Chapter-3

Constitutional and Legislative Framework of Consumer Protection Law in India (other than the Consumer Protection Act, 1986)

An attempt has been made in preceding Chapter to discuss various factors for evolution and development of consumer law in India. It emerges that during the advent of British rule in India along with the application of English common law, various legislative measures were also taken from time to time with a view to protect the interest of public at large (which indirectly covered consumers interests) but most of them were by and large overshadowed by common law principles in their contents. In spite of these enactments, principles of common law also continued to be applied through the judgments of the Privy Council and the High Courts and when necessity arose for either interpreting or clarifying these statutes or for dealing with those subjects which were not covered by these statutes. After Indian independence the Constitution of India became highest law of the land although it does not contain any explicit provision on the subject of the consumers, but there are many provisions that have direct bearing on the consumer interests. Besides the Constitutional provisions in India, the consumer protection legislations\(^\text{82}\) comprise wide

\(^{82}\) These enactments, in addition to the Constitutional provisions, dealing with consumer protection include: the India Telegraph Act, 1858; the Indian Penal Code, 1860; the Sale of Goods Act, 1930; the Drugs and Cosmetic Act, 1940; the Prevention of Food Adulteration Act, 1954; the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954; the Essential Commodities Act, 1955; the Monopolies and Restrictive Trade practices Act, 1969; the Sugar (Regulation of Production) Act, 1961; the Indian Medicine Central Council Act, 1970; the Standards of Weights and Measures Act, 1976; the Prevention of Black Marketing Act, 1980; the Standards of Weights and Measures (Enforcement) Act, 1985; the Bureau of Indian Standard Act, 1986; the Consumer Protection Act, 1986; the Jute Packaging Material (Compulsory use in Packing Commodities) Act, 1987; the Competition Act, 2002; the
spectrums of laws with specific dimensions. This Chapter discusses the aforesaid dimensions.

I. The Constitutional Mandate
   (A) Freedom of Profession, Trade or Business and Consumer Protection

As stated above the Constitution of India does not contain any explicit provision on the subject of the consumer, a large number of Constitutional provisions have direct bearing on the consumer protection. Most of these provisions are pertaining to the directive principles of the state policy.\(^{83}\) As a part of fundamental freedoms, the Constitution of India guarantees under sub-clause (g) of Article 19(1), freedom of profession, trade or business, and thereby ensuring that the State cannot prevent a citizen from carrying on a business, except by a law imposing a reasonable restriction in the interest of the general public.\(^{84}\) However, under Article 19(2), no such right can be enforced where the business is dangerous or immoral. Such business may be absolutely prohibited or may be required to be licensed. Moreover, restrictions can be imposed on a business in terms of place and time also. There is no right to carry on a business at every place or at any time. There can be reasonable restrictions on “business on the streets”\(^{85}\) and any “harmful trade”\(^{86}\) or “dangerous trade”.\(^{87}\) Reasonable

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restriction can be imposed for public convenience also.\textsuperscript{88} Thus, sub-clause (g) of Article 19(1) of the Constitution of India does not confer on any individual or association the monopoly right to carry on any trade or business or any right to carry on a trade or business without competition from eligible persons.\textsuperscript{89} Hence, if by reason of any state action, an element of completion is introduced into a trade, the existing trader or licensee who might have been enjoying a monopoly in the trade cannot complain of the infringement of his fundamental right conferred by this Article.\textsuperscript{90}

Article 43 of the Constitution of India obligates the State to secure, by suitable legislation or economic organisation or in any other way, for all workers, agricultural, industrial or otherwise, work, a living usage and conditions of work ensuring a decent standard of life in the same way as the ILO (International Labour Organisation) is promoting the interests of workers as consumers. The Article 43 has been relied upon the reasonableness of the restrictions imposed by the Minimum Wages Act 1948, upon the fundamental rights of business guaranteed by Article 19(1)(g);\textsuperscript{91} to condemn unfair labour practices.\textsuperscript{92}

Regarding public health, Article 47 requires the State to take steps 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. The Article 47 makes improvement to public health a primary duty of


\textsuperscript{88} \textit{Ebrahim v. Regional Transport Authority}, (1953) SCR 290.


