible given the nature of investigation required for the scientific analysis of the food in question. It appears that this legal provision requiring payment of the compensation within a period of six months in case of death of the consumer will have only an ornamental value.

The above compensatory provision has been unnecessarily limited to consumers only. The definition of consumer given under FSS Act is narrow in scope. The term consumer as defined means persons and families purchasing and receiving food in order to meet their personal needs.⁴⁸ In this definition, cryptic words with ambiguity have been used that are bound to undo the good work undertaken under the FSS Act. This definition limits the scope of payment of compensation to consumers only leaving aside those persons who consume unsafe food purchased by the consumer. Furthermore, it includes only those persons who have purchased unsafe food and not those who have received unsafe food free of charges. This definition uses the expression “purchasing and receiving” which would constrict the scope of the Act. It is suggested to supplant it with the expression “purchasing or receiving” which would quite considerably enlarge the scope of the FSS Act.

48 Sec. 2(f)

A CRITICAL APPRAISAL OF THE FOOD SAFETY AND STANDARDS ACT, 2006

The definition also attempts to give protection to the ‘family,’ *means members of the family*⁴⁹ without defining this term for the purposes of the FSS Act. Would it include only those members of the ‘family’ who live and dine under one roof or will it include all those who are supposed to live under one roof but are not. Would it include, for instance, son of a father, who works at other place and lives there but was with his parents at the time he and his ‘family’ consumed unsafe food? Would this definition include a married daughter who incidentally was present in parental home when they consumed unsafe food together? Would it include divorcee daughter?

Similarly, the above definition further confines its scope to the food purchased and received to meet personal needs. Again, the expression “personal needs” has not been defined. This expression will depend upon a number of factors and may vary from consumer to consumer. What may be necessity for one person may be luxury for another. What may be luxury for routine consumption may be necessity at some special occasion like festival or marriage party. In-fact this expression should not have found place in the definition. It is suggested that the definition of the consumer given under the CP Act⁵⁰ in relation to goods only with necessary fine tuning be substituted in place of the present definition of the consumer.

A stringent provision with far reaching implications has been incorporated which empowers Adjudicating officer or the court as the case may be which has convicted any person of an offence leading to grievous injury or death to publish name and place of residence of such person at his expenses in such newspaper or in such manner as the Adjudicating officer may direct. Even order for cancellation of licence,

49 Emphasis supplied

50 See Sec. 2 (d) which states: consumer means any person who buys goods for consideration which has been paid or promised or partly paid or partly promised or under any system of differed payment and includes any person who uses these goods with the approval of the person who has purchased good for consideration which has been paid or promised or under any system of differed payment but does not include any person who purchases goods for resale or for commercial purpose.

re-call of food from market, forfeiture of establishment and property in case of grievous injury or death of consumer may be issued.⁵¹

XXXIX. OVERRIDING EFFECT OF THIS ACT OVER ALL OTHER FOOD RELATED LAWS

The FSS Act has an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.⁵² This Act is not in addition to but is in derogation of any other law inconsistent there with. This provision will bring certainty and will eliminate any possibility of multiple courts or tribunals having jurisdiction on the same subject.

XXX. CONCLUSION

The FSS Act has come up with science based standards for the protection of consumers of articles of 'Food.' Novel concepts have been used with flexible language to protect the interest of the consumers. The liability created in essence is criminal in nature imposing hefty fine or imprisonment for contravention of the provisions of the FSS Act. The compensatory provisions for victims of grievous injury or for representatives of deceased have been provided. However, the Act does not maintain any difference between grievous injury and grievous injury resulting permanent disablement for the purposes of award of compensation. The Act is not free from ambiguous provisions and the provisions for interim relief, corrective advertisements and locus stand for voluntary consumer organization are altogether missing. The definition of consumer given in the Act is clouded by clumsy wording that has constricted its scope.



51 Sec. 65 (3)

52 Sec. 89

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UNSAFE FOODS AND CONSUMER PROTECTION: RECENT LEGAL TRENDS

*A. Rajendra Prasad**

INTRODUCTION

It is aptly said “the very first day that men opened their eyes in the world they knew hunger and the use of food.”¹ Food is one of the basic necessities of life. There is nothing important to human beings in daily life, than food. The consequences of food adulteration or unsafe food have short term and long term adverse effects. Unsafe food causes many acute and life-long diseases. WHO estimates that food borne and waterborne diseases taken together kill about 2.2 million people annually, 1.9 million of them are children. Food borne diseases and threats to food safety continue to be a growing public health issue. Food borne disease has a significant impact not only on the health but also on development.

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1 Giovanni Battista Segni “Coestia et Fame” (Bologna 1602) cited in Sayed Ahmed Marei “The World Food Crisis.” (1976) p.115..

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Moreover, globalization of the food trade and development of international food standards have raised awareness on food safety and export potential in developing countries. In May 2010, the World Health Assembly approved a new resolution on food safety. Global food safety shows concern for global consumers especially consumers in developing countries. Microbiological hazards and the food borne diseases they cause are increasingly important public health problems. Chemical hazards remain a significant source of food borne illness. Chemical contaminants in food include natural toxicants, such as mycotoxin and marine toxins, environmental contaminants, such as mercury and lead and natural substances in plants. New technologies, such as genetic engineering, irradiation of food, modified-atmosphere and packaging, can improve food production and food safety with accompanied health hazards. Building capacity in food safety is essential in most countries, especially developing ones. This paper examines the new legislative attempt in India to regulate unsafe foods under The Food Safety and Standards Act, 2006.

It is said that a majority of the Indian laws on food have become obsolete and are only meant for exploiting the consumers. Multiplicity of food laws, standard settings and enforcement agencies pervade different sectors of food, which create confusion in the minds of consumers, traders, manufacturers and investors. Basing on the recommendations of Subject Group on Food and Agro industries, Standing Committee in Parliament on Agriculture's 12th Report, an Integrated Food Law titling 'The Food Safety and Standards Act, 2006' was enacted. The Act is a comprehensive and modern piece of legislation and a step towards consolidation of different food laws. It aims at elimination of multi- level and multi- departmental controls. The Act repeals the Prevention of Food Adulteration Act, 1954 and the other Orders.

The objective of the new Act is to consolidate the laws relating to food and to curb food adulteration by prescribing higher penalties for violation of food laws. It aims to establish Food Safety Management System for ensuring availability of safe and wholesome food for human consumption and Food Safety and Standards Authority of India (FSSAI) for laying down science based standards for articles of food and to

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regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption.

Definition of Food

It is interesting to examine the definition of food while legally analyzing the issues of unsafe food. The term 'food' is defined under different laws. Sec.3 (1) (j) of Food Safety and Standards Act, 2006 says "food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum and any substance, including water used in the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing in the market for human consumption plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances: Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regard to its use, nature, substance or quality. According to Sec.2 of Prevention of Food Adulteration Act (PFA Act), 'Food' means any article used as food or drink for human consumption other than drugs and water and includes: (a) any article which ordinarily enters into or is used in the composition or preparation of, human food, (b) any flavoring matter or condiments and (c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes under this Act.

The Courts are widely interpreted the term 'food' under PFA Act. In some cases, it is said that milk is food, whereas water is not food. To sell milk as a substance, which contains 40 percent and with 60 percent of water, then milk in question is without any doubt, a breach of Act. Ice is not food. However, standards are prescribed for ice-lollies or edible ice and ice candy respectively. Pan *masala* is food. The definition of "food" specifically covers that even those articles that are used in the preparation of food articles are to be considered as articles

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of food.² Similarly, Tobacco comes within the definition of “food.” Tobacco is consumed by human beings and it is eaten with betel leaves. Tobacco is therefore food. In view of the definition of food which is to be found in Sec.2(v) of the Act, the Court is not concerned with the actual use to which the article in question may be put. To constitute food for the purpose of the Act, it is enough that the article in question is usable as food or drink for human consumption.

In *Municipal Corporation, Indore v. Dattatreya*³ it was laid down that the acquittal of the accused solely rests on the ground that no offence was made out as the article ‘butter’ was to be used in preparation of ghee and therefore, not covered under Sec.2(v) of the Prevention of Food Adulteration Act. The Act defines “food” very widely as covering any article used as food and every component, which enters into it and even flavoring matter and condiments. It is of common knowledge that the word ‘food’ is a very general term and applies to all that is eaten by men for nourishment and takes in subsidiaries. It is clear that groundnut oil is food for the simple reason that it is an article which is used in the preparation of human food. Sugar by itself, is an article used as food or at any rate, it is an article, which ordinarily enters into or is used in the composition or preparation of human food. Ghee is an article used as food. As far as the question of consideration of coconut oil as an article of food is concerned, it is no doubt used as food in some parts of the country, while in the case of other parts, it is not. In such instances, it is for the Food Inspector to prove that the sample of coconut oil purchased was meant for human consumption as food.⁴ Chilli Powder is food. It is enough if article is generally or commonly used for human consumption or the preparation of human food. It can hardly be disputed that chilli powder is commonly used for preparation of human food. It therefore, clearly falls within the purview of the definition of the term “food” as given in Sec.2 (v) of the Act.

In the UK, the term ‘food’ is not exhaustively defined, but includes (1) drink (2) articles and substances of no nutritional value which are

2 Ram Shankar Gupta v. State of U.P. 1996 (2) EFR 35.

3 1986 E.F.R. 321 (M.P.).

4 See *State of Tamilnadu v R. Krishna Murthy* A.I.R. 1980 S.C. 538.

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used for human consumption (3) chewing gum and other products of a like nature and use and (4) articles and substances used as ingredients in the preparation of food or anything falling within this provision. Food does not include (a) live animals or birds or live fish which are not used for human consumption while they are alive (b) fodder or feeding stuffs for animals, birds or fish (c) controlled drugs within the meaning of the Misuse of Drugs Act 1971 or (d) subject to such exceptions as may be specified in an order made by the Secretary of State (i) medical products within the meaning of the Medicines Act 1968 in respect of which product licenses within the meaning of that Act are for the time being in force or (ii) other articles or substances in respect of which such licenses are for the time being in force in pursuance of orders.

Unsafe food

If the food is to be said unsafe, first of all, it must be injurious to health. Sometimes, the food may be adulterated but not injurious to health and in such cases, it is difficult to be saying such food is unsafe. For example, water added to milk, sugar added to honey etc. However, it is said, The Food Safety and Standards Act, 2006 covers both kinds of adulterants which are injuries to health as well as not injurious to health. The Food Safety and Standards Act, 2006 defines unsafe food and says under sec.2(zz) “unsafe food” means an article of food whose nature, substance or quality is so affected as to render it injurious to health :

- i. by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substance; or
- ii. by the article consisting, wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or
- iii. by virtue of its unhygienic processing or the presence in that article of any harmful substance; or
- iv. by the substitution of any inferior or cheaper substance whether wholly or in part; or

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- v. by addition of a substance directly or as an ingredient which is not permitted; or
- vi. by the abstraction, wholly or in part, of any of its constituents; or
- vii. by the article being so coloured, flavoured or coated, powdered or polished, as to damage or conceal the article or to make it appear better or of greater value than it really is; or
- viii. by the presence of any colouring matter or preservatives other than that specified in respect thereof; or
- ix. by the article having been infected or infested with worms, weevils or insects; or
- x. by virtue of its being prepared, packed or kept under insanitary conditions; or
- xi. by virtue of its being mis-branded or sub-standard or food containing extraneous matter; or
- xii. by virtue of containing pesticides and other contaminants in excess of quantities than specified by regulations.

The food is said to be unsafe for two conditions under the Act;

1. The 'condition' of food to make it unsafe such as processing or the presence of any harmful substance, inferior substance or not permissible colours, flavours, preservatives or infected with worms or containing pesticides etc,
2. unrelated with the quality or standard of food such as packaging, misbranding etc. The Act deals with all these issues which make the food unsafe.

In the UK, "subject to certain defenses, any person who renders any food injurious to health by means of any of the following operations: (1) adding any article or substance to the food; (2) using any article or substance as an ingredient in the preparation of the food; (3) abstracting any constituent from the food or (4) subjecting the food to any other process or treatment with intent that it is to be sold for human consumption, is guilty of an offence. Any food commonly used for the

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human consumption which is sold or offered, exposed or kept for sale is presumed, until the contrary is proved, to have been sold or, as the case may be, to have been or be intended for the sale for human consumption... "Injury" in relation to health, includes any impairment, whether permanent or temporary and 'injurious to health' must be construed accordingly. In determining whether any food is injurious to health regard is to be had not only the probable effect of that food on the health of a person consuming it but also to the probable cumulative effect of food of substantially the same composition on the health of a person consuming it in ordinary quantities. Since regard is to be had to the 'probable' effect of the food, food is not injurious to health merely because exceptional people are liable to be injured; however an offence is committed if a substantial proportion of the community which is likely to use it would be injured."⁵

Unfit for Human Consumption-the main test

While construing the matters of 'adulteration,' the courts mainly rely on the test whether the adulterated food is unfit for human consumption or not. Adulteration of food is so dangerous and widespread that has so often led to large human tragedies. It is 'an act perilous to human life and health' If milk is diluted with water, it is said to be adulterated within the meaning of the Act. Adulteration is technically interpreted by the courts by applying the test of 'fit for human consumption' and other matters are considered as irrelevant. For example, if a sample of *atta* that contained fifteen living meal worms and that *atta* could not be termed to be adulterated. It is apparent from the report of the Public Analyst that he only detected fifteen living meal worms. Taking advantage of this fact, it was urged that this report would not prove that the wheat *atta* was adulterated. Reliance in this regard has been placed on the Division Bench decision of the High Court in State of Haryana v. Om Prakash⁶ Wherein a sample of Zeera, a weevil and sixteen living mealworms were found. The distinction between the living worms and insects was noticed and it was held that it could not be termed to be adulterated. In such cases, the report of the Public Analyst must

5 Halsbury's Laws of England, 18(2) 4th ed. p.195.

6 A.I.R. 1985 P & H 317.

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indicate that it was insect-infected or that it was unfit for human consumption. The sale of milk, to which water has been added is an offence punishable under Sec.16 (1)(a), regardless of the question of adulteration.

