

20. The above reasoning was given by the Bench based on the facts of that case and the original Section 6 of the main Act. The effect of death of father prior to 5-9-1985 entitling a daughter for a share arose in this case. Now, a major change is brought about by virtue of the 2005 amendment bringing in new situations. But Section 29(A) with its *Non-Obstante* clause is still there as it is which means that Section 29A continues to except the applicability of Section 6. The reason is, now Section 6 of the Act is on lines with Section 29-A but Section 29-A is applying notwithstanding Section 6. Can it therefore be said that the two sections would apply ? If Section 6 applies to the whole of India, where is the need for retaining Section 29-A in the Act ? Therefore it looks as though that the central amendment under Act 39 of 2005 is incomplete and requires to be remedied so as to harmonise that section with the State amended sections by taking necessary measures. Till then the apparent anomaly persists causing hardship to the sharers.

21. There seems to be another conflict also. While Section 29-B of A.P. Act provides for devolution by Survivorship in some cases, this is changed in Section 6(3) of Central Act.

22. Previously, as per Section 24 of the main Act, re-marriage of widow was a bar to succession to property. Now this Section 24 of the main Act is deleted. The bar was originally under The Hindu Widows Remarriage Act, 1856. The reason for this deletion of the 1856 Act is because that 1856 Act itself was repealed by Central Act No.24 of 1983 w.e.f. 31-8-1983.

23. From the above discussion, I feel that there is lacuna existing between Section 29-A of the State and the new Section 6 of the main Act. It is for the Parliament or the concerned State Legislatures to consider this and bring uniformity in the Act as early as possible to remove the anomalies and give finality of the statute.

CONSUMER PROTECTION ACT, 1986 – SUGGESTIONS FOR AMENDMENTS

By

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The Consumer Protection Act, 1986 should be renamed as “*The Protection of Consumer Rights Act, 1986*” and the preamble must be amended to state that the Act is for the better protection of the rights of consumers and for that purpose it provides for the establishment of Consumer Councils and “*Consumer Rights Fora and Commissions*” for the protection and enforcement of Consumer Rights and for redressing the consumers’ grievances and for matters connected therewith or incidental thereto.

The Act is a remarkable piece of social welfare legislation and an innovative blend of the principles of the law of contracts, sale of goods and torts. Though it is in addition to and not in derogation of the provisions of any other law for the time being in force (Section 3), the clause in certain enactments ousting the jurisdiction of a Court or Tribunal or other authority in relation to matters referred to would come in the way of invoking remedy under the Act. The Act should, therefore, be given an overriding effect

by providing that the rights and remedies under the Act and those under any other law for the time being in force are mutually exclusive and notwithstanding any other law for the time being in force, a consumer shall be entitled to enforce his rights and avail his remedies under the Act.

The conventional definition of a 'Consumer' as a potential purchaser of products and services offered for sale is purely in economic terms. The modern view, however, is that monetary exchange or consideration is not regarded as essential to the definition of a 'Consumer'. The inference is that even free services, opinions, statements, assurances *etc.* are also covered by the definition, though they are not commercial products or services in the traditional sense. The Act, albeit being a modern legislation obliterating the outdated doctrine of 'caveat emptor', has adopted the traditional view in the definition of a 'Consumer' in Section 2(1)(d). Principles like Promissory estoppel (Liability against the Government or public authority), Doctrine of Legitimate expectation and Doctrine of Public accountability under Administrative Law, Doctrine of Constitutional Torts under Constitutional Law and Liability for misstatements under the Law of Torts *etc.*, fasten liability on the Government or public or other authorities, even though their liability is not founded on consideration. The definition of a 'Consumer' in the Act has been intentionally extended to persons who may have had no privity of contract with a trader or service provider. There is no justification, therefore, for stipulating that consideration is essential for the liability of a trader or service provider under the Act. The definition of a 'Consumer' should, therefore, be amended to accord with the modern view.

To give full effect to the legislative intent for covering prospective consumers also, as expressed in Section 12(1), the definition of a consumer under Section 2(1)(d) should be

amended by inserting the words "or agrees to buy" after "buys" in clause (i) and "agrees to hire" after "hires" and "agrees to avail" after "avails" in clause (ii).

The definition of a 'Consumer dispute' in Section 2(1)(e) as a dispute where a person against whom a complaint is made, denies or disputes the allegations contained in the complaint is not complete because even if the person against whom the allegations are made admits them, there will be a 'consumer grievance' that needs to be redressed. The definition should, therefore, be amended accordingly and the expression 'Consumer dispute redressal' should be renamed as "Consumer grievance redressal", as the latter expression has a wider connotation, implying inquisitorial resolution while the former implies only adversarial adjudication of the 'is' between the parties.