\textsuperscript{92} \textit{Eveready Co. v. Labour Court}, AIR 1962 All 497.
the State. Hence the court should enforce this duty against a defaulting local authority, on pain of penalty prescribed by law, regardless of the financial resources of such authority. In case of need, the local authority should approach the State Government to grant loan or aid, and the latter should supply the money required in view of the primary duty of the State under Article 47. Restrictions imposed by a law providing for the prohibition of consumption or production of liquor cannot be challenged as violative of Article 19(1)(g) in as much as dealing in liquor cannot be regarded as a “trade or business” within the meaning of Article 19(1)(g) and because such law gives effect to the provision of Article 47.

(B) Right to Life, Consumer Protection and the Directive Principles: Relations

Article 21 of the Constitution of India states: “No person shall be deprived of his life and personal liberty except according to procedure established by law.” Thus, Article 21 of the Constitution guarantees every person life with dignity free from all kinds of exploitation. The guarantee of life and liberty under Article 21 is the most important fundamental right guaranteed by the Constitution. Article 21 can be said to be the “heart and soul” of the Fundamental Rights. Article 38 mandates the State to bring about a social order

in which justice – social, economic and political shall inform all the institutions of life. Article 38(1) of the Constitution of India states: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Thus, it is the duty of the State under the Constitution to function as a Welfare State, and look after the welfare of all its citizens. Besides, India being a member of the United Nations, inter alia, and a staunch believer in upholding the human dignity, equality, brotherhood and welfare of all people since time immemorial, following the principle of “welfare of all of our people, and the sanctity of our Constitutional vision and goals” has not lagged behind in the endeavours made at the international level. The consumer cannot be ignored while giving any practical shape to this mandate. According to Article 39 (b) and (c), also, the State is required to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good, and the operation of the economic system should not result in the concentration of wealth and means of production to the common detriment. This is the most important directive to the State under Chapter IV of the Constitution, which support the whole public distribution system and the administrative mechanism to control hoarding and profiteering in India. The Supreme Court has held that a statutory corporation, even if it may not be a public utility, has also to comply with Article 39 of the Constitution and charge only fair prices.

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For commodity, not vital for consumers, greater consideration can be given to profit.

In India, the protection and enforcement of human rights confined to “Civil and Political Rights” in the form of “Fundamental Rights” (Part III) and “Economic, Social and Cultural Rights” in the form of “Directive Principles” (Part IV) in the Constitution of India discusses the vision of the Constitution. The framers of the Constitution were quite clear in assigning an equal role to each and every individual in the political process and decision making. The framers of the Constitution also provide for affirmative steps in the form of seats allocation or reservation in election bodies for those incapable of competing in political process on equal footing. For effective participation in that process as well as for leading a dignified life, which they did not want to leave to the political process alone or postpone for the future, they also provided for Fundamental Rights which initially included what later became Directive Principles.\(^{103}\) The Fundamental Rights and Directive Principles, which have been distinguished as the conscience of the Constitution, and harmony and balance between them, have been found to be among the basic feature to the Constitution.\(^{104}\) Part IVA of the Constitution of India titled “Fundamental Duties” (Article 51A) provides that every citizen must do his duty towards the nation as well as the fellow citizens. Article 51A enjoins upon every citizen the duty to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem; to cherish and follow the noble ideals which inspired our national struggle for freedom; to uphold and protect the sovereignty, unity and integrity of India; to promote harmony and the spirit of common brotherhood amongst all the people.

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etc. In *State of Maharashtra v. Sarangdharsingh*, the Apex Court held that what has been incorporated in the form of Part IVA was implicit in the Preamble, Part III and Part IV of the *Constitution* because fundamental rights of the citizens can become meaningful only if the State and citizens do their duty to bring about real equality amongst the people belonging to different segments of the society.

The provisions of the *Constitution* including Fundamental Rights are alterable but the result thereof should be consistent with the basic foundation and the basic structure of the *Constitution*. Republican and democratic forms of Government, secular character of the Constitution, separation of powers, dignity and freedom to the individual are basic features and foundations easily discernible, not only from the Preamble but the whole scheme of the *Constitution*. In *S.R. Bommai v. Union of India*, the Apex Court held that Preamble of the *Constitution* is the basic feature. Though the word "socialist" was not expressly brought out in the main parts of the *Constitution*, its seedbeds are right to participation in public offices, right to seek consideration for appointment to an office or post; right to life and right to equality which would amplify the roots of socialism in democratic form of Government; right to equality of status and of opportunity, right to equal access to public places and right to prohibition of discrimination read with right to freedom, protective discrimination, abolition of untouchability, its practices in any form a constitutional offence, as guaranteed in Part III and IV of the *Constitution*.