The doctrine of “*res ipsa loquitur*” (the thing speaks for itself) is of no use in matters of adulteration. One really fails to comprehend why the mere proof of an article of food like decomposed or diseased meat or rotten fish or putrid fruits and vegetables by the condition of the article itself should not be sufficient to attract the definition of “adulterated” as contained in Sec. 2(I) and further proof of fitness of the article for human consumption is still necessary for bringing home the guilty as specified in the definition of food under Sec. 2(v)

The Food Safety and Standards Act define the term ‘adulterant.’ It says under Sec. 3 (1) (a) of the

Act, “adulterant” means any material which is or could be employed for making the food unsafe or substandard or misbranded or containing extraneous matter. In this definition, the unsafe food, sub-standard food, misbranded food or containing extraneous mater will come under the purview of adulterant.

Packaging and labelling of foods is a very important aspect in relation to food products or food items. Sec.23 of The Food Safety and Standards Act says that no person shall manufacture, distribute, sell or expose for sale or dispatch or deliver to any agent or broker for the purpose of sale, any packaged food products which are not marked and labelled in the manner as may be specified by regulations: Every food business operator shall ensure that the labelling and presentation of food, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting in which they are displayed and the information which is made available about them through whatever medium, does not mislead consumers. The Act also regards goods are unsafe if they are mis-branded.

The food is considered as unsafe under the Food Safety and Standards Act, if it contains pesticides and other contaminants in excess of quantities specified by regulations. Simply speaking, an insecticide is a pesticide used against insects. It is a chemical used to kill the insects

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that consume plants. Insecticides are natural or synthetic chemicals used to manage insects and pests. However, they are important for disease control and providing food and fiber for a growing world population. Toxic substance or poison is understood as any chemical substance that produces injurious effects when penetrates into the human organism. The abusive use of chemical insecticides may bring many negative consequences that affect the people. When a person comes into contact with an insecticide, which can be only once or repeatedly, the effect that can produce to him will depend on the time of exhibition, the harmfulness of the insecticide, the amount and the means through which the substance enters the organism. A person can use daily an insecticide for the control of the insects, exposing to itself every day in small quantity, but the amount of pesticide that is concentrated in the body, increases progressively, until after a time it becomes a toxic dose. In view of this, the legal controls are inevitable to regulate sale or usage of insecticides. In India, Insecticides Act was passed in 1968.

The Food Safety and Standards Act also concerns 'genetically modified foods,' 'organic foods,' 'functional foods,' 'primary foods' etc. Sec.22 says that, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, and foods for special dietary uses, functional foods, nutraceuticals, health supplements, proprietary foods and such other articles of food, which the Central Government may notify in this behalf. The term, "genetically engineered or modified food" is defined as food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology.⁷ 'GM foods or GMOs (genetically-modified organisms) are most commonly used to refer to crop plants created for human or animal consumption using the latest molecular biology techniques. These plants are modified in the laboratories. However, various safety, environmental, ethical and socio-economic issues are involved. GM food, it is believed, can cause cancer. It is also said that food is unsafe and

⁷ Sec. 22(2).

the whole eco system will get polluted as GM plants either contain or produce toxins.

If it is felt that the legal enforcement is only one measure for the prevention of food adulteration and it will not have any appreciable impact unless and until there is awareness of the small traders about the food standards which they are expected to maintain, awareness of the common consumer regarding the dangers of adulteration and how to take advantage of the legal machinery to force the traders to get the proper food and lastly, a sense of honesty among the food traders, big and small, in the maintenance of the safety and quality of food. In fact, UN experts are predicting a food crisis in the coming years with prices at decade long high and supply of basic food crops falling due to bad weather and poor harvests. Such exigencies lead to food adulteration and supply of unsafe foods.

Unsafe food and Consumer Protection

Consumers of food have right to get safe food. It is universally recognized that 'right to food is fundamental right to human existence.' The UN Resolution of Consumer Protection in 1985 focused its attention on food and said 'when formulating national policies and plans with regard to food, governments should take into account the needs of all consumers.' It implies that is the basic need of the consumer to get safe food. Unsafe food, for example in case of adulteration, can harm consumer health and hence is a serious offence. One of the basic objectives of Consumer Protection Act, 1986 in India is to protect the consumer against marketing of goods which are hazardous to life and property. A complaint can be lodged under the Act for the goods which will be hazardous to life and safety when used. Sec. 2 (1) (f) of Consumer Protection Act says "defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force. In the same way, Sec. 2(1) (g) of the Act says "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. 'Unsafe' can be termed either 'defect' in goods or 'deficiency in service' in a broader perspective under the Consumer

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Protection Act to extend protection to the injured consumer. In some cases, for example, the consumer fora awarded compensation for the injury caused by consumption of unsafe food by treating it a deficiency of service. While taking the food so supplied by the Airlines, a passenger suddenly experienced some pain in his mouth because of some hard substances piercing the gum. It was found that it was a piece of sharp metallic wire, which got into the mouth with rice and curry.⁸ In another case, where the complainant while travelling by Air was served with food containing broken glass articles which was noticed while chewing the food, it was held as deficiency in service.⁹ Thus, it is said, supply of defective goods amounts to gross deficiency of service.¹⁰

Interestingly, Sec. 3 (1) (f) The Food Safety and Standards Act, 2006 says “consumer” means and includes person and families purchasing and receiving food in order to meet their personal needs. Unlike Consumer Protection Act which defines consumer to include buyer and user of goods, the Food Safety and Standards Act clearly insists contractual privity between the seller and ‘consumer’ of food. It clearly excludes the persons who are not the purchaser of goods. It again excludes the purchaser of food for commercial purpose. However, the term ‘consumer’ is defined in a broader way to allow persons and family to lodge a complaint against sellers of food on many issues including issues of unsafe food.

The Food Safety and Standards Act prescribe stringent punishment to the wrong doer for providing unsafe food. Sec. 65 provides compensation in case of injury or death of consumer. It says that(1) if any person whether by himself or by any other person on his behalf, manufactures or distributes or sells or imports any article of food causing injury to the consumer or his death, it shall be lawful for the Adjudicating Officer or as the case may be, the court to direct him to pay compensation to the victim or the legal representative of the victim, a sum of —(a) not less than five lakh rupees in case of death; (b) not

8 Indian Airlines New Delhi v. S.N.Sinha 1992 CPJ 62(NC).

9 Rishi Bagoria & others v. Lufthansa German Airlines & Anr, 2003(1) CPR 593 (Cal).

10 Halda Office systems Pvt. Ltd. v. Bapuji Institute of Engineering and Technology 2012 (3) CPR 97.

exceeding three lakh rupees in case of grievous injury and (c) not exceeding one lakh rupees, in all other cases of injury: the compensation shall be paid at the earliest and in no case later than six months from the date of occurrence of the incident and in case of death, an interim relief shall be paid to the next of the kin within thirty days of the incident.

Though the Food Safety and Standards Act is in an infant stage, some consumer welfare measures are initiated by some State Governments under the Act. For example, Gujarat banned *gutka* and pan *masala* completely from September 1, 2012¹¹ The Maharashtra government had recently imposed a comprehensive ban on *gutka* and pan *masala*. *Gutka* is banned in Kerala, Madhya Pradesh, Bihar and Rajasthan. In course of time, the Act will strengthen the rights of consumers of food and pave the way for ‘Safe food for all.’

CONCLUSION

Consumer has the right to obtain safe and nutritious food. Food may be unsafe for various reasons. There are many food laws in India to protect the interests of consumers of food. However, the presence of multiplicity of laws causes concern to the agencies concerning the enforcement and standard settings of food products. Instances of food adulteration and misbranding are common in both rural and urban areas and there is an urgent need to curb these evils. The Food Safety and Standards Act was passed as an integrated food law in India to provide safe food to the consumers and laid down many stringent provisions. However, it is said that The Food Safety and Standards Act is industry driven and the Food Authority is heavily bureaucratic. The following are some of observations to make the Act more effective to offer safe goods to the consumers.

1. The objectives of the Act should include the issues of consumer health, nutrition and food culture.
2. Strict labeling should be required for any food that contains even one genetically engineered ingredient or that has been produced using genetically modified organisms or enzymes

11 <http://www.business-standard.com/generalnews/news/gujarat-bans-gutkapan-masala-completelyseptember-11/51774/> (Last visited on September 4, 2012).

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3. The definition of “unsafe food’ under the Act does not include adulteration which makes the food unsafe whereas the definition of ‘adulterant’ under the Act includes any material which makes food unsafe.
4. Again, the definition of ‘unsafe food’ has not excluded food becoming unsafe because of innovations without any reliable scientific basis as in the case of GM food.

In spite of the above shortcomings, the recent legal innovation of integrated food law in India in the form of The Food Safety and Standards Act undoubtedly protects the interests of consumers from unfair practices of unscrupulous traders and the effective implementation of the Act will really make them to feel that they need not ‘to pray again and again to the gods’¹² for (safe) food.



¹² Sayed Ahmed Marei “The World Food Crisis.” (1976) p.101.

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IMPLEMENTATION OF CONSUMER WELFARE LEGISLATIONS: REASONS FOR FAILURE AND SOLUTIONS

*Vandana Vasudevan**

INTRODUCTION

It was an innocuous mango but it caused me terrible suffering for a week, ironically just days before I write this piece. It looked fine when I cut it- yellow and juicy like *langda* mangoes are. But the last bite felt like I had swallowed a shot of concentrated chemical. Before I knew what was happening, it had already been ingested and immediately there was a strong burning sensation in the mouth and gullet. The allergy caused needed a bout of antibiotics to subside. I had been a victim of fruits which had been ripened by the illegal use of carbide gas. It brings me to the first law we will examine for this paper.

I. Food Safety and Standards Rules and Regulation, 2011

Across the markets of this country, fruits do not look or taste the way they used to a generation ago. They no longer look like nature

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intended them to be—imperfect, with blotches here and there. Plant tissues produce a chemical called ethylene naturally, which then triggers the enzymes that cause ripening. Given the compulsions of the modern economy, fruit is transported in various stages of rawness and put in large refrigerated warehouses where they are exposed to ethylene gas in low concentration—at a level safe for humans—to induce the ripening process. But as a widespread practice, unscrupulous traders—which would mean almost all traders in India—don't want to take the long route of putting fruits to regulated amounts of ethylene gas in warehouses. They use an easier solution of wrapping a small quantity of calcium carbide in a paper packet and keeping it near a pile of bananas, or a box of mangoes, for a couple of days. The moisture in the fruit reacts with calcium carbide and produces acetylene gas, which hastens the ripening process. Calcium carbide, colloquially called *masala*, is a gas used for welding steel. It's cheap; a kilo costs Rs. 25-30 and can ripen tonnes of fruit. Calcium carbide is a classified carcinogenic, besides causing mouth ulcers and gastric trouble. Acetylene affects the nervous system, triggering anything from dizziness to seizures. In fact, so widespread is the usage of *masala*, that not using it can become a unique advertising platform. Mother Dairy in 2011 started advertising its Safal papayas as naturally ripened without the use of calcium carbide, to differentiate from papayas being sold elsewhere.

In case of food items, we don't need to look far for evidence of adulteration. The advertisements of the Ministry of Consumer Affairs titled 'JagoGrahakJago' themselves acknowledge the rampant adulteration that exists in household food items and gives tips to consumers to detect them. The ads warn that milk could be synthetic. Sugar and salt can be contaminated with chalk powder. Chilli powder could be mixed with brick powder grit or saw dust. The common adulterant in tea leaves is artificial colour. Mustard seeds could be substituted with harmful argemone seeds. Coriander powder may have horse dung in it. All festivities are now discoloured by adulterated *khoya*(dried milk) and false silver foil on sweets which is often aluminium.

Section 2.3.5 of the Food Safety and Standards Regulation 2011, (Prohibitions and Restrictions on Sales), titled, "prohibition of use of

carbide gas in ripening of fruits” says “*No person shall sell or offer or expose for sale or have in his premises for the purpose of sale under any description, fruit which have been artificially ripened by use of acetylene gas, commonly known as carbide gas.*”

The Food Safety and Standards Act 2006 exists to protect consumers from impure food items. In August 2011, all previous food safety laws including the Prevention of Food Adulteration Act 1954, were all consolidated as the Food Safety and Standards Rules and Regulations 2011, under a single regulator Food Safety and Standards Authority. (FSSA) The law is well thought out and detailed but its implementation is erratic.

Reasons for Failure

a) Jurisdiction of each state

The health ministry occasionally awakens to the gravity of fruits ripened using carbide and alerts all state food authorities under the Food Safety and Standards Authority of India to this issue. A procedure for detection of acetylene in godown or treatment chamber for detection of artificial ripening of fruits as developed by C.F.T.R.I., Mysore was circulated to all the States/U.Ts. Requesting them to bring it to the notice of all enforcement staff of the State/ U.T. for their guidance and compliance. Health is a state subject and while the ministry can warn and castigate, the strictness of implementation is up to each state government.

b) Lax control over wrongdoers

Ahead of Diwali in 2009, 10 tonnes of spurious *khoya* disappeared hours after it was seized in east Delhi. In January 2010, the Gujarat government admitted in the state high court that 80% of those charged with adulterating food have been acquitted due to laxity and delays by the government in prosecuting them.

Random raids on mandis are made by each state government, erratically, which is clearly not enough, because the practice of infusing masala is very well entrenched among growers and traders. The leader of the fruits and vegetables trade in Mumbai has been quoted in a news report of July 2011 saying, “Calcium carbide was

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being used for ripening fruits all across the country from a long time. I fail to understand why raids are being conducted all of a sudden.”

c) **Ill equipped watchdogs**

Enforcement agencies like the FSSAI have shortage of staff and there are too few laboratories for testing food items for impurities

d) **Manufacture and sale are mostly unorganised**

India being a vast and extremely diverse, complex country, the point of sale could be anywhere - an organised supermarket or a *mandi* or a lone hawker selling fruits and vegetables on a push cart in a neighbourhood. The adulteration itself can happen by the wholesaler or at any of these points of sale. In case of food items, a significant proportion is manufactured and sold in the unorganised sector. Spices are ground, masalas are mixed and *papad* rolled out in homes or small establishments and could be sold loose or in unbranded packets at weekly *haats*. Again, adulteration could happen anywhere in this chain. Therefore, spreading the net to catch wrong doers becomes difficult for the law enforcers.