The Act does not comprehend a situation where certain goods when used by normal persons do not cause any harm, but cause injury when used by persons sensitive to such goods. The Act should be amended to provide for remedy in such cases, if the consumers are not sufficiently forewarned about the consequences of such persons using such goods.

The definition of a 'complainant' under Section 2(1)(b) includes a consumer. Sometimes, it may not be possible for a consumer himself to file a complaint for reasons beyond his control, such as being away abroad, acute illness *etc.* There should, therefore, be a provision whereby any person duly authorized by a consumer could file the complaint, on his behalf. There should also be a provision enabling any person to file a complaint, if it is in public interest or in the interests of consumers at large (*pro bono publico litigation*). The Consumer Protection Councils also should be empowered to file a complaint, if it is in public interest or if the larger interests of consumers are in jeopardy.

As the word 'any' in the definition of 'Service' under Section 2(1)(o) is significant and the definition is both explanatory and expandatory, many services are held by the Court/Tribunals to have been covered. The definition, however, excludes the rendering of any service free of charge or under a contract of personal service. It should be amended to include any service free of charge also, if a liability can be fastened on a service provider for a deficient or hazardous service or an unfair or a restrictive trade practice.

The definition of a 'person' under Section 2(1)(m) is not happily worded. It may be amended to include an individual; a company; an association of persons or a body of individuals, whether incorporated or not; a local authority and every artificial juridical person, not falling within any of the other categories.

The objects of the Consumer Protection Councils to be constituted under Sections 4, 7 and 8A by the Central/State Government at the Central, State and District levels for promoting and protecting the rights of consumers are laid down in Section 6 of the Act. However, no functions have been specifically assigned to them, although some legislative measures by way of subordinate legislation, in the form of Rules and Regulations made under the Act, have been contemplated for giving effect to the objects of the Consumer Councils. The Act should, therefore, be amended, on the lines of The Protection of Human Rights Act, 1993, to provide that the Consumer Protection Councils should perform all or any of the functions, namely (a) review the safeguards and measures provided by or under 'The Protection of Consumer Rights Act, 1986' or any other law for the time being in force for the protection and enforcement of consumer rights and recommend measures for their effective implementation; (b) review the factors that inhibit the enjoyment of

consumer rights and recommend appropriate remedial measures; (c) undertake and promote research in the field of consumer rights; (d) spread consumer rights literacy among various sections of the society, promote awareness of the safeguards and measures available for the protection and enforcement of these rights through publications, the media, seminars and other available means and organize educational programmes for the consumers, with the support and involvement/participation of the Government, public or other authorities; (e) encourage the efforts of non-governmental organizations and institutions working in the field of consumer rights; (f) review the factors responsible for any unusual or abnormal or alarming trends in the prices of goods or services and suggest to the Government, public or other authorities appropriate remedial measures for safeguarding the interests of consumers and (g) such other functions as they may consider necessary or expedient for the protection of consumer rights. To make the Consumer Protection Councils really effective, the Act should provide that the recommendations made by them in the discharge of their functions should be given due weight by the Central/State Governments followed by necessary action taken thereon. Section 5(1) should be amended to provide for holding of at least two meetings every year by the Central Council, in view of its important objects and functions.

Section 6 says that promotion/protection of the Rights of consumers is the object of Consumer Protection Councils. *But, the Rights themselves are not specifically conferred on the consumers.* This is a lacuna in the Act and the Act should be amended accordingly.

Clause (a) of Section 6 relates to the Right to safety and protection against marketing of defective products and poor services that are hazardous to life and property. There must be a recall/ban of such products/

services from the market. That is provided for in clauses (g), (h) and (ha) of Section 14(1). Clause (b) of Section 6 relates to the Right to adequate/true information to the consumer and protection from fraud, falsity, deceit and misleading devices/practices to enable him to make an informed decision. Section 14(1)(f) provides for ordering a trader or service provider to discontinue the unfair or restrictive trade practice or not to repeat it. The Act should, however, be amended to make the marketing of goods and services which are hazardous to life and property and the adoption of any unfair or restrictive trade practice by any trader or service provider offences under the Act and to confer on a Forum/Commission the power of punishing the trader or service provider found guilty of such offences, with an appropriate penalty.