In *Minerva Mills v. Union of India*, the Constitution Bench of the Apex Court held that the Fundamental Rights and the Directive Principles are two wheels of

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105 (2011) 1 SCC 577; 2011 (1) UJ 325 (SC).


the chariot in establishing the egalitarian social order. The Apex Court held that
the right to life enshrined in Article 21 of the Constitution means something
more than survival of mere animal existence.\(^{108}\) The right to live with human
dignity,\(^{109}\) right to subsistence allowance during suspension,\(^{110}\) right to means of
livelihood\(^{111}\), right to health,\(^{112}\) right to food,\(^{113}\) right to safe drinking water,\(^{114}\)
right to pollution free environment\(^{115}\), right to education,\(^{116}\) right to shelter,\(^{117}\)
right to travel abroad,\(^{118}\) right to speedy trial,\(^{119}\) right to gender
equality,\(^{120}\) right to free legal assistance,\(^{121}\) right to compensation,\(^{122}\) right to
prisoners to interview,\(^{123}\) right to a fair trial,\(^{124}\) right to a quality life,\(^{125}\) right to


\(^{112}\) Consumer Education and Research Center v. Union of India, AIR 1995 SC 922.


\(^{115}\) M.C. Mehta v. Union of India, AIR 1987 SC 965: 1986 (1) SCALE 199.


\(^{124}\) Police Commissioner, Delhi v. Registrar, Delhi High Court, AIR 1997 SC 95.

family pension, right against solitary confinement, right against bar fetter, right against handcuffing, right against delayed execution, right against custodial violence, and right against public hanging have been held to be part of right to life under Article 21 of the Constitution. Besides, social justice has been held to be Fundamental Right as well as Directive Principles are forerunners of the UN Convention on Right to Development as inalienable human right.

(C) Legislative Competency and Consumer Protection

It appears from the above discussions that overtime the Apex Court in India has developed the inter-link between fundamental rights and directive principles. So far as the freedom of carrying of a business or trade is concerned, the grant of such licences cannot depend upon the absolute discretion of an administrative authority and clear policies have to be laid down on which the discretion can be exercised, taking due note of consumer interest. The discretion has to be exercised judicially. If the law requiring license does not set out the considerations, it would be void. If considerations are set out in the law, but are

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133 Consumer Education and Research Center v. Union of India, AIR 1995 SC 922.
departed from by the competent authority, while administering the law, then the order of the competent authority would be void, despite the law being valid. Generally, an existing licence cannot be revoked without giving the licensee an opportunity of being heard.\textsuperscript{135} There can be restrictions on licences but these must be reasonable.\textsuperscript{136} The restrictions should be, inter alia, in the interest of consumers. Accordingly, total prohibition can be imposed against manufacture of drugs or preparations which are injurious to health.\textsuperscript{137} In order to impose restrictions on the manufacture, import, sale or distribution of any products on the ground of public health, reliance should be placed on its scientific testing by experts. In \textit{Shivarao Shantaram Wagle v. Union of India},\textsuperscript{138} the Supreme Court followed the same principle. Now question arises who will impose restrictions? The Constitution of India has distributed the subjects, relating to product and service regulation, between the centre and the states for their better quality and efficiency. Most of the subjects concerning consumer protection have been placed in the Concurrent List of the Seventh Schedule to the Constitution of India.\textsuperscript{139} The relevant entries are:

1. Preventive detention for the reasons connected with maintenance of supplies and services essential to the community.\textsuperscript{140}
2. Adulteration of foodstuffs and other goods.\textsuperscript{141}

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\textsuperscript{136} \textit{All Delhi Rickshaw Union v. Municipal Corporation}, AIR 1987 SC 648.
\textsuperscript{137} \textit{Lakshmikant v. Union of India} (1997) 4 SCC 739.
\textsuperscript{138} AIR 1988 SC 952.
\textsuperscript{139} The Constitution of India, Seventh Schedule (Article 246), List III- Concurrent List.
\textsuperscript{140} Ibid., Entry 3. See the Essential Services Maintenance Act, 1968.
\textsuperscript{141} Ibid., Entry 18. See Prevention of Food Adulteration Act, 1954.
3. Drugs and poisons excepting cultivation manufacture and sale for export of opium.  