Solutions

- a) Ensuring compliance will however require strict monitoring. Instead of random raids, authorities must record a certain number of raids conducted on merchants every month. There should be a calendar drawn up for inspections in the different *mandis* and bazaars of the city and action taken immediately.
- b) In case of food products BIS needs to be mandatory and not voluntary. Groceries and masalas are a mass consumer item and their adulteration is a health issue. Just like baby food is on BIS's mandatory list, so should groceries.

II. LIFTS ACT /INDIAN ELECTRICITY ACT

In Cuffe Parade, Mumai's Jolly Maker Towers-1, which is considered to be India's richest cooperative housing society, early one morning in April 2010, one of the Otis lifts went berserk. It suddenly clanged shut, zoomed up at great speed right up to the 25th floor and then slid to stop between the 24th and 25th floors. The chain which

balances the counter weight of the lift fell through the 25 floors and hit the bottom with an almighty clang that jolted the residents.

Technical flaws have been responsible for 35 fatal accidents in Mumbai alone in the past four years. This happens when someone is entering and the lift car moves, leaving the person to fall into the shaft and crash to his death many feet below. Or when the doors open while the car is in motion, resulting in the occupant getting crushed between the car and the landing floor. That's what killed a Gurgaon teenager, a 50-year-old lady in Borivali, Mumbai, a three-year-old in Bangalore, two men in separate incidents in Pune and many more between 2008 till now.

The reason for almost every elevator accident is poor maintenance. With some regional variations, the various lift acts-the Gujarat Lift Act 2000, Tamil Nadu lift Act 1997, Karnataka Lift Act 1974 etc. broadly lay down the following rules: Every lift has to obtain a licence before it is operational from the Lift Inspector who is the Electrical Inspector of the district

1. Lifts have to be inspected before grant of a license and every three years
2. In addition to inspections by the electrical inspector, the owner of the lift has to undertake maintenance activity every six months and report to the inspector
3. Lifts older than ten years have to be replaced

The Lift Acts state many more safety precautions and rules of operation. But the frequent accidents show that maintenance of lifts is lax. Sometimes licences to operate the lifts itself are not obtained. A TOI news report of 10th May 2012 states that 8% of Bangalore's lifts were unlicensed.

Reasons for failure

a) Shortage of engineers to do periodic checks

In January 2010, Mohammad Afzal, a Mumbai activist and crusader for lift safety in buildings, perused the records of the public works department of Maharashtra, under the Right to Information (RTI).

He found that the Bombay Lifts Act 1939 and the Bombay Lift Rule 1958 require that the PWD is supposed to inspect every lift in Mumbai-Pune-Thane twice every year. The maintenance contractor is supposed to check the lift once a month. Given the number of lifts in Mumbai, the number of PWD engineers was woefully inadequate and mathematically each lift's turn to be checked would come only once in four years. Afzal filed a public interest litigation against the state, which prompted an increase in the number of engineers. Despite that, today for 86,550 lifts in Mumbai, there are 37 engineers. Assuming no other leave except Sundays, which still means 15 inspections per engineer per day—practically impossible given the time required to file reports, investigate accidents. Afzal is also questioning whether the 21 new engineers inducted are qualified to test elevators or have they been inducted as an eyeash.

A news report on 10th May in the Times of India says that the Karnataka State Electrical Inspectorate (KSEI) officials said that 100 strong contingent of electrical inspectors and engineers were not enough and that the department was short-staffed.

b) Areas not coverage by the legislation

There are some parts of the country which are not governed by any lift laws. In July 2011, when a thirty two year old man was crushed to death by the lift in his residential building, it was brought to light that Noida and Greater Noida, twin cities on Delhi's borders which are part of the National Capital Region, were not covered under any lift laws!

c) Archaic Laws

Many states have not amended their Lift Act for a few decades while in the mean time, lift technology has changed, more buildings have come up; the way lifts are maintained has changed. The West Bengal Lifts Act is of 1955. The Karnataka Lift laws are of 1974. A mega polis like Mumbai which has close to one lakh lifts (including Pune, Thane and Navi Mumbai) and is synonymous in popular imagination with multi-storeyed buildings, is governed by two archaic lift laws-The Bombay Lift Act 1939 and the Bombay Lift

Rules 1958. The idea of housing societies was not prevalent when these laws were made. So, issues like maintenance of lifts by outside contractors and penny pinching by housing societies who scrimp on getting trained engineers are not covered by these laws, leaving them inadequate.

d) Penalties are not enough deterrents

Despite poor lift maintenance in contravention of the law, resulting in loss of life; the penalties laid down in the Lift Acts are only monetary with no threat of imprisonment. The monetary penalties too are hardly daunting.

The Tamil Nadu Lifts Act, 1997, says that whoever violates the Act in any way “*shall be punishable with fine which may extend to one thousand rupees and in the case of a continuing contravention with a further fine which may extend to fifty rupees for every day during which such contravention is continued after such conviction.*” The Gujarat Lift Act 2000, says the following about penalties : “*punishable with fine not exceeding five thousand rupees and, in the case of continuing contravention, with an additional fine which may extend to one hundred rupees for every day during which such contravention continues after conviction for the first such contravention.*”

e) Lack of public awareness

Lifts are supposed to have a maintenance certificate which shows when they were last checked hung inside the lift for users to see. They are supposed to be fire resistant. Every building has to have a fire lift too for emergencies. But since Indians are very poor at prevention and only react after a disaster takes place, few are aware of these rules. Their ignorance allows building owners and law enforcers to exploit the situation.

Solutions

1. Mandatory not recommended guidelines

Today lifts are supposed to be installed according to a ‘recommended’ set of safety guidelines by the Bureau of Indian Standards and monitoring of whether even these are being

followed is almost nil. The BIS norms for lift installation need to be mandatory, not just recommendations.

2. Stricter Penalties

The Lift Act needs more teeth. A small monetary penalty is hardly a deterrent for rich builders to maintain the lifts of their housing complexes. Since negligence results in nothing short of death, the punishment for an offender needs to be far more frightening.

3. One single law

Electricity may be in the concurrent list of the constitution, and that may have been suitable in the pre-liberalised era. Lifts might not be that common in India then, so the lift inspection job was given to the Electricity Inspector of the district and the Electricity Act 1910, superseded the Lift Act. But in a new modern India which has seen a boom in the construction of high rises needs a different approach towards lifts and their safe operation. Currently each state has its own lift laws, some archaic, some upgraded, each with different norms about how often inspection should be done. Lifts need one central law that can be uniformly implemented without ambiguity.

4. Stricter Implementation

Until there is a central law, at least the implementation of the existing lift laws needs far more stricter implementation. In all my years of living in different high rises in Delhi and Mumbai, I have never seen a lift inspector. I have only sometimes seen the maintenance engineers of the lift company. There is enough evidence to show that monitoring of maintenance by the owner is lax.

III. DRUGS AND COSMETICS (AMENDMENT) ACT OF 2008

The Associated Chambers of Commerce and Industry of India (ASSOCHAM) has projected that the market size of the Indian cosmetics industry which is currently estimated at Rs.10,000 crores will double to be worth Rs. 20,000 crores by 2014 due to emergence of a young urban elite population with rising disposable incomes and increase

in working women looking for lifestyle-oriented and luxury products. ASSOCHAM points out that the industry has mainly been driven by improved purchasing power and rising fashion consciousness among people and industry players spending heavily on the promotional activities to increase consumer awareness.

But cosmetics, even top end brands are full of chemical substances like sodium laureth sulphate, cocamidemonoethanolamine or acrylate copolymers and their use needs to be regulated. Many of the chemicals in coloured cosmetics and creams and lotions have been found to be toxic in the west and at least some of them have been banned. According to a study by the European Journal of Cancer, there is a link between breast cancer and under arm deodorant usage. Deodrants, contain propylene glycol which blocks the sweat gland and aluminium whose usage is linked to Alzheimer's disease. One in three brands of lipsticks tested, contained more lead than was the upper limit acceptable. Lead is toxic and causes DNA abnormality. Sunscreens contain oxybenzone, a chemical linked to cellular damage and hormonal disturbances. European governments are far stricter and have banned 1,222 more chemicals in cosmetics than the US.

The American website www.ewg.org/skindeep lists nearly 70,000 cosmetic products and rating them for safety on a scale of zero to 10. A rating of zero to two is deemed safe. Some of the popular, international cosmetic and toiletries brands endorsed by Bollywood stars and available all over India have ratings of four and above. So did some creams which are household names in India. Given the increased use of cosmetics among women in India, there is almost no action on the issue of toxic substances in cosmetics.

This was a much needed amendment made in 2008, to the anachronistic Drugs and Cosmetics Act 1940. The section 17E of 'Adulterated Cosmetics' was one of the new additions to the Act. It says the following:

For the purposes of this Chapter, a cosmetic shall be deemed to be adulterated,

- a) if it consists in whole or in part, of any filthy, putrid or decomposed substance;

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- b) if it has been prepared, packed or stored under insanitary conditions whereby it may have been contaminated with filth or whereby it may have been rendered injurious to health;
- c) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;
- d) if it bears or contains, for purposes of colouring only, a colour other than one which is prescribed;
- e) if it contains any harmful or toxic substance which may render it injurious to health;
- f) if any substance has been mixed therewith so as to reduce its quality or strength.

While periodic arrests are made of people who sell spurious drugs, there is no one testing the cosmetics in the Indian market. Even a cursory look at the cosmetic products stocked in the grocery or chemist shop will show that there are many local brands of creams and lotions, some of them claiming to be herbal and some not even listing their ingredients. In smaller towns, such dubious brands are more commonly found. When tests show that international brands like L'oreal, Garnier and Revlon have toxic substances in them, one can safely assume that the unchecked production of local brands has a very high probability of being adulterated

Reasons for Failure

1) The Act is poorly detailed

The amendment about adulteration talks of “poisonous or deleterious substances” or “harmful or toxic substances” which may be injurious to health. It does not clarify which substances are harmful or toxic. How will they be checked and by whom and how frequently? What will be the manner of checking?

2) No audits

There have been no reports, as far as one can see, of adulteration in cosmetics which have been unearthed during any inspection. No brand or product has been taken off the market after being unsuitable. It is unrealistic to imagine that this was because every

cosmetic sold in India is perfect, so it is most likely to be because of no audit being done.

Solutions

1) Detailing Toxic substances

The list of toxic substances in cosmetics is widely available, thanks to the work done by western countries. The Act needs to append them so that it is clear to manufacturers as to which substances are deemed harmful.

2) Periodic Audits

There needs to be regular checking of the ingredients used in various cosmetic brands, the results should be made public and penalty levied if the manufacturer is found guilty of including harmful chemicals.

3) Taking inputs from consumers

The bare manner, in which the amendment on adulteration in cosmetics has been worded, shows a cursory effort at understanding the issue. It clubs all cosmetics under a generic heading, not even differentiating between coloured cosmetics and creams, a basic categorization in the cosmetic industry. This shows that the addition to the act has been done without much study and absolutely no inputs from actual users. This needs to be rectified, so that more flesh and bones can be added to the law.

IV. ISI MARK

Though ISI is not a legislation, it is a standard set up by the government for the welfare of consumers, so it is pertinent to discuss its implementation in this paper.

ISI stands for the Indian Standards Institute, a body set up when India gained Independence to create standards needed for orderly commercial growth and maintaining quality in industrial production. By the mid-80s the country's socio-economic climate had changed, triggering the need to set up a stronger body, the Bureau of Indian Standards (BIS),

which then took over ISI. But the term “ISI mark” continues to be used to mean that a certain product conforms to the quality standards set up by the government.

Who can use the ISI mark? BIS is authorised by a legislation of 1986 to offer product certification. This certification programme is basically voluntary, (except for a specified list of items which have safety implications like gas valves, baby food etc. which require mandatory certification). Other than that, any manufacturer who feels confident enough that his product has the ability to meet the BIS standard can apply for product certification.

BIS Standards

There are 19,000 standards formulated for products across the 16 categories. It covers so many areas with such meticulous detail that there actually shouldn't be any substandard products.

A body called the Certification Advisory Committee, consisting of people from sectors such as manufacturers, consumers, government agencies, industry associations, exists under BIS to advise on policies and formulation of standards on different products. To ensure that consumer interests are effectively represented in these committees, BIS invites NGOs or experts to participate in the committee of their interest.

The structure and policies of BIS to ensure quality and safety to consumers are well formulated in pain staking detail and well intentioned. Logically, with such stringent standards to protect consumers, our markets must feel like those in western countries, where you can pick a product and ponder about its suitability for you, but not worry about safety and quality. Then why are consumer complaint forums bursting at the seams about things which broke down immediately after buying or about promises not kept by manufacturers? Here is why:

Reasons for Failure

Adherence to BSI is mostly voluntary

With only 30,000 manufacturers across industries granted licences to use ISI mark, obviously there is an ocean of manufacturers who

are operating at sub-par standards because there is no pressure on them to conform to any quality standard.

Standards slip after getting certification

Manufacturers slip on standards once they get the ISI certification and BIS is not vigilant enough in catching on.

False claims of ISI mark

Unscrupulous producers use the ISI mark and cheat consumers without actually applying for the license through BIS.

No way of checking if guidelines are followed

In case of a PIL filed in Mumbai on the issue of toxic Chinese made toys being sold in the Indian market, the BIS admitted that while it has set guidelines for safe toys it doesn't have the where with all to identify who is not adhering to them.

Solutions

1. Make guidelines mandatory

Currently if a manufacturer wants to apply for an ISI certification, he has to submit his application at the BSI office. A BIS officer will then evaluate at the factory level, the capability of the manufacturer to produce goods according to the standards laid down for the category. Samples are tested at the factory and outside. If the evaluation is satisfactory and the product passes the tests, a licence is granted and the manufacturer can use the coveted ISI mark. Or the manufacturer provides test reports to BIS after it gets the product tested in the bureau's labs and gets the necessary documents certified independently. BIS is supposed to check the veracity of the reports within a month and grant a licence for usage of the ISI mark.

Such a structure is prone to manipulation and is based too much on trust which will not work in a corruption prone society like ours.

BSI should do away with the voluntary scheme and make it mandatory for all products to conform to basic quality standards.

- **Clamp down on manufacturer falsely using the ISI mark**

BIS conducts enforcement raids on such manufacturers, whose numbers have been increasing every year, but these need to be more regularised and offenders penalised.