On a reading of Section 2(1)(c)(iv) and other provisions, there seems to be no remedy under the Act where prices of goods or services are not fixed by or under any law for the time being in force; or not displayed on the goods or any package containing such goods; or not displayed on the price list exhibited by a trader or service provider by or under any law for the time being in force; or such price list is not exhibited at all; or the goods are not packaged but sold as they are and excess or unreasonable price has been charged by the trader or service provider. A remedy for such contingencies has to be provided for and a Forum/Commission should be empowered to grant relief, if in its opinion, the price charged is excessive or unreasonable.

Clause (e) of Section 6 relates to the Right of the consumers to seek redressal of grievances against a trader or service provider in a proceeding before a Forum/Commission, which is a quasi-judicial tribunal. The clause should also relate to the 'enforcement of rights' besides 'redressal of grievances' and a District Forum/State

Commission/the National Commission should function as 'Consumer Rights Enforcement Agencies' rather than as 'Consumer Disputes Redressal Agencies'. They should, therefore, be renamed as a '*District Consumer Rights Forum*', a '*State Consumer Rights Commission*' and the '*National Consumer Rights Commission*', respectively.

Though the Consumer Protection Councils are endowed with the responsibility of promoting and protecting the consumer rights, they have no right to be heard in any proceeding before a Forum/Commission. Such a right should be given to them, if the proceeding involves the larger interests of consumers.

Under sub-section (1)(b)(iii) of Sections 10, 16 and 20, one of the qualifications of a person for being appointed as a member of a Forum/Commission, is that he should be a person of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. In this, the most important field of consumer affairs is omitted. It should be included and a person having knowledge of or practical experience in matters relating to Consumer Rights must be preferred for the appointment.

Under Sections 10, 16 and 20, the disqualifications of a person to be appointed as a member of a Forum/Commission have been provided for and one of the disqualifications is, if he has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the State/Central Government, involves moral turpitude. A Forum/Commission has the power for trial of offences under the Act (Section 27(2)) and to impose penalties under the Act, including the penalty of imprisonment (Section 27(1)). To reinforce the credibility of a Forum/Commission, conviction for any cognizable

offence during the last 10 years should also be made a disqualification, whether or not the offence, in the opinion of the State/Central Government, involves moral turpitude. There should also be a specific provision for the removal of a member, if he incurs any disqualification during his tenure as a member and for his removal on the ground of proved misbehaviour or incapacity, or engagement during the term of his office in any paid employment outside the duties of his office, or unfitness to continue in office by reason of infirmity of mind or body as his continuation in office in such circumstances will be detrimental to public interest.

Under Section 11, the territorial jurisdiction for instituting a complaint is specified with reference to the opposite party but not the complainant although the legislation is for the welfare of consumers. The Act does not appear to have conceived of a situation wherein a complainant actually and voluntarily residing at a place, say, Hyderabad, buys defective/spurious/hazardous goods or hires or avails of deficient/hazardous service or pays excess price for the goods or service or becomes a victim of an unfair or a restrictive trade practice adopted by a trader or service provider at another place, say Delhi. In such a situation, it would be unjust to mandate him (the expression used in Section 11(2) is 'shall be instituted') to institute the complaint at Delhi. The territorial jurisdiction should, therefore, be specified with reference to the complainant but not the opposite party.

The Act is meant to provide inexpensive justice to the consumers as per the opening paragraph of the Statement of Objects and Reasons in the Amendment Act, 2002. The Act is for the better protection of the rights and interests of consumers from the baneful effects of defective/spurious/hazardous goods or deficient/hazardous services or unfair/restrictive trade practices. The provision

for payment of a fee for filing a complaint (Section 12(2)) with a District Forum or an appeal/revision with a State Commission/the National Commission (Section 18/22(1)) is, therefore, unjustified and should be deleted. The prescription in Section 26 for payment of costs, not exceeding Rs.10,000/-, to the opposite party by a complainant, instituting a frivolous or vexatious complaint is a sufficient deterrent against misuse of the provisions of the Act by a complainant.

Under Section 13(2)(c), where a complainant fails to appear on the date of hearing before a District Forum, it may either dismiss the complaint for default or decide it on merits. There is no provision to restore the complaint, even in a case where the complainant's failure to appear is for reasons beyond his control and provision is made only for appeal/revision. Restoration of the complaint should be provided for.