4. Economic and social planning.  

5. Commercial and industrial monopolies, combines and trusts.  

6. Legal, medical and other professions.  

7. Trade and Commerce in, and the production, supply and distribution of – (a) the product of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods on same kind as such products; (b) food stuffs, including edible oilseeds and oils (c) cattle fodder, including oil cakes and other concentrates; (d) raw cotton, whether ginned or unginned and cotton seed; and (e) raw jute.  

8. Weights and measures except establishment of standards.  

9. Price control.  

10. Electricity.  


Under Article 19(1) (g) of the Constitution the words “occupation, trade or business” have been used. Though the word “business” is ordinarily more

142 Ibid., Entry 19. See the Drugs and Cosmetic Act, 1940.  

143 Ibid., Entry 20.  

144 Ibid., Entry 21.  

145 Ibid., Entry 26.  

146 Ibid., Entry 33. See the Jute Packaging Material (Compulsory use in Packing Commodities) Act, 1987.  

147 Ibid., Entry 33-A. See the Standards of Weights and Measures Act, 1976.  

148 Ibid., Entry 34. See the Prevention of Black Marketing Act, 1980.  

149 Ibid., Entry 38.  

150 Ibid., Entry 39. See the Press and Registration of Books Act, 1867.
comprehensive than the word “trade”, in the Article 19(1) (g) it is used as synonymous with the other, as meaning any substantial and systematic organised course of purpose.\textsuperscript{151} This is a wide expression and would comprise within its ambit the interests of public health and morals, economic stability of the country, equitable distribution of essential commodities of fair prices, maintenance of purity in public life, prevention of fraud, amelioration of the conditions of farmers or workmen; implementation of the directive principles in Part IV. The following are instances of restrictions imposed in the interests of the general public –

1. Regulations laying down the conditions of any hours of employment in shops and commercial establishments, even where no employee is engaged; or fixing minimum wages in an industry; providing for payment of bonus even in a year of loss; or widening the definition of ‘workman’ or ‘employer’ in relation to industrial disputes.\textsuperscript{152}

2. A provision for the cancellation of a license on the ground that it has been obtained by fraud (whether the licensee is a party to that fraud or not), after giving the licensee an opportunity of being heard.

3. Restrictions imposed upon the sale of essential commodities to ensure their equitable distribution and availability at fair prices, e.g., the fixing of maximum selling prices, or upon the production of food products for the maintenance of their food value, e.g., to require that a beverage must contain a maximum percentage \textsuperscript{153} of fruit juice; elimination of hoarders and black marketers, fixing a maximum stock-limit.\textsuperscript{154}


\textsuperscript{152} \textit{Basti Sugar Mills v. Ram Ujagar}, AIR 1964 SC 355.

\textsuperscript{153} \textit{Hamdard Dawakhana v. Union of India}, AIR 1965 SC 1167.

\textsuperscript{154} \textit{Suraj v. Union of India}, AIR 1982 SC 130.
4. Restrictions imposed by the Motor Vehicles Act upon the right to ply vehicles on public highways, for the conservation of roads, prevention of congestion and the like.\textsuperscript{155}

5. Restrictions imposed on the right to carry on a profession, in the interest of purity in the public life or other grounds of public interest, i.e. that a legal practitioner who is empowered on behalf of or against a Municipality shall not be entitled to stand as a candidate for election as a councillor of that municipality, or that no legal practitioner shall appear in proceedings for annulment of transfers of property made by tribal people in favour of non-tribal.\textsuperscript{156}

6. Restrictions imposed by the Imports and Exports (Control) Act, 1947, under the imperative necessity to control export and import trade for the economic stability of the country,\textsuperscript{157} even though it involves the refusal of license to traders other than the agency created or recognised by the State.