CONCLUSION

The above discussion examines four legislations that were made for providing consumer welfare. The legislations are very different from each other, pertaining to widely varying industries. The Food Safety and Standards Rules, 2011 is the umbrella legislation for all food safety related issues including prevention of adulteration in edible goods. The Lift Act lays down laws for elevator operations. The Drugs and Cosmetics (Amendments) 2008, covers the pharmaceutical and cosmetics industry while the ISI mark assures quality. Yet, despite their divergent nature or focus area, there are some common lacunae which results in their only partially achieving the objectives they were supposed to achieve.

1. Poor implementation by the enforcing agency
2. Inadequate penalties which are not sufficient to deter wrong doers
3. Being outdated and archaic, so not able to cover contemporary realities
4. Not being tightly worded to cover all possible circumstances

More significantly, there are many areas of consumer protection for which laws in India are yet to be developed or upgraded to match contemporary Indian society, like for example mobile phone radiation or online identity theft resulting in bank frauds. On the whole, Indian consumers are much less protected by laws than their counterparts in the western or south East Asian countries. Indian law makers and enforcers have a lot more to do in order to grant our consumers welfare and protection.



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25 YEARS OF CONSUMER PROTECTION ACT : CHALLENGES AND THE WAY FORWARD

*Saurabh Arora & Shalini Panigrahi**

INTRODUCTION

“Consumer is the king of market, if he is getting exploited than the market will be ruined.”

This is the most common saying which clearly depicts the importance of Consumer in today’s market or society as whole. In every moment of life, every individual is a consumer irrespective of his race, creed, religion, sex, age. Consumer Protection and right to information are now an integral part of the life of an individual and we all have made use of them at some or the other point in our daily routine. In the present era of Globalization, the role of consumer is very wider and relevant legislations should safeguard the interest of consumers.

Now it is universally accepted that the consumer has a right to be provided with all relevant information in order to avoid exploitation and

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made a considered choice in availing of products and services. The Consumer Protection Act, 1986 provides the meaning of “consumer.”

Thus, the concern of consumer protection is to ensure fair trade practices, quality of goods and efficient services with information to the consumer with regard to quality, quantity, potency, composition and price for their choice of purchase. In present day scenario, consumers were not evincing any interest to know about their right to information about the quality, quantity, potency, purity, standard and price of goods and services and their protection against unfair trade practices.

The aim of this paper is to highlight the significance of consumer protection and right to information as a boon for today’s generation. Starting with good food is the corner stone for survival, health and development for current and succeeding generations. Manufacturers are not often concerned about the quality of goods and services and their impact on the health of people and environment. Instead of the consumer guiding the producer about what should be produced, it is the producer who decides what the consumer should want. Now days, Consumer is very much deprived of right to information. The Research Scholar concentrates on the consumer’s outlook to have information on certain food items and ingredients. The Government is taking the initiative by imposing moratorium over certain food items and products but not reaching to the Consumer’s awareness about the moratorium. The food adulteration, unsafe food, genetically modified food and exaggeration of products lead to consumer as scapegoat due to non-exercise of his right to information. In this paper, the Research Scholar provides the consumer’s right to information on Milk Adulteration, food adulteration, melamine contents in milk, salmonella contamination in peanut butter, ban of dairy products from china, carefulness towards dietary supplements already recalled by Food and Drug Administration, USA and advisories of Food Safety and Standards Authority of India (Ministry of Health and Family Welfare), Prohibition of use of carbide gas for artificial ripening. Due to lack of information, consumer is deprived of his right.

The Consumer Protection Act, 1986, (CPA) protects the interests of the consumers in the widest form in India. This is so because the CPA is an additional forum to vindicate consumer’s claim and it is not

an alternative remedy. In *Skypak Couriers Ltd v. Tata Chemicals*¹ Ltd. the Apex Court observed that even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to a certain deficiency of service, then the existence of arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force. Thus, the scope of CPA is very wide and it practically covers all sorts of disputes between a consumer and provider of goods and services.

The Primary Focus of the Act

According to me the Act focuses primarily on four areas:

1. Marketing and advertising practices.
2. Consumer agreements and contracts.
3. Franchise agreements.
4. Strict liability.

In addition, there are a number of other areas that are visited. Chapter 2 of the Act regulates the specific rights of the consumer. Some of them are mentioned below:

Consumer Right No. 1:

Right of equality: this right entails a prohibition on any form of unfair discrimination in the consumer market, including the right to unlimited access to goods and services, the right to high-quality goods and services, the right to fair pricing of goods and services and the right to lodge complaints.

Consumer Right No. 2:

Right to privacy: this right entails certain limits on the unfettered use of consumer's personal information for unsolicited direct marketing campaigns by requiring all direct marketers to provide consumers with an "Opt out" option for unsolicited marketing

¹ AIR 2000 SC 2008, 2000 (3) BLJR 1681.

communication. Consumers can also register a pre-emptive block on a register to be operated by government or industry.

Consumer Right No. 3:

Right to Choose: this entails the right of a consumer to select a supplier of his or her own choice, the right to cancel or renew a fixed term contract without penalty or charge, the right to receive quotes prior to authorisation for repairs of maintenance, the right to cancel direct marketing transactions within five business days without incurring penalties and the right to return goods and receive refunds within fifteen days.

Consumer Right No. 4:

Disclosure and information: this right entails provisions which require simple and transparent contracts which supply consumers the right to information in plain and understandable language, requiring the compulsory display of prices and provision of transaction records, the right to sale records such as receipts and invoices, requiring product labels and trade descriptions not to be misleading and allowing the consumer the right to the identification of deliverers, installers and others.

Consumer Right No. 5:

Fair and responsible advertising, marketing and promotion: this right prohibits unfair marketing practices such as bait marketing, referral, negative option marketing and sets standards for customer loyalty programs

Consumer Right No. 6:

Fair and honest dealings: this right prohibits false, misleading and deceptive representations; prohibits overselling and overbooking; and prohibits unconscionable conduct.

Consumer Right No. 7:

Right to Fair, just and reasonable terms and conditions: this right prohibits unfair, unreasonable or unjust contract terms and requires consumers to be given free copies of contracts. This right outlaws unilateral changes to contracts and in addition outlaws certain types

of agreements (minors, negative option, etc) or any form of contracting out.

Consumer Right No. 8:

Right to Fair Value, Good Quality and safety: this right facilitates the access to quality service, safe goods and services and redress by providing statutory warranties for safety and quality and most importantly by extending strict liability to retailers for illness, injury, damage to property and death as a result of defective goods or improper labelling.

Consumer Right No. 9:

Right to Accountability from Suppliers: this right provides that consumers that are subject to lay-by agreements may be entitled to the supply of equivalent or superior products, alternatively, request full refund of money paid, plus interest, where the goods or services provided are defective or improper. Furthermore, suppliers in possession of any prepaid certificates, credits, vouchers, membership fees or other money belonging to the consumers, must not treat such property as theirs; exercise care, diligence and skill; and assume liability for any losses suffered by consumers in this regard.

RTI HELP DESK

The RTIA-05² is a proactive, enabling and dynamic statute. For an enhanced consumer protection we need to combine the benefits of both CPA and RTIA-05. The best remedy to a consumer can be provided if we club both the preventive as well as curative remedies. The problem seems to be lack of awareness in these two fields more particularly regarding the RTIA-05. The RTIA-05 is a recently enacted legislation and public awareness in this regards is not up to the mark. To achieve this task the govt. of India has constituted the first ever and sole RTI HELP DESK in India. It is regularly spreading awareness about the RTIA-05 and solving the problems and queries of people of India.

2 Right to Information Act, 2005.

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The RTI HELPDESK has discussed the scope of RTIA-05 for the benefit of general public. In fact, both CPA and RTIA-05 are assisting in enforcing the constitutional mandates of right to speedy trial as mentioned U/A 21 of the Constitution of India. So much so that RTIA-05 can be said to be protecting basic feature of the Constitution.

However, the RTIA-05 has both positive and negative aspects that are aptly mentioned in the annual review of the RTI HELP DESK. The liability of Public Information Officer (PIO) assisting a Public Authority must be properly appreciated and agitated before the appropriate forum so that RTIA-05 can be meaningfully used. Interestingly Section 22 of RTIA-05 provides an overriding authority to the provisions of RTIA-05 even against the Official Secret Act. The intention of the Legislature seems to be clearly in favour of Section 14 (1) of the CPA, 1986 as amended by the 1993 amendment maintaining transparency in the governmental functioning. The same can be very effective if we adopt a sound e-governance policy in India. The RTI HELP DESK made a request to the Central Information Commission to use Information and Communication Technology (ICT) for its various administrative purposes. The Commission was kind enough to not only consider those suggestions but also playing a pro-active role in utilizing ICT for its administrative purposes. However, the Government seems to be lagging far behind particularly regarding a sound E-mail base that can effectively help in the effective implementation of RTIA-05.

Advertisement

Advertising is any paid form of non-personal presentation and promotion of ideas, goods or services by an identified sponsor. In today's fast-paced, high-tech age businesses use advertising to make prospects aware of their products and services and to earn profits through increasing their sales and sales turnover. Advertising reflects contemporary society. The making of an ad copy, its message, its illustrations, the product advertised, the appeal-used all these have a social flavour. Advertising affects society and gets affected by it. It is therefore, necessary to use this weapon with caution to avoid a corrosive effect on social values.

Can we escape ourselves from advertisements? Consumers are bombarded with more than 1500 commercial messages a day. For most

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companies, the question is not whether to communicate but rather what to say, how to say it, to whom and how often. To reach target markets and build brand equity in this cluttered market advertisers sometimes overstep social and legal norms. This paper attempts to explore the ethical concerns in advertising. Ethical norms deal with character, norms, morals and ideals. They give an idea of what is fair or unfair or what is right and wrong. The ethical principles underlie social policies and are dictated by the society we live in. Like any other profession, the advertising field is governed by the laws and enactment governing the mass media. By citing live cases the paper discusses the nature of problems faced by the consumers through misleading advertisements and evaluates the relative efficacies of institutional mechanisms, laws and regulations available for easy redressal of consumers. Outdated laws, poor enforcement of them are some of the lacunas in order to control advertising.

In the current business world with a large variety of goods and services, advertising is becoming one of the most important instruments of existing and potential 'customers' and 'visitors' information, awareness and interest in the cause of persuasion. The company marketing depends primarily on different types of advertisements to enforce that their products are better or more sufficient than the competitors. Recently, the advertising grows over business economic interests – in advertising concepts are intertwined economics, sociology, psychology and aesthetics issues. For this reason, advertising interpretation is a complex problem because each person perceives the information in their own way, and the information itself is never completely objective. It is very important that advertising unfairness factor would always stay below a principle of justice. Advertisers, by submitting misleading advertising, which affects consumers' decisions, try unfairly convince consumers to believe in advertisers' ideas and thus affect the other person's ability to compete. By impact of misleading advertising consumers end up purchasing items at a higher price or at a lesser quality than they had intended. User's interests are violated, while trying to suggest that the product or service has unique features - in this case the user gets manipulated to promote himself to accept disadvantageous decisions. In certain scenarios, misleading advertising may occur in order to boost an individual's status as is the case with

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political advertising. Misleading advertising can occur in order to boost membership for instance through sporting clubs or church donations. As advertising has the potential to persuade people into commercial transactions that they might otherwise avoid, many governments around the world use regulations to control false, deceptive or misleading advertising. “Truth” refers to essentially the same concept, that customers have the right to know what they are buying. False advertising, in the most blatant of contexts, is illegal in most countries. However, advertisers still find ways to deceive consumers in ways that are legal or technically illegal but unenforceable. Because of that reason, deep attention in the EU is paid for legal regulation of advertising in order to protect consumer rights and not to damage their economic interests. It is prohibit for economic subjects to perform any acts contrary to fair business practices and good management of customs affairs, including the use of advertising, which in accordance with EU regulations and the laws of the Republic of Lithuania are considered misleading. EU tries to approximate the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm ‘consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors. EU tries to protect people from actions or omissions which by deceiving the consumer prevent him from making an informed and thus efficient choice.

When is advertising deceptive

The Constitution of India guarantees freedom of speech. Special restraint is needed in commercial speech including advertising. An advertisement is called deceptive when it misleads people, alters the reality and affects buying behaviour. According to Federal Trade Commission (USA) deception occurs when –

1. There is misrepresentation, omission, or a practice that is likely to mislead.
2. The consumer is acting responsibly in given circumstances.
3. The practice is material and consumer injury is possible because consumers are likely to have chosen differently if there is no deception.

Deception exists when an advertisement is introduced into the perceptual process of the audience in such a way that the output of that perceptual process differs from the reality of the situation. It includes a misrepresentation, omission or a practice that is likely to mislead. These may include the following:

1. Violates Consumers' Right to Information:

Use of untrue paid testimonials to convince buyers, quoting misleading prices, disparaging a rival product in a misleading manner are some examples of misleading. Advertisers of anti-aging creams, complexion improving creams, weight loss programs, anti-dandruff shampoos and manufacturers of vitamins or dietary supplements are usually guilty of making exaggerated product claims. Some of the examples of advertisements in this category are:

“A fairness cream is advertised with the claim that its user will get a fair complexion within a month.

“Parle G Original Gluco Biscuits puts a tall claim of being ‘the World’s largest selling biscuits’ on its package on the basis of the results of a survey done in the Year 2003 by A. C. Nielsen.

“Advertisements by some financial companies such as doubling money in a given time without base to justify claim are deceptive in nature.”

“Many colleges misrepresent in their prospectus that the institution is affiliated to a particular university and an accredited one. In one of the cases decided in 2004 the complainant took admission believing representations made in prospectus that college was recognized by the government of Punjab and was also approved by the Central Council of Indian Medicine for the whole course of five and a half years. The complainant deposited Rs. 1,00,000/- as donation and Rs. 65,000 as admission fees. Four years after 1996-97 no exams were being held. The Punjab University, CCIM and Baba Farid University did not grant any affiliation for want of requisite infrastructure. It was held to be a case of unfair trade practice and deficiency in service.