The enumeration in Section 14 of various kinds of relief that may be granted to a consumer is exhaustive, the words 'the following things, namely' in Section 14(1) being significant, leaving no scope for a Forum/Commission to mould the relief according to the facts and circumstances of a case. The section should be amended to empower the Forum/Commission to grant any other relief also that may be equitable or appropriate in the facts and circumstances of a case.

The order of a District Forum that could be issued under Section 14(1)(e) to direct the opposite party to remove the defects in the goods in question is against the consumer rights and their protection. No question of selling defective goods and removing the defect/s therein should arise and no consumer should suffer from the trauma of buying defective goods and getting the defects removed. There should, therefore, be no provision to remove the defects, irrespective of any warranty clause to that effect in the contract of sale of goods and even if there is

such a warranty, it should be deemed to be a condition/stipulation essential to the main purpose of the contract, the breach of which would give rise to a right to treat the contract as repudiated and to reject the defective goods. Replacement of the defective goods with new goods of similar description, which shall be free from any defect (Section 14(1)(b)) or returning to the complainant the price paid by him (Section 14(1)(c)) should be the only relief that could be granted.

Considering that an unscrupulous trader or service provider had already enriched himself unjustly by exploiting the consumers, before a complaint against him is filed and disposed of against him; that he would have continued to unjustly enrich himself if no complaint has ever been filed and that such exploitation is detrimental to public interest, to make the Act more stringent, the minimum sum payable under Section 14(1)(hb) should be enhanced to '10%' of the value of such defective goods 'manufactured and offered for sale' or of service provided to the consumers.

Under Sections 15, 19 and 23, there is provision for 'Appeal' against the order of a District Forum, a State Commission and the National Commission to a State Commission, the National Commission and the Supreme Court, respectively and for Revision under Section 17(1)(b) and Section 21(b) by a State Commission/the National Commission, though the word 'Revision' has not been used in the Act. The language used, however, namely 'fifty per cent of that amount or Rs.25,000/- (in Section 15), Rs.35,000/- (in Section 19), Rs.50,000/- (in Section 23), whichever is less' is more beneficial to the opposite party against whom a complaint is filed. Further, these amounts are abysmally small when compared with the pecuniary jurisdiction of a Forum/Commission. The Act should, therefore, and to discourage a trader or service provider from protracting the litigation, provide that the amount which

a person is required to deposit for preferring the appeal/revision should be 'fifty per cent of the amount he is required to pay in terms of an order of a Forum/Commission'.

The Amendment Act of 2002 has provided that Benches of a State Commission/the National Commission may exercise the jurisdiction, powers and authority thereof and the President of a State Commission/the National Commission may constitute a Bench with one or more members, as he may deem fit (Section 16(1B) and Section 20(1A)). There appears to be some discordance between these provisions and Section 14(2) which contemplates conduct of every proceeding by more than one member. The anomaly should be rectified. Single member Benches are antithetic to judicial dispensation, particularly when power has been conferred on a Forum/Commission to try offences under the Act (Section 27(2)) and impose penalties (Section 27(1)), including the penalty of imprisonment for a term which may extend to three years, unless such Benches are presided over by members, having a judicial background. There is, therefore, no justification for appointing persons without a judicial background as members and the Act should be amended accordingly.

There is no provision in the Act to grant relief in a case where a defect in the goods or deficiency in the service or the hazardous nature of goods or service is the direct and proximate reason or cause for the injury or loss suffered by a consumer by the damage or destruction or loss of his other goods or property. Such a provision should be made.

Under Section 17A, on the application of the complainant or *suo motu* but not at the instance of the opposite party, at any stage of the proceeding, *if the interest of justice so requires*, a State Commission may transfer any complaint pending before a District Forum to another District Forum within the State

and under Section 22B, the National Commission may transfer any complaint pending before a District Forum of one State to a District Forum of another State or before one State Commission to another State Commission. Such a provision should also be made for withdrawal and transfer of any case from a District Forum to a State Commission and a State Commission to the National Commission.

Under Section 22A, where the National Commission has passed an *ex parte* order against the opposite party or a complainant, the aggrieved party may apply to the Commission to set aside the said order in the interest of justice. Under Section 22(2), the National Commission has the power to review any order made by it, when there is an error apparent on the face of the record. Such powers should be conferred on a District Forum/State Commission also.

Under Section 24 of the Act, every order of a Forum/Commission shall be final, if no appeal is preferred against such order. Even where an appeal is preferred, such order shall be final unless a stay is granted against such order and it is in force. The section should be amended accordingly.