7. Restrictions imposed upon cane-growers not to sell sugarcane to occupiers of factories, except through a Cane-growers’ Co-operative Society is not less than 75 percent of the total cane-growers within an area.\textsuperscript{158}

8. Restrictions for the suppression of injurious business like gambling, or prostitution.\textsuperscript{159}

9. In order to protect rickshaw pullers from exploitation, - to prohibit rickshaw-owners from hiring out their rickshaws.\textsuperscript{160}


\textsuperscript{157} Krishan v. State of Rajasthan, AIR 1982 SC 29.

\textsuperscript{158} Tika Ramji v. State of U. P., (1955) SCR 393.

\textsuperscript{159} Malerkotla v. Mushtaq, AIR 1960 Punj 18.
10. Elimination of middlemen to ameliorate the condition of agriculturists.\textsuperscript{161}

Thus, the Preamble, Articles 14, 19, 21 read with Articles 38, 39, 42, 43, 46 and 47 provide rights of individuals as well as directed principles and laudable objectives which the Union and State governments are required to translate into action in due course of time to improve the quality of life of the workers as consumers. More specifically, the principle amply reflects the inclusion of the philosophy of the concept of consumerism in Article 47 of the Constitution of Indian. However, consumerism as social concept will provide opportunity to the buyers to get more value of the money which they will spend on a particular commodity or commodities. It will increase the buying efficiency which will ultimately result into surplus purchasing power to enable the buyers to buy more goods within their own budgets. This classic concept will not allow unhealthy and unsafe products to be in the market. It will also give birth to social marketing concepts which will promote consumer welfare and customer satisfaction to enable the producers and manufactures to produce more in the development of economy. Under this concept, market planning will be needed. Ultimately, consumerism will endeavour to provide changes to create new marketing techniques and effluent new social responsibilities for the producers and buyers both. It will provide new impetus to the consumers, new responsibilities to the co-operators and new areas of policy making for the government to provide solutions to a number of complex problems which have cropped up in the economy. It is developed upon the consumerists to help the government for the success of this movement. Ultimately the movement will assure good life to the buyers and sellers and ensure utility, and durability of the

\textsuperscript{160} Mansingh v. State of Punjab (1985) 4 SCC 146.

\textsuperscript{161} Arunachala v. State of Madras, AIR 1959 SC 300.
commodities and above all rational utilization of the resources to reshape and regenerate already strained economy of the country.

(D) Binding Force

The above stated constitutional mandate and the philosophy underlying in it reflects that all laws including legislations concerning consumer protection in India must respect the said mandate and underlying philosophy thereto. It is an established principle of law that the Constitution of India is the highest law of the land and all laws, national or local, customary or statutory, past and future draw their validity and legitimacy from it. Thus, law relating to consumer protection is always subject to the Constitution. Article 13 of the Constitution indicates that laws inconsistent with or in derogation of the Fundamental Rights contained in Part III of the Constitution would "to the extent of such inconsistency, be void." In its form and structure, the Constitution follows the Western liberal model of Constitutionalism, but it has several features founded on Indian traditions and the special needs and circumstances of the society. The success and durability of any democratic politics depends upon the existence of a series of principles and values from which it draws its legitimacy and in Indian context this set of principles, values have been outlined in the Constitution of India and the foundational source of

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legitimacy flows from the “WE, THE PEOPLE OF INDIA.”166 Thus, we the people of India are consumers as well. The Preamble to the Constitution of India emphasizes the principle of equality as basic to the Constitution167. Equality of opportunity to all irrespective of their caste, colour, creed, race, religion and place of birth which constitutes one of the core values of the Universal Declaration of Human Rights also forms part of Preamble to the Constitution of India.168 JUSTICE169, LIBERTY, EQUALITY, including social, economic and political justice, the golden goals set out in the Preamble to the Constitution of India is to be achieved.170 Thus, providing consumer justice is one of the objectives laid down to the Preamble to be secured and achieved to all its consumers.

In this background now we propose to discuss in the following pages the relevant legislations concerning consumer protection in India. These legislations are: the Indian Penal Code, 1860, the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Prevention of Food Adulteration Act, 1954, the Essential Commodities Act, 1955, the Monopolies and Restrictive Trade Practices Act, 1969, Consumer Protection Act, 1986 and the Competition Act, 2002 etc.