In the case of Bhupesh Khurana v. Vishwa Buddha Parishad a class action suit was filed by twelve students who had joined the BDS

course offered by the Buddhist Mission Dental College run by Vishwa Buddha Parishad. The students' complaint was that the college, in its advertisement and prospectus inviting applications for the course, had given the impression that it was affiliated to Magadh University, Bodh Gaya and recognized by the Dental Council of India and was fully equipped to give the degree of Bachelor of Dental Science. However, after joining the college and attending classes, the students found to their dismay that the annual examinations were not being held because the college was neither affiliated to Magadh University, Bodh Gaya and nor recognized by the Dental Council of India. As a result the students lost two precious academic years, but also spent money on fees, hostel charges, etc. holding the college to be deficient the National Commission directed it to refund the admission expenses of all the twelve students along with interest of 12 percent .

2. Violates Consumers' Right to Safety:

When an advertisement for cooking oil says that using the said oil frees the user from heart problems, then such an advertisement is misrepresenting the facts.

Companies advertise products highlighting health cures and drugs of questionable efficacy and health gadgets of unknown values. Tempted by an advertisement, claiming to increase a person's height, Nadiya, a Class VIII student having a height of 135cms got admitted to Fathima Hospital for surgery, on 24-7-1996, for increasing her height. The surgery was conducted and a ring fixator was fixed on the legs which had to be adjusted every six hours. To her dismay Nadiya found her left leg shorter by ½ inches, and therefore she could not walk. By September 1996, the pain had increased and the complainant was bed-ridden till March, 1998. The Commission held the hospital and the doctors negligent and deficient in their service and directed them to pay Rs. 5, 00,000/- with costs amounting to Rs. 2,000 to the complainant.

Many of the juice, sharbat, wafer manufacturing companies do not mention the ingredients used in it. For example, Haldiram offers many types of sharbats which are artificially flavoured but the front

side of the package has big and attractive pictures of the fruit itself, creating misunderstanding amongst the consumers.

3. Violates Consumers' Right to Choice:

When material facts which are likely to influence buying decisions are not disclosed the advertisement becomes deceptive. In several advertisements it is stated that 'conditions apply' but these conditions are not stated. Not disclosing material facts amounts to deception. For example, the recent print ad for Videocon mentions a 1-ton split-AC available for Rs. 15,990/, a very attractive offer. But there is a small asterisk which mentions three things in small font. They are: "Conditions apply"

"Prices valid in Delhi and NCR under exchange only"

"Actual products may differ from those displayed in the offer"

Such ads not only mislead consumers by concealing important information from them. Advertisements for general medicines available over the counter, never talk of the side effects that may result from their frequent use.

4. Advertisements directed at children

Children in India constitute 18.7 percent of the World kids population and one-third of our country's population is under the age of 15 years. Thus in India, children form a massive 30 percent of the total population and this segment is growing at a rate of 4 percent per annum. This means a huge target market of 300 million is available to advertisers and they are already focusing on the kid channels.

A survey by A C Nielsen UTV's research partner showed that an average child watches TV for about three hours on week days and 3.7 hours on weekends, the time spent on television goes up with age and the preferred language of viewing is Hindi across all age groups. Apart from the programmes children also view a lot of the advertisements.

In India the advertising expenditure per year on products meant for children but purchased by parents, like health drinks, is 12 to 15 percent of the total Rs. 38,000 million. Ad expenditure per year on

products meant for children and also bought by them such as chocolates is seven to eight per cent. The advertisers rely on the children's pester power on their parents. The ethical issues involved are advertisers try to exploit. Young children by advertising products that are not conducive to their health.

"Children are naïve and gullible and are vulnerable to advertiser's enticements."

"They lack independent judgment and experience."

"The line between the children's shows and commercials is fading."

"Is the strategy of selling to parents by convincing the children a fair one? Most parents would think it is unfair."

5. Puffery

It means the use of harmless superlatives. The advertisers use them to boast of the merits of their products (best, finest, number one, etc.). Even law permits trade puffing or exaggeration. But subjective statements of opinion about a product's quality are so untrue that it becomes an outright spoof and which is not true. In 1997 MRTP Commission asked Hindustan Lever Company to stop its campaign that its Pepsodent toothpaste was 102 per cent better than the Colgate toothpaste. Hindustan Lever was restrained from "referring to any Colgate Toothpaste in any manner, either directly or indirectly, by means of any allusion or hint in its TV commercials or newspaper advertisements or hoardings, by comparison of its New Pepsodent with any product of Colgate in general and Colgate Dental cream in particular.

6. Use of sex appeals

Sex appeal is used explicitly to sell all kinds of things. It is used to gain consumer attention. It is used where it is not even appropriate to the product or service being advertised. Women are shown as decorative objects or as sexually provocative figures for advertisements for products and services where women are not required. The corporate sector should be encouraged to eliminate the violation of women's rights online and the internet service

providers to undertake efforts to minimize pornography, trafficking and all forms of gender based violence.

7. Bait advertising

It means taking advantage of consumer psychology and depriving consumers of a choice. For example, a consumer is lured into a retail outlet by an advertisement for a low cost item and then is sold a higher priced version or to be defective. Once the consumer enters the store, he or she is pressured to purchase another more expensive item. On visiting such stores, one finds a handful of outdated products on the discount announced and other better products as 'fresh stock.'

8. Advertising of harmful products

Advertising is not restricted to products that are good for people. According to law in India advertisements for cigarettes, liquor, paan masala, products that are harmful to the public continue to find a place despite the ban imposed by the government in private channels, cable, and through the use of surrogates. Examples include Mc Dowell's Soda, and Wills lifestyle stores which are seen as surrogate advertising for Mc Dowell's Whiskey and Wills cigarettes respectively. The issues involved are:

- Whether such products should be advertised or not?
- If they should be advertised, and they will need to be advertised so long as their production is not banned, in what media should they be advertised?
- Further, if they are permitted to be advertised, whether the warning signs on the packages of these products really serve any purpose?

The role of in-film advertising and surrogate advertising in promoting the sale of these products also needs to be examined more closely. Advertisers pay film producers to place their products in certain film scenes by integrating the products in the film scripts and screen plays.

My Views

1. We have to educate our neighbours and consumers and ensure cautiousness.

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2. The consumer help line number 1800-11-4000, where consumer can complain, seek information or counseling through BSNL and MTNL telephones. It must be made accessible through all telephones.
3. As a consumer, we must know what we are eating and to have a choice in this matter. The reality is that we are eating misbranded, adulterated, unsafe food all the time without our knowledge.
4. Labelling laws need to be drastically tightened to ensure people are aware of food that is genetically modified.
5. Hopefully, the policy makers will use the moratorium window to strengthen the regulatory process. And provide consumer choice through mandatory labelling.
6. Politicians should supposed to serve the people of India, instead serving the interests of biotech seed corporations.
7. GM crops should be introduced in our country only after proven tests and experiments.
8. It is necessary to eradicate consumer health care system which provides selective care through a multiplicity of schemes and programs, and discriminates on the basis of residence (rural-urban) in providing for entitlements for healthcare.
9. The government to quash the BRAI Bill even before it is tabled in the Parliament and earn the respect of its citizens while restoring faith that this government respects democracy and the wellbeing of its citizens.

CONCLUSION

The protection of consumers is not only a responsibility of the State but also a mandate against commercial and business entities. A satisfied consumer base is essential for the successful existence of commercial enterprises. At the same time consumer matters must be taken care of by the use of Information and Communication Technology in India. An online environment must be provided to take care of consumer rights and disputes in a transparent, efficient and hassle free manner. The

consumer dispute resolution essentially requires use of “Alternative Dispute Resolution Mechanism” (ADRM) as well as “Online.”

“Dispute Resolution Mechanism” (ODRM). Although ODR in India has started gaining momentum yet there is lot to be done. If we analyse the culture of ADR in India than one fact is very clear. In India we have not yet given due importance to the ADRM, much less to ODRM. The e-governance plan of India is silent in this regard. This is one of the flaws of the ICT strategy of India that is not in conformity with the contemporary standards.

The electronic governance in India is not taking care of the ODR perspective and the same will be a fatal mistake by all counts in this consumer driven society. We need to capatilise “collective expertise” and an “ideal public-private partnership” base in India to effectuate consumers rights in India. Let us hope that the Consumer Protection Act, 1986 will be amended suitably to accommodate the concerns discussed in this work.

The more guidelines are required within a nation-state, national laws may prevent some of this harm, but once national boundaries are crossed, their effectiveness is limited and consumers can hope for very limited protection. The position of the consumers much stronger in this era of globalization and privatization where the sudden unchecked advent of Multi National Companies has to be balanced with the protection of the rights of the consumers by the legislature and the judiciary.

As a consumer we have much concern about the money, choice, health and safety of the life. In last few years’ market is found to be influenced by the false, misleading advertisements or representations, bargaining, offering gifts, prizes, contests and hoardings attracting public for product or services.



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CONSUMER LEGISLATION IN INDIA: ISSUES AND CHALLENGES

*Mirza Juned Begand & Habib Zafar Khan**

INTRODUCTION

Consumer is an individual who purchases and uses goods and services. The technological developments have multiplied the need of consumer and have changed the tradition that guided our living in the past. The rapid industrial development has not only brought new innovations and products into common use but has also affected the outlook of our living. The simple kinds of goods which were catering our needs have been replaced by complex and complicated products. In view of the socio-economic changes which have taken place, it is expedient to bring up a strong and broad base consumer movement which may give impetus and bring about socio-legal measures necessary for consumer protection.¹

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1 Rajendra Kumar Nayak, "Consumer protection law in India," Indian law institute Publication (1st edn. 1991).

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The Consumer Protection Movement has come to stay as one of the most important social movement of our time. It serves as a fine example of the innovative manner in which society responds to the problems of exploitation of the weaker section by the stronger one, a factor that accompanies the progress of the human race.

In the wake of the new Economic Policy, which seeks to liberate Indian Industry from the myriad administrative and legal controls, consumerism in India has undergone an unrecognized transformation. It has been observed: “Consumerism is the term used to describe activities of government design to protect consumer is not a recent development. The increase in emphasis on consumerism in recent years has given the appearance that the philosophy of governmental protection of consumers from certain business practices is a modern development. But there are many examples of such governmental activity which has been a part of the law for many years...many of the functions of most administrative agencies are related to consumer protection.”²

Consumers play a vital role in the economic system of every nation because in the absence of effective demand that emanates from them, the economy of the nation virtually collapses. Every trader is also a consumer. The society cannot be divided in two sections of consumers and traders in the way in which the tenants or labour as a class can be segmented against landlords or employers.³

The total effect of law in the field described as “consumerism” has proved to be a mixed blessing. Finally, many laws design to protect consumers as a practical matter have given very little protection. The law may lead consumers by the hand but it can’t force them to make an intelligent decision. Many laws designed to protect consumers have created tons of paper work & red tapism for the business community with no oblivious benefit to the consuming public.

2 Corley, Black & Reed, “The Legal Environment of Business,” 513(4th edn. 1998).

3 Avtar Singh, “Law of Consumer Protection Principles & Practice),” Eastern Book Co., Publication (4th edn. 2005).

CONSUMERS' RIGHTS

Eight rights are incorporated in the United Nations Guidelines for Consumer Protection (UNGCP). These are:

1. **Right to Safety:** The right to be protected against goods which are hazardous to life and property.⁴
2. **Right to Information:** The right to be informed about the quality, quantity, purity, price and standards of goods.⁵
3. **Right to Choice:** The right to be assured access to a variety of products at competitive prices, without any pressure to impose a sale, i.e., freedom of choice.
4. **Right to be Heard/Represented:** The right to be heard and assured that consumer interests will receive due consideration at appropriate forums.⁶
5. **Right to Seek Redressal:** The right to get relief against unfair trade practice or exploitation.⁷
6. **Right to Consumer Education:** The right to be educated about rights of a consumer.⁸
7. **Right to Basic Needs:** The basic needs such as adequate food, drinking water, shelter, clothing, health care, electricity and education of a consumer must be satisfied.

4 Bureau of Indian Standards Act, 1986, Prevention of Black Marketing and Supply of Essential Commodities Act, 1980; Prevention of Food Adulteration Act, 1954; Agriculture Produce(Grading and Marketing)Act, 1937; Essential Commodities Act, 1955; Motor Vehicle Act, 1988;

5 See CUTS Vitamins Cartel Case, CUTS(2003), 'Pulling Up Our Socks-A Study of Competition Regimes of Seven Developing Countries of Africa and Asia: The 7-Up Project,' CUTS, Jaipur.

6 Examples-Parliamentary, Petition, Standing Committees, Consumer Organisation, Central and State Consumer Protection Councils, Competition Commission of India, The Telecom Regulatory Authority of India (TRAI), Reserve Bank of India(RBI)

7 Consumer Protection Act, 1986; Competition Act, 2002; Arbitration and Conciliation Act, 1996 and other sectoral regulation provides redress mechanisms.

8 Indira Gandhi National Open University (IGNOU), Consumer Welfare Fund (CWF), newspapers, electronic media, sectoral regulators provides for such consumer education in India.

- 8. Right to Healthy Environment:** A healthy competitive environment ensures effective competition and consumer welfare by promoting innovation and market oriented tools.⁹

These rights are included in the Twenty-Point Programme by the Government of India. The Rights No. 1 to 6 are also preserved in the Consumer Protection Act, 1986.

Consumer Protection in India

Government of India has enacted several laws to protect the interests and rights of consumers. Some of these laws are as follows:

- a) **The Essential Commodities Act, 1955** which aims to regulate and control the production, supply and distribution and prices of essential commodities.
- b) **The Prevention of Food Adulteration Act, 1954** which aims to check adulteration in food items and eatables.
- c) **The Drugs and Cosmetics Act, 1940** which seeks to ensure purity and quality in drugs and cosmetics.
- d) **The Standards of Weights and Measures Act, 1956** which aims at ensuring that consumers get the right weight and measurement in products.
- e) **The Household Electrical Appliances (Quality Control) Order, 1976** which seeks to ensure safety and quality in the manufacture of electrical appliances.
- f) **The Consumer Protection Act, 1986** which seeks to provide speedy and inexpensive redressal to the grievances of consumers.

The Consumer Protection Act, 1986

The Act provides following remedies to an aggrieved consumer:

- 1) Removal of defects in goods or deficiency in service.
- 2) Replacement of defective goods with new goods of similar description which shall be free from any defect.