Under Section 25(1), where an interim order made under the Act is not complied with, a Forum/Commission may order the property of the person, not complying with such order to be attached. Such a provision should be made in respect of a final order also, without restricting it to a final order directing payment of money.

Under Section 25(3), there is no provision for enforcing any order, other than that in respect of any amount due from any person under an order made by a Forum/Commission, that may be passed by it. Such a provision should be made.

Under Section 27(1), one of the penalties that may be imposed on a complainant or a

trader or service provider, if he fails or omits to comply with any order made by a Forum/Commission, is fine which shall not be less than Rs.2,000/- but which may extend to Rs.10,000/-. The penalty of such an amount of fine is ineffective and should, therefore, be deleted. Further, the penalty, to be more deterrent, should be 'imprisonment for a term which shall not be less than one year but which may extend to three years and fine of Rs.10,000/-'.

The power of the National Commission to make Regulations under Section 30A is plenary whereas the power of the Central/State Government to make Rules under Section 30 is limited to carrying out the enumerated provisions only. The anomaly should be rectified.

There are many legislative enactments in our country, made in the interests of consumers but, their implementation by the Executive leaves much to be desired. Further, due to many reasons, consumers generally prefer to suffer silently in the hands of unscrupulous traders or service providers instead of seeking a legal remedy. If no complaint is filed, the errant trader or service provider goes scot-free. As far back as in 1985 itself, the United Nations recognized the Consumer Rights on par with the Human Rights. Hence, on the lines of The Protection of Human Rights Act, 1993, a Forum/Commission should be given the power to inquire, *suo motu* or on a complaint filed before it by a complainant, into allegations of violation of Consumer Rights or abetment thereof; or negligence in the prevention of such a violation or abetment thereof, by a public servant and pass appropriate orders. The Act should also provide for the procedure of a Forum/Commission for the investigation into such allegations. Further, the violation of any of or all the Consumer Rights or the abetment thereof or the negligence of a public servant in preventing such a violation or the abetment thereof

should be made an offence under the Act, with an appropriate penalty.

The State should be a model service provider or a trader, when it carries on any trade or business. But, unfortunately, the State is the biggest litigant in our country. Hapless citizens are driven to litigation and are pitted against the might of the State. Therefore, and to uphold the 'the test of

reasonableness' in State action, the Act should be amended to provide for awarding exemplary costs against the State if it as the opposite party loses a case, not involving any substantial question of law. For this purpose, the definition of the State under Article 12 of the Constitution of India should be adopted. The State should recover such exemplary costs from the concerned public servant/s, responsible.

JUDICIAL ACTIVISM AND RECENT CHALLENGES

By

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*"Give every man thine ear, but few thy voice :
Take each man's censure, but reserve thy judgment"*

William Shakespeare wrote in his Hamlet many centuries back. Even today Judiciary and right justice are seen as the last asylum to many who long for the deserved justice. Over the years, this organ of Government has acquired an unprecedented energy and initiative, even to overcome the other two organs at times. Assertion of judiciary and its power is referred to as judicial activism. It is also defined as an over active judiciary recent Supreme Court judgment on IXth scheduled and Article 31-B cannot be used to concern unlimited powers directly attack on supremacy of Parliament by saying no unlimited power for parliament to enact law at will and few landmark cases that highlight judicial activism are *Keshvanand Bharati v. Kerala*, *Minerva Mills v. Union of India*, *Indira Gandhi v. Raj Narain* and *SP v. Union of India* etc. The active role of the Indian judiciary, particularly that of the Supreme Court, has been appreciated both within and outside India. The independence ensured through the constitutional provisions in favour of the

Judiciary and subsequently strengthened by the judicial interpretation has definitely contributed to the present status of the Indian Judiciary. Yet, in this sphere of judicial activism, there are also a few coexisting misconceptions that need to be understood in order to appreciate the activist role of the judiciary in India better.

Public Interest Litigation (PIL) made judicial activism possible in India. Before the Court accepts a matter for adjudication, it must be satisfied that the person who approaches it has sufficient interest in the matter. The test is whether the petitioner has *locus standi* ! to maintain the action. This is intended to avoid unnecessary litigation. The legal doctrine that no one except the affected person can approach a Court for a legal remedy was holding the field both in respect of private and public law adjudications until it was overthrown by the PIL wave. PIL, which is a manifestation of judicial activism, has introduced a new dimension to Judiciary's involvement in public administration. The Issue of *locus standi* and the procedural complexities have taken a back seat in the