II. The Indian Penal Code, 1860

166 Preamble to the Constitution of India begins with the words, “We the People of India”. See Mahendra P. Singh, V. N. Shukla’s Constitution of India, Eastern Book Company, Lucknow (2008) p. 386.


The Indian Penal Code, 1860 is meant to be codifying statute that is a statute intended to be complete itself with regard to the subject-matter with which it deals.\textsuperscript{171} The principle of construction applicable to codifying statute does not exclude reference to earlier case law on the subject covered by the statute for the purpose of throwing light on the true interpretation of the word of statute where they are or can be contended to be open to rival construction but the matter outside the statute can be referred only to find the true interpretation codifying statute and not to add to a codifying statute.\textsuperscript{172}

The Indian Penal Code is the foremost penal law of the country which contains the substantive law of crime. It caters to the needs of the consumer in some manner. However, Sections 264 to 267 (Chapter-XIII)\textsuperscript{173} of the Indian Penal Code relate to fraudulent use of false instrument for weighing, fraudulent use of false weight and measures, anyone in possession of false weight or measure respectively. The offence consists in deceiving a person to believe that a particular weight or a measure is a genuine and authentic one when it is not as such. In \textit{Bansidhar v. State of Rajasthan},\textsuperscript{174} the applicant, a licensed opium dealer was prosecuted under Section 266 of the Penal Code for keeping two sets of weights in the shop; one set of weights was less in weight then the standard weight and he defrauded the public by using false weights. It was found that the accused was sitting on the gunny bag beneath which true and false weights were found. Holding the applicant guilty the court said the only inference that could be drawn from these circumstances was that accused possessed false weights, knowing them to be false and intending that the same might be fraudulently

\textsuperscript{171} \textit{Tiruvengada Mudaly v. Tripurasundari Ammal}, AIR 1926 Mad 906.


\textsuperscript{173} Chapter- XIII (Sections 264 to 267) of the Indian Penal Code, 1860 deals with “Of offences relating to weights and measures”.  

\textsuperscript{174} AIR 1959 Raj 191.
used. It is relevant to mention that in India, the Standard of the Weights and Measures Act, 1956 regulates the metric system and has fixed the standard weight, length and capacity as a kilogram, a metre and litre respectively. In England the Weights and Measures Act, 1878 regulates such offences.\textsuperscript{175}

The penal code further provides Sections 269 to 271\textsuperscript{176} on spreading of infections and in Sections 272 to 276 on adulteration of food or drink, adulteration of drugs, sale of adulterated drugs and sale of drugs as a different drug or preparation are punishable with imprisonment or with both. The Apex Court in \textit{X v. Hospital Z}\textsuperscript{177} held that if a person suffering from the dreadful disease “AIDS”, knowingly marries a women and thereby transmits infection to that women, he would be guilty of offences prescribed under the Sections 269 and 270 of the Penal Code. These statutory provisions impose a duty upon a person not to marry as the marriage could have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the women whom he marries apart from being an offence. This decision was criticised on the ground that it could be appropriate to specifically include “wilful transmission” of “AIDS” punishable under Section 269 of the Penal Code. The doctor should be asked to notify to the health authorities/ department the details


\textsuperscript{176}Chapter- XIV (Sections 268 to 294A) of the Indian Penal Code, 1860 deals with “Of offences affecting the public health, safety, convenience, decency and morals”.

of the patients suffering from “AIDS” + and those with antibodies. This will help in taking appropriate steps for treating “AIDS” patients. However, the doctor is not required to inform to the employer about the “HIV+” status of the employee, unless of course the employee expressly or impliedly agree to waive the condition of confidentiality. Thus, subsequently in another X v. Hospital Z, the Apex court held that if an HIV-positive person contracted marriage with a willing partner, then the same would not constitute the offences defined by Sections 269 and 270 of the Indian Penal Code (IPC). Section 269 of the IPC defines the offence of a “Negligent act likely to spread infection of disease dangerous to life” and Section 270 contemplates a “Malignant act likely to spread infection of disease dangerous to life”.

Section 277 and 278 of the IPC also deal with voluntary corrupting or fouling water of public spring or reservoir so as to render it less fit for the purpose for which it is voluntarily used and making voluntarily used and making voluntarily atmosphere