⁹ <http://www.cuts-ccier.org/pdf/ConsumerProtectionRegime-India.pdf> accessed on 12-08-12

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- 3) Return of price paid by the consumer.
- 4) Payment of compensation for any loss or injury suffered by the consumer.
- 5) Discontinue the restrictive or unfair trade practice, and not to repeat it.
- 6) Withdraw the hazardous goods from being offered for sale and not to offer them for sale.
- 7) Provide for adequate cost to the aggrieved party.

The Consumer Protection Act provides for a three-tier system of redressal agencies: one at district level known as District Forum, second at state level known as 'State Commission' and third at national level known as 'National Commission.' A complaint is to be made to the district forum of the concerned district where the value of goods and services and compensation, if any, is up to Rs.20 lakhs, to the 'State Commission' between Rs.20 lakhs and Rs.100 lakhs, and to the National Commission for more than Rs.100 lakhs. Interestingly, there is provision for appeals against the orders of a particular redressal forum by the aggrieved party before the next higher echelon and even from the findings of the National Commission before the Supreme Court.

REASONS FOR THE FAILURE OF CONSUMER PROTECTION LEGISLATION

The Consumer Protection Act, 1986 is a central and comprehensive piece of legislation intended to sub-serve the cause of the consumers at large. Though an attempt has been made to provide a law taking in to account the current situation of the economy and the prevailing scientific advancement in the process of manufacture of products, the law requires a lot of change to meet the constantly growing and changing needs of the community. But there are some problems in functioning of the Consumer redressal mechanism; these problems are discussed given below:

1) Pendency of suit and Delay in Justice

There are plethoras of cases that are pending for years before consumer forums. Such delay in disposal of complaints under the consumer protection act has lowered the 'consumers' confidence in

these bodies. The position today that except for law suit in which substantial amounts of money are involved, the law courts have not proved to be an effective and speedy or even feasible mechanism geared to serve the needs of harassed and troubled consumers.

Inferior or substandard commodities in the marketplace are still rampant in our present day social order. These types of problems hardly reach the courts due to various formalities, procedure, cost of litigation and delay in proceedings a consumer has to face. These factors make recourse to the law either unpalatable or infeasible. That is why consumers suffer from their powerlessness more in the market-place when they find themselves unable to knock the doors of the courts for the injustice done to them and also involvement of advocates which unnecessarily complicates the proceeding, and moreover the proceedings are becoming too technical for the common consumer to understand.

2) Inoperative Dispute Redressal Mechanism

It is also true that mere enacting Law to secure the interest of consumer by itself cannot serve its object unless there is proper implementing mechanism. In India there are many laws related to consumer redressal but due to one or other reasons they have lost their path to attain its goal.

4) Lack of Infrastructure

The infra-structure has yet to be set up, the Consumer forum have no separate buildings, staff, lack adequate resources including human resources (full time employees) for translating programs and functions into effective actions and follow-up, and lack of sufficient budgetary allocation. The Central Government not paying attention to grant fund to the State Government for improving the Consumer Forum situation. The Central Government does not use its Consumer Welfare Fund in this regard, which is mostly under-utilized.¹⁰ At present many members of the district forums lack the required knowledge and skill to discharge their responsibilities.

¹⁰ 'Disorder, Disorder,' The Economic Times, issued dated 12.04.2011.

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5) Lack of Awareness among the Consumer

It is equally true that every consumer who has these problems in the market-place does not adopt the legal course for the reparation of wrongs done to him. It is also not necessary that all consumer transactions give rise to legal causes of action. The level of awareness of Consumer rights and available mechanism for the consumer grievances is very poor amongst the consumer in India.

6) Globalization and Technological effect in legislation

With the globalization, liberalization, industrialization and technological development the flowing of consumer goods beyond boundaries and by introduction of E-commerce the consumer protection legislation need to be amended to meet these exigencies.

The main reasons for the low level of Consumer awareness in India are:¹¹

- i) India have geographical dispersion with a large number of population which spend their lives below poverty line due to this Consumer redressal Policies could not reach to all section of the society.
- ii) The consumer are unable to resort and save themselves due to financial problems, poor literacy, lack of knowledge and therefore they easily get exploited by the sellers and service providers.

MEANS OF EFFECTIVE IMPLEMENTATION OF CONSUMER PROTECTION LEGISLATION

1) Need of Good Governance

An effective, efficient and fair implementation of the consumer protection legislation is one of the conditions precedents for promoting the culture of good governance and thereby ensuring the better promotion and protection of the rights of the consumers. If the rights of the consumers in relation to the quality of goods and services are assured and taken care of then there will be no cause for complaints.

11 Dr. Sushila, "Consumer Dispute Redressal Mechanism: A Critical Appraisal, Center for Consumer Protection Law and Advocacy RGNUL, Punjab.

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This situation would certainly create an atmosphere wherein the clients, customers and consumers would feel satisfied with the things needed most to them. In this context, the concerns of the good governance need to be mentioned briefly with a view to establish linkage with the concern of the consumer protection law and institutions. Generally speaking, the thrusts of the good governance movement are efficiency, effectiveness, ethics, equality, economy, transparency, accountability, empowerment, rationality, partiality and participation.

In view of these requirements of the good governance one can easily and with success establish the co-relations with the concerns of the consumer protection law and policies. From the point of view of the concerns of the consumer protection law, it may generally be emphasized that the concerns of consumers rights protection are to ensure fair trade practices, quality goods and deficiency free services with information in regard to quality, potency, components and price with a view to provide opportunity to the consumers in regard to their choices.

In view of the remedies available to the consumers under the consumer protection laws there is no doubt that at the end of the day, the efforts of the operates of law and agencies are genuine and there is a sense of commitment, the culture of good governance would pervade where in the consumers would feel highly satisfied and there would be no real cause for making a complaint or showing their dissatisfaction in anyway. Therefore, the proper and effective implementation of the laws, dealing with the protection of the consumer's rights would promote the cause and concern of the good governance.

It would, finally, be better to highlight one or two areas with a view to focus the developments in regard to the protection of consumers right as well as the concern of the good governance movement is to promote and ensure accountability of producers and providers in public domain. The judgment of the supreme courts in Lucknow Development Authority v. M.K. Gupta,¹² may be cited as an

12 (1994) 1 SCC 243, see also Ghaziabad development authority v. Balbirsingh, AIR 2004 SCW 2362.

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illustration in the instant case the supreme court while establishing the jurisdiction of the consumer disputes redressal agencies created under the consumer protection act emphasized that the service provided by a private body or a statutory or public authority are within the jurisdiction of the consumer protection act in this context, the supreme court also laid down that any defect or deficiency in such service would be treated as unfair trade practice and would amount to denial of service.

An effective, efficient, speedy and fair implementation of the consumer protection act is one of the condition precedents for promoting the culture of good governance and thereby ensuring better promotion and protection of the rights of consumers.

Therefore, the consumer forums and commissions established under the consumer protection act, need to be given extra attention to ensure its efficient, effective, fair and inexpensive functioning.

2) **Deceptive Advertising**

Some businessmen give misleading information about quality, safety and utility of products. Consumers are misled by false advertisement and do not know the real quality of advertised goods. A mechanism is needed to prevent misleading advertisements.

3) **Alternative Dispute Settlement Mechanism**

For the effective implementation and minimizing the pendency of cases and providing speedy justice to the consumer it is necessary to adopt alternative dispute resolutions. This may be done through the process of:

- Conciliation
- Mediation
- Collective bargaining
- Arbitration
- Lokadalat

All these process may be created to strength the alternative mechanism. These processes are the effective and economical system for quick redressal of public grievances. Consumer should

be encouraged to approach this process in suitable cases for speedy and inexpensive disposal of the disputes.”

4) **Conducting Awareness Programme**

The government and local agencies should conduct from time to time consumer awareness programme to awakening the consumer about their rights and knowing the redressal mechanism if violation of such rights take place. Such awareness programme which educate the poor and illiterate consumers shall be organized at district and village level at regular interval because people living in far remote and rural areas do become victim of unlawful trade practices being adopted by wrongdoers. The awareness programme can be also conducted by the mean of media which has all circulatory impact and better consequences.

In view of this, a national awareness programme required to be launched aggressively at the district and village level through state government, local voluntary consumer organization, organization of civil society, educational institutions- school, colleges, universities and research institutions and NGO's. It is said that aware consumer is an asset to the society. Various methodologies, educational institutions are expected to follow such as, seminars, workshops, lectures, discussions, colloquiums, essay competitions, quizzes etc., in the area of consumer protection and welfare to give boost the consumer protection movement in the country for the benefit of most vulnerable categories of consumers such as:¹³

- Women and children
- Youth
- Farmers and rural families
- Middle and working class

Infact, right to consumer education can be said to have an overarching importance. Since it is the gateway through which all other right can be secured.

13 Dr. Sushila, “Consumer Dispute Redressal Mechanism: A Critical Appraisal,” Center for Consumer Protection Law and Advocacy RGNUL, Punjab.

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5) Consumers' Associations

Consumers should form voluntary associations. These associations can educate and awaken consumers. They can take organized action and put pressure on businessmen to adopt fair trade practices.

6) Legitimacy for Existence

Business exists to satisfy the needs and desires of consumers. Goods are produced with the purpose of selling them. Good will, in the long run, sell only when they meet the needs of consumers.¹⁴

7) Trusteeship

Businessmen are trustees of the society's wealth. Therefore, they should use this wealth for the benefit of people.¹⁵

8) Freedom of Enterprise

Businessmen must ensure satisfaction of consumers. In the long run, survival and growth of business is not possible without the support and goodwill of consumers. If business does not protect consumers' interests, Government intervention and regulatory measures will grow to curb unfair trade practices.¹⁶

9) Settlement of Good Infrastructure

The redressal agencies like central consumer protection council, state consumer protection council, and district consumer protection council are need to be strengthening not only in terms of good infrastructure but also by updating and upgrading the knowledge and skills of the members of these redressal agencies. There is needed to constitute circuit benches for district forum. It is also necessary to constitute the separate department of consumer affairs in all the states which only deals with matter related to consumer issues.

10) Malpractices of Businessmen

Fraudulent, unethical and monopolistic trade practices on the part of businessmen lead to exploitation of consumers. Consumers often

14 http://EzineArticles.com/?expert=Dr._Gomathi_Viswanathan 1

15 *Ibid.*

16 *Supra* 14 http://EzineArticles.com/?expert=Dr._Gomathi_Viswanathan

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get defective, inferior and substandard goods and poor service. Certain measures are required to protect the consumers against such malpractices.

The business community itself can help in achieving consumer protection and satisfaction through self-discipline. Businessmen can regulate their own behaviour and actions by adopting higher ethical standards. Trade associations and chambers of commerce can check unfair trade practices used by some businessmen. The government should prescribe high mandatory standard for product and services. The government must impose duty on seller, service provider, traders and industry etc. to provide high quality of goods to consumers. The government should frame laboratory at every district level for the checking the quality of the goods or product.

11) Penalty for non-compliance of order

There must be huge penalty imposed by the court and it should be strict also so that violator shall think thousand times before violating any law or infringing any right of the consumer. The rights of the consumer are subject to be respected by the seller. Although the Act amended in 1991, 1993 and 2002 but again certain amendment in the existing laws are required for the better implementation of the law.

12) Regular Inspection and Investigation

There must be regular and effective inspection and investigation by the government agencies that make examination of the quality of product and the premises, plant and machinery in where the goods manufacture. The inspection should be conducted from grass root level to high root level i.e. from manufactures to dealer.

13) Consumer Expected to assume responsibility

It is not only the duty of the Government but consumer should also have the burning desire to know about their rights and go through redressal mechanism if their rights are violated Rights and Duties have collateral relation. Every consumer must be alert as self-help is the best help. He should educate himself and know his rights. He should not allow unscrupulous businessmen to cheat him. Consumers

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should not only exert their rights but also explicit their attitude and behaviour responsibility towards other consumer, environment and future generation.

14) Co-operation between Central and State Government

In the bilateral system for the better application of the consumer protection there must be proper co-operation between centre and State Government. It will assist smooth and uniform implementation of uniform consumer protection laws and rules across all jurisdictions. The government should effectively implement consumer related programmes and policies.

15) CPA to be strengthened

CPA has very good provisions to deal with unfair trade practice but it needs to be strengthened by providing an investigatory body similar to that under MRTP act. The VCOs can also play an important role in curbing the menace of misleading ads by taking such complaints before the consumer foras.¹⁷ The State can ensure consumer protection through legislative, executive and judicial actions. The laws enacted by the Government must be strictly enforced by the executive.

CONCLUSION

The efficient and effective programme of consumer protection is of special significance to all of us because we all are consumers. Once Adam Smith said, "consumer is the sole end and purpose of all production and the interest of the producer ought to be attended to only so far it may be necessary for promoting that of the consumer." The right of the consumer should be regarded as worthy of respect and all better legislation and redressal mechanism shall be framed to secure the right of the consumer. The active involvement and participation of Central and State Government, observance of a Voluntary Code of Conduct (VCC) by the trade and industry and the Citizen's Charter by the service provider is

¹⁷ Prof. Suresh Misra, Chair Prof., Centre for Consumer Studies, IIPA New Delhi & Members Central Consumer Protection Council, Department of Consumer Affairs, GoI.

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necessary to see that the consumers get their due. It is demand of the era is for total commitment to the consumer cause and social responsiveness to consumer needs. The consumer protection law should be implemented such to protect the rights of consumers through a sound institutional framework. Mere framing of legislation is insufficient the proper and effective implementation of legislation is also necessary. Whatever there is a loophole in the legislation which is fading the aim of the act shall be filled and the agencies which are instituted for the implementation of the act shall be governed in effective, efficient and fair manner. All these transformation shall be done to frame the society the better place to live for all.



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INTERPRETATION OF MEDICAL NEGLIGENCE UNDER CONSUMER PROTECTION ACT, 1986

*Auqib Jeelani Malik & Deepak.P **

INTRODUCTION

Medical negligence defined as¹ the failure to exercise rational caution and capability during diagnosis and treatment over a patient in accordance to the prevailing standards in force at that point of time. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires and a person is not liable in negligence because someone else of greater skill and knowledge would

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1 Ratanlal and Dhirajlal, Laws of Torts, 24th edition, 2002, edited by Justice G. P. Singh.

have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also exists among medical men; nor is a practitioner necessarily negligent if he has acted in accordance with one responsible body of medical opinion in preference to another in relation to the diagnosis and treatment of a certain condition, provided that the practice of that body of medical opinion is reasonable.

Gross medical mistake² will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of an aesthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly.

MEDICAL NEGLIGENCE

Medical profession has been brought under the Section 2(1) (o) of CPA, 1986. In a significant ruling in *Vasantha P. Nair v Smt. V. P. Nair* (1991), the national commission held a patient is a 'consumer' and medical assistance was a 'service.' A doctor is held liable for only his acts (other than cases of vicarious liability). Vicarious liability arises in case of government hospitals where the doctor is responsible, but the hospital has to pay the compensation.

It is well known that a doctor owes a duty of care to his patient. A doctor can be held liable for negligence only if one can prove that she/he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. Supreme Court make it obligatory in *Parmanand Katara³ v. Union of India* case, it was held that "every doctor, at the governmental hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life"

2 K. Vishnu v. National consumer Dispute Redressal commission & another AIR 2000 AP 518.

3 (1989) 4 SCC 286

to avoid incidence of “medical negligence” in certain cases. Medical Council⁴ of India, a statutory body which lays down standards of medical education and recognition of medical qualifications in India, registers doctors to practice in India and promote the health and safety of the public. Medical Council of India is guided by the Medical Council Act 1956 which imposes certain obligations on medical professionals, however a PIL filed in the Supreme Court by “People for Better Treatment” (PBT) in 2000 (W.P. Civil No. 317/2000), unraveled the failure of the council to perform the duty⁵ of enforcing the provisions of the Act.

The National Commission as well as the Apex Court in catena of decisions has held that the doctor is not liable for negligence if he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals and not if someone else of better skill or knowledge would have prescribed a different treatment or operated in a different way.

The Supreme Court in its land mark decision Indian Medical Association v.V.P. Shantha and Others⁶ laid down certain guidelines with respect to medical negligence and interpreted the definition of medical service under the Consumer Protection Act. It also laid down certain exception to the definition such as:

- Service rendered to a patient (free of cost or charity) by a medical professional would not fall under the definition of ‘service’ under Consumer Protection Act 1986.
- Service rendered by a doctor under contract of personal service was not covered under Consumer Protection Act 1986.

PROOF OF NEGLIGENCE

The principle of Res-Ipsa-Loquitur has not been generally followed by the Consumer Courts in India including the National Commission or even by the Apex Court in deciding cases under this Act. The Hon’ble

4 Indian Medical Association v. VP Shantha [AIR 1996 SC 550]

5 "The Four Elements of Medical Malpractice" Yale New Haven Medical Center: Issues in Risk Management, 1997

6 (1995) 6 SCC 651

Supreme Court in the case of *Dr. Laxman Balkrishna v. Dr. Triambak*,⁷ has held the view that “All medical negligence cases concern various questions of fact, when we say burden of proving negligence lies on the complainant, it means he has the task of convincing the court that his version of the facts is the correct one.” In *Sethuraman SubramaniamIyer v. Triveni Nursing Home*,⁸ National Commission held that expert opinion in medical negligence played an effective role.

CRIMINAL NEGLIGENCE

According to sec. 304 A⁹ which covers acts of medical professionals, whoever causes the death of the person due to negligence or a rash act, not amounting to culpable homicide, can be tried and suitably punished with imprisonment for 2 years or fine or both. A judgment in *Jacob Mathew v. State of Punjab*¹⁰ has made profound impact in a backward direction for appropriate adjudication of medical negligence cases in India. Supreme Court of India defined ‘criminal negligence’ under this case and held that “to prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do.”

A Bench of Mr. Arijit Pasayat and Mr. C.K. Thakkar observed that the words “gross negligence” or “reckless act” did not fall within the definition of Section 304-A IPC, defining death due to an act of negligence as culpable homicide not amounting to murder. In cases where Civil and Criminal liability of a doctor causing death of his patient comes into play, the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing with a higher degree of morally blameworthy conduct.

7 AIR 1969 SC 128

8 1997 (2) CPR 144 (NC)

9 Indian Penal Code, 1860

10 AIR 2005 SC 3180.

Recently, the highest compensation ordered by our Hon'ble Supreme Court in a medical negligence case *Nizam Institute of Medical Sciences v. Prasanth S. Dhananka & Amp; Ors*,¹¹ a techie who found himself paralyzed waist down after a surgeon damaged his spinal cord during an operation to remove a tumor in the chest, was awarded Rs.1 crore in damages by the Hon'ble Supreme Court of India. This case is one of the best examples of Medical Negligence.

CONCLUSION

Doctors have to perform their duties with due diligence. Gross Lack of competency or gross inattention, or in differences to the patient's safety can only initiate a proceeding against a doctor. The scope of medical service has to be extended under the Consumer Protection Act, 1986. Consumer disputes need to be disposed in a faster. Only a healthy medical environment can create a great society.



¹¹ (2009) 6 SCC 1.

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IMPLEMENTATION OF CONSUMER WELFARE LEGISLATIONS: REASONS FOR FAILURE AND SOLUTIONS

*Sakshi Chhatwal, Bhavuk Sharma & Pragya Wazir**

“It’s in our best interest to put some of the old rules aside and create new ones and follow the consumer - what the consumer wants and where the consumer wants to go.”

-Robert Iger

One has to understand the definition of a consumer before analysing the consumer welfare legislations. In simple words, a consumer is someone who buys and uses goods or services. The Indian law for consumer protection (Consumer Protection Act 1986 and its amendments) has defined ‘consumer’ as any person who buys any goods for a consideration.

Well, to safeguard his interests, a consumer wants to be protected from unscrupulous sellers or providers and be able to voice his grievances

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effectively and get redress when wronged. Consumer welfare is an object that the state might want to achieve and which the consumers would desire. However what would allow and facilitate this is a set of rights, clearly delineating what consumers should get.

The aim of this essay is to find an inference as to how the consumer related laws in India can be enforced properly as there has been an urgent need to update old laws so that a consumer gets a remedy for his grievances without being harassed and hence he enjoys the article purchased by him to the fullest. Therefore, this research paper will analyse the Consumer Protection Legislations in India which will include The Consumer Protection Act 1986, The Consumer Protection Rules 1987, The Consumer Protection Regulations 2005, The Bureau of Indian Standards Rules 1987, The Bureau of Indian Standards (Certification) Regulations 1988, Select Provisions of the Indian Sale of Goods Act 1979, Draft National Consumer Policy (Adopted during 2nd National Consultation on March 3, 1998). It is high time that apart from the six rights (Safety, Information, Choice, Representation, Redressal and Consumer education) which are recognised by COPRA 1986, it should also expressly include detailed guidelines for Protection of Consumer from malpractices. The present Act is moreover procedural and administrative in nature. The analysis of various consumer welfare legislations has led to an observation which has highlighted numerous reasons for the failure of the consumer protection legislation.

At one side the rationale behind the National Consumer Policy which has stemmed from Article 39 of the Indian Constitution, aiming to provide all-round welfare of the country is still lacking some of the important clauses for the welfare of the consumer.

The Consumer Protection Act 1986 indeed is a very unique and highly progressive piece of Social Welfare Legislation. The legislative intention behind this Act is to clear all hurdles in promoting competition among business units whether of domestic or foreign origin, but it fails to provide consumer friendly act which makes consumer a king in reality. The provisions of this Act are intended to provide effective and efficient safeguards to the consumers against various types of exploitations and unfair dealings, but with the changing scenario the act needs to be

amended and more consumer protection clauses are required to be encompassed within it, the suggestions are as follows :

- a) Definition of a consumer needs to be redefined in the Consumer Protection Act;
- b) Whistle Blower Protection clause should be added in Consumer Protection Act;
- c) RTI Act which should be encompassed in the Consumer Welfare Legislation for the protection of consumer interest;
- d) Consumer protection Act has relief only available for goods and not for services and it does not have an arbitration clause;
- e) Select provisions of the Indian Sale of Goods Act 1979, Draft National Consumer Policy¹ has talked about the conditions and warranties in detail but has not spoken about strict liability clause nor has it adopted expressly to protect the interest of the consumers;²
- f) Clause for Remedy for consumers against unnecessary appeals, in the form of penalties;
- g) Inclusion of Clause for bill of rights for taxi drivers in the Consumer Protection Act;
- h) The consumer protection legislation has not given any detailed guidelines of the process to be adopted further by the consumer who are victims of online fraud and it must also have chronic hazards advisory panel cooperation with states and with other federal agencies (import safety management & inter agency cooperation). E.g. Bhopal Gas Tragedy.

POLICY MATTER I

Consumer Definition needs to be redefined in the Consumer Protection Act.

1 Adopted during 2nd National Consultation on March 3, 1998.

2 European Communities Product Liability Directive Council Directive of 25 July 1985.

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Section 2(1)(d) of the Consumer Protection Act, 1986 (COPRA) defines a consumer as a 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 for any commercial purpose.

A reading of the above definition of the term consumer makes it clear the Parliament wanted to exclude from the scope of the definition the persons who obtain goods for resale and also those who purchase goods with a view to using such goods for carrying on any activity for earning. The immediate purpose as distinct from the ultimate purpose of purchase, sale in the same form or after conversion and a direct nexus with profit or loss would be the determinants of the character of a transaction-whether it is of a “commercial purpose” or not. Thus buyers of goods or commodities for “self-consumption” in economic activities in which they are engaged would be consumers as defined in the Act.

In *Laxmi Engineering Works v. PSG Industries*,³ the Supreme Court laid down the test as close and direct nexus with the commercial activity. It is not the value of goods but the purpose for which it was purchased

³ AIR 1995 SC 1428.

that matters. The persons who purchase the goods for consumption or use in the manufacture of goods or commodities on a large scale with a view to make profit will all fall outside the scope of the definition of consumer. In *Super Engineering Corp. (Huf) v. Sanjay Vinayak Pant & Anr.*,⁴ the National Commission held it necessary that there should be a close nexus between the transaction of purchase of goods and the large scale activity carried on for earning profit.

In *C. P. Moosav. Chowgle Industries Ltd.*,⁵ the National Commission held that the case falls under Section 2(1)(d)(ii) and appellant is entitled to compensation.⁶

In *Dr. Vijai Prakash Goyal Petitioner v. The Network Limited Respondent*,⁷ petitioner ordered for supply of Ultrasound Scanner Model 212 to the respondent. Respondent supplied the machine with a Warranty of one year. It was alleged that after installation, the machine went out of order. It was found that the machine needed to be replaced, as it being defective. It was pleaded that petitioner is not a consumer as defined in Consumer Protection Act, 1986. Reiterating its earlier judgments in *Jay Kay Puri Engineers and Others v. Mohan Breiveries & Distilleries*⁸ and many other decisions,⁹ the National Commission held that purchaser of a machine would be a consumer if the defect in machine develops within warranty period even though the machine was purchased for commercial purpose.

In *Super Computer Centre v. Globiz Investment Pvt. Ltd.*,¹⁰ the National Commission held that the purchaser of the machinery would certainly be a consumer in respect of defect in machine during period of warranty.

4 1992-CPJ-1-95-NC.

5 2001-CPJ-3-9-NC; 2001-CPR-2-92-NC.

6 Also refer to *Synco Textiles Pvt. Ltd. v. Greaves Cotton & Co. Ltd.* 1991-CPJ-1-499-NC..

7 1998-CPJ-1-31-NC.

8 I (1998) CPJ 38 (NC)

9 In *H.C.L. Ltd. v. - Krishna NanuNaik* 1993-CPJ-2-174-NC ; 1993-CTJ-1-101-NC.

10 III (2006) CPJ 265 (NC)

Thus it is clear from a series of judgments that the person who purchases goods for commercial purposes is also a consumer, if the defects in the goods purchased are found during the warranty period.

POLICY MATTER II

Why Whistle Blower Protection clause should be added in Consumer Protection Act? “Don’t put your head up, because it will get blown off.”¹¹

A strong and urgent need for a whistle blower in our consumer legislations is felt. A whistle blower is a person who tells the public or someone in authority about alleged dishonest or illegal activities occurring in a government department, a public or private organization or a company. The whistle blowers have the right to reveal legal violations that abuse the legislation or regulations specifically designed to promote public health, safety or welfare. They are a selfless entity for public interest and organizational accountability.

The Constitution of India and the Statutory Enactments are the two traditional methods of Whistle blowing. The Constitution of India provides means of Whistle blowing in the form of PIL and enforcement of “Public Law Remedy” for the violation of Fundamental Rights.

The Socio-Justice tool through which these aspirations of the Constitution and people of India are achieved is known as “Public Interest Litigation” (PIL).

After feeling the need for whistle blowing and adoption of it in the form of PIL in the constitution of India, the constitution still does not provide for protection for whistle blowers. It is hard to stand the fact that the government of India is still considering to adopt a whistle blower protection law.¹² The evolution of PIL in India has an interesting background. In the famous case of *Keshavananda Bharati v. State of*

11 Annexure 1.

12 Bill is however currently pending in the upper house of Parliament, Rajya Sabha for discussion & Further Passage. The Bill was introduced in Rajya Sabha on 29 March 2012. Corruption can also be eradicated to some extent by the help of the whistle blowers.

Kerala,¹³ the Supreme Court has regarded PIL as a method of whistle blowing and has considered it as an important tool for execution of justice. But the question that lies is why then our legislature is so hesitant to pass the Whistle blower protection Act or whistle blower protection clause in the consumer protection Act. Supreme Court has agreed in various landmark judgments tracing its roots from *Keshavananda Bharati v. State of Kerala*¹⁴ to *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*¹⁵ to *Fertilizer Corporation Kamgar Union v. U.O.I*¹⁶ that whistle blowing will ultimately put a brake on the arbitrary and unreasonable conduct of various state and private authorities towards consumers. Supreme Court has termed PIL/whistle blowing as the “Doctrine of Basic Structure.” But the absence of the Whistle blower protection Act or whistle blower protection clause in the consumer protection Act is some what destroying the concept of basic structure.

The statutory enactments like Indian Penal Code, 1860, the Prevention of Terrorism Act, the Code of Civil Procedure, 1908, etc also provided means for fighting against civil and criminal wrongs and the same also proved effective deterrent for the commission of further wrongs. They are however, incomplete without the means of “information technology” that can provide the safest, secure and strongest form of Whistle blowing. This takes us to the contemporary modes of Whistle blowing.

The Government of India has been ignorant towards whistle blowers dilemma as it fails to provide protection to the identity of those who expose corruption under the Right to Information Act. The Whistle blowers Act at least protects the career interest of the whistle blowers and their identity. But a more important issue is the risk whistle blowers face in terms of physical harm. There is no provision for providing physical protection to them.

Solution to this issue is that there should be a provision in the Right to Information Act itself that the identity of whistle blowers will not be

13 (1973) 4 SCC 225.

14 *Ibid.*

15 (1976) 3 SCC 832.

16 AIR 1982 SC 344.

revealed under the Act. The clause should be in such a manner that it protects the interest of all affected.¹⁷

Firstly, the Act should establish a simpler and fairer standard for whistle blowers in proving retaliation by their agencies. Secondly, it must give whistle blowers the right, for the first time, to appeal their own cases to the Merit Systems Protection Board. Thirdly, the Act shall enhance the independence of the Office of Special Counsel and required OSC to work in the interest of whistle blowers. Fourthly, the Act must also give whistle blowers increased procedural protections and important guarantees of confidentiality. Finally, whistle blowers should have the right to information against their appeal made and they must also know what is happening in their case and how far they are protected by law.

The important question lying here is whether the Act's protection should be extended to members of the Armed Forces, the Secret Services and the Police or not? In our opinion, it should be extended, subject to the condition that the disclosures shall not jeopardise operations or endanger the lives of personnel. The judiciary may have to remain outside its purview unless the Contempt of Courts Act is first amended to provide for a public interest defence.

POLICY MATTER III

Why RTI Act should be encompassed in the act as per section 6 of Consumer Safety Act 1972(US)?

Authorities under the CPA are quasi-judicial and they can provide a "curative solution" only. The need of the hour is to adopt a "preventive approach" as well. That essentially requires an action on the "administrative side." This is the reason why Right to Information Act, 2005 assumes significance in the context of consumer rights. While the CPA provides for "quasi-judicial" remedy which takes care of the 'administrative remedy.' A good "combination" of both the preventive as well as curative remedies can protect the consumer's rights in the widest form. The Right to Information Act, 2005 is a proactive, enabling and dynamic statute. For an enhanced consumer protection we need to combine the benefits of both CPA and Right to Information Act, 2005.

17 The U.S. Whistle blowers Protect Act of 1989 (amended in 1994).

The problem seems to be lack of awareness in these two fields more particularly regarding the Right to Information Act, 2005, the consumer dispute resolution essentially requires use of “Alternative Dispute Resolution Mechanism” (ADRM) as well as “Online Dispute Resolution Mechanism” (ODRM).

In India, we have not yet given due importance to the ADRM, much less to ODRM.

POLICY MATTER IV

Apart from goods, relief should be available for services also in the Consumer Protection Act.

The judgement of the Supreme Court in Lucknow Development Authority v. M.K. Gupta (1994) 1SCC 243,¹⁸ the Supreme Court while establishing the jurisdiction of the Consumer Disputes Redressal Agencies created under the Consumer Protection Act emphasized that the service provided by a private body or a statutory or public authority are within the jurisdiction of the Consumer Protection Act. In this context, the Supreme Court also laid down that any defect or deficiency in such service would be treated as unfair trade practice and would amount to denial of service.

Hence the Consumer Protection Act needs to be amended and relief should be made available for the services which are availed by the consumers at all levels, under the present act following remedies are available to consumers:

- Removal of defects from the goods;
- Replacement of the goods;
- Refund of the price paid;
- Award of compensation for the loss or injury suffered;
- Discontinue and not to repeat unfair trade practice or restrictive trade practice;
- Not to offer hazardous goods for sale;

¹⁸ See also Ghaziabad Development Authority v. Balbir Singh, AIR 2004 SCW 2362.

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- To withdraw hazardous goods from sale;
- To cease manufacture of hazardous goods and desist from offering services which are hazardous in nature;
- if the loss or injury has been suffered by a large number of consumers who are not identifiable conveniently, to pay such sum (not less than 5% of the value of such defective goods or services provided) which shall be determined by Forum;
- to issue corrective advertisement to neutralise the effect of misleading advertisement;
- to provide adequate costs to parties.

POLICY MATTER V

Why Consumer Protection Act should be amended and arbitration clause should be brought under its purview?

In *Skypak Couriers Ltd v. Tata Chemicals Ltd.*,¹⁹ the Apex Court observed that even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to certain deficiency of service, then the existence of arbitration clause will not be a bar to the entertainment of the complaint by the redressal agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force. Thus, the scope of CPA is very wide and it practically covers all sorts of disputes between a consumer and provider of goods and services.

In, *Saipriya Estates v. V.V.L. Sujatha*,²⁰ a person approached a district forum in Hyderabad for a legal dispute which arose under an agreement containing an arbitration clause. The proceedings in the district forum were objected to by the opposite party against whom the remedy was claimed on the ground that since the agreement contained an arbitration clause the dispute under the agreement only laid before an arbitration tribunal and not the consumer forum.

¹⁹ AIR 2000 SC 2008, 2000 (3) BLJR 1681.

²⁰ Writ Petition No. 4205 of March 13th, 2008. (<http://www.indiankanoon.org/doc/442010>)

The High Court of Andhra Pradesh held that the remedies under the Consumer Protection Act, 1986 are in addition to other laws and hence an arbitration clause cannot bar a person from approaching the district forum for a consumer dispute. However, it is important to remember in case of consumer contracts which contain arbitration clauses if the arbitration process commences when a consumer cannot approach a district forum. Therefore it is advisable for a consumer to quickly approach a district forum, before arbitration proceedings are commenced.

POLICY MATTER VI

Why strict liability clause should be expressly included in the Consumer Protection Act?

The Consumer Protection Act 1987 is an Act of the Parliament of the United Kingdom that made important changes to the consumer law of the United Kingdom. Part 1 implemented European Community (EC) Directives,²¹ the product liability directive, by introducing a regime of strict liability for damage arising from defective products.

When European Community (EC) Directives of 1985²² made product liability strict, the consumer protection Act 1987 and giving effect to the Directive in England, adopted the same approach making the producers, jointly as they are severally, liability to consumers. But the consumer protection Act 1987 didn't adopt strict liability clause expressly in there act.

The aim of strict liability is to ensure that the consumer would be compensated from any one of the suppliers in the supply chain. A further purpose is to promote accountability and responsibility to consumers even in the cases where there is no contractual nexus between the consumer and the supplier, such as the importer or distributor.

This clause is going to have a dramatic effect from the retailer side as many of the big retailers may find it too risky to stock goods that

²¹ 85/374/EEC.

²² *Ibid.*

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could pose a potential risk. If they can't understand how they are meant to store and stack your product, they may decide not to stock it at all.

Apart from Competition Act 2002, the strict liability clause will make a desirable buying market for consumers free from malpractices.

POLICY MATTER VII

Why Consumer Protection Act should have a Clause for Remedy for consumers against unnecessary appeals, in the form of penalties?

The rising amount of frivolous appeals from Retailers, manufacturer and service providers have led to miscarriage of justice,²³ even though section 26 was inserted in the Consumer Protection Act in 1993, which provides for a maximum penalty²⁴ of Rs. 10,000 on complainants if their complaints are baseless.²⁵ This provision too has not worked well because not only the penalty amount is incommensurate with the harassment meted out to the defendant but also it takes years to arrive at that finding.²⁶ It is advocated that the penalty amount should be increased to 1 lakh.

The need of hour is that the consumer protection act should expressly state that misleading the court shall be a punishable & cognizable offence. The legislature should make it a policy matter to preserve the true essence of consumer welfare legislation.

POLICY MATTER VIII

Why should consumer protection act have a Clause for bill of rights for taxi drivers?

The Bill is a statement of principles, outlining expectations of both taxi drivers and passengers. The purpose of the Taxi Bill of Rights is to improve taxi service. The consumer protection act should have a clause for malpractices practised by taxi drivers in order to save the consumer

23 Citibank NA v. Pradeep Kumar Patri RP NO 2587 of 2011.

24 Dwarka Dheesh Investment v. NK Bhatia CPRps 305 2012 NCDRC Jan 6, 2012

25 R. Narasimha Reddy v. Kuchakula Surender Reddy, F.A. No. 502 of 2011, decided on March 5, 2012

26 RCI India Pvt Ltd v. Parthasarthy NCDRC, Revision Petition No. 443 of 2007

from harassment. There should be a mention of rights of taxi passengers in detail either in the act or in the bill:

- A driver may not refuse service to a customer based on the length of trip, or proposed method of payment. Human rights law protects against discrimination based on a number of things, including race, religion, physical disability, sex or sexual orientation.
- Drivers may not ask a passenger to pay more than the displayed fare.
- Passengers may need assistance entering or exiting the taxi, and storing items. Taxi drivers may not add charges to the fare for handling luggage.
- Disabled persons have the right to travel by taxi with a certified assistance dog that sits on the floor and is held by a leash or harness. Assistance dogs include guide dogs for the visually impaired and service dogs for people with other disabilities.
- Smoking is not permitted in taxis, as they are considered enclosed work places. As the driver, it is his responsibility to respect that and to ensure that the passengers do, too.
- If a customer requests a receipt, the receipt should include information such as Taxi Company, taxi number and driver name, if requested.

The legislature should regard it as a policy matter and provide the consumers with Taxi Driver's Bill of Rights, and the ministry of Transportation should be partnered with Consumer Protection to establish telephone and web-based services where feedback regarding taxi services can be directed for the welfare of consumers.

POLICY MATTER IX

Why consumer protection legislation should have detailed guidelines for victims of online fraud?

The OECD (Organisation for economic co-operation and development) adopted E-Commerce Guidelines to foster fair commercial practices on line. But as the online market place grew, so did awareness that crooks could use cyberspace to dodge the law by locating in one

country and targeting consumers in another. However, the procedure to be followed by a consumer after being a victim of cyber fraud is not mentioned in any of the provisions of the Consumer Protection Act.

With more than 3,311 hubs spread all over the country, India is fast emerging as a leading e-commerce market place globally, says a recent report by eBay, a popular e-commerce hub. However, the industry is faced with the challenge of ensuring consumer confidence in keeping their identities and information secure. Some of the common e-commerce security threats looming large over the industry include identity theft, data security breaches and phishing, which predominantly figure on the list of consumer complaints. As the biggest casualty of the emerging risk factors is the trust of the consumer in digital commerce, it becomes imperative for any business to take necessary steps to reduce customer concerns about shopping and banking online.

A few basic guidelines can go a long way in making the experience of online shopping a fruitful exercise. One of the most important decisions a customer is required to take during online transaction is to choose the payment gateway. Such guidelines are missing from the Consumer Protection Act.

Since online shopping is constantly evolving, in emerging markets like India, shoppers need to be aware of different techniques used by merchants to use the web as an interactive platform to sell their products. Various new e-commerce platforms are mushrooming in India, but not every site pays adequate attention to user information security, both financial and otherwise. Given that a lot of these are start-ups, there is an additional responsibility on the sites to instill trust in the consumer's mind, who are warming up to the e-commerce platform.

Many online shopping services do not guarantee refund in case the goods are not delivered. A proper system for addressing customer grievance like an exclusive customer care number can be helpful. The new challenge, in online shopping, lies in identifying the so-called alluring deals that offer huge discounts on products. Some of these deals offer products of inferior quality from suppliers, which lack credibility, creating confusion among the potential consumers about fake and genuine products.

Undoubtedly, significant progress has been achieved in building an effective strategy against cyber fraud – educational campaigns, technical prevention measures and law enforcement capabilities and co-operation have all advanced. Statistics-gathering and analysis of the situation and taking relevant steps in order to safeguard the interests of the consumers is very important. Measuring the impact of consumer education would help improve methodologies for designing and running further campaigns. An analysis of the different kinds of initiatives conducted in member countries and their impact on consumer understanding and behaviour could provide a useful basis from which to derive best practices. In a country like India, legislative changes are still needed to enable authorities to successfully investigate and take enforcement action against fraud, particularly in the cross-border context. OECD member countries are committed to achieving further significant progress against cyber fraud to ensure that the risks lurking on the Internet do not outweigh its benefits for consumers, as well as for economic and social development as a whole.

Had there been a detailed procedure talking about the steps and measures to be taken by a victim of online fraud, the Consumer Protection Act could have been more effective and valuable. But since, the legislature has framed laws in a disconnected way; hence these laws lose its significance, causing a great disadvantage to the consumers for whom these laws are enacted. Therefore a need for a uniform law is felt wherein; all laws dealing with the interests and protection of consumers are provided in an elaborated manner.

POLICY MATTER X

Why consumer protection legislation should have chronic hazards advisory panel in cooperation with states and with other federal agencies?²⁷

Bhopal gas tragedy is the best example of chronic hazard in which among the 500,000 people exposed to the gas 20,000 have died till date and 120,000 continue to suffer devastating health effects as a result of

²⁷ Chronic Hazard Advisory Panel SEC. 28.[15 U.S.C. 2077] of Consumer product safety act 1972.

25 YEARS OF CONSUMER PROTECTION ACT : CHALLENGES AND THE WAY FORWARD

their exposure; the tragedy shows the existence, nature and extent of chronic diseases which included cancer Hazards, severe respiratory issues, reproductive issues which were as a result of toxic material like Lead, Nickel, Copper, Chromium, Hexachlorocyclohexane and chlorobenzenes which were found in soil samples. Mercury was found to be between 20,000 to 6,000,000 times the standard levels in soil.

The inclusion of clause of chronic Hazard advisory panel shall help to tackle such kind of issues in future which will provide advice in respect of e chronic hazards of cancer, birth defects, and gene mutations associated with consumer products for consumer welfare. The clause will enable the federal- state cooperation to investigate the matter relating to health, safety or consumer protection assistance.

“The customer is the most important visitor on our premises. He is not dependent on us. We are dependent on him. He is not an interruption on our work. He is the purpose of it. He is not an outsider on our business; he is the 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.”

-Mahatma Gandhi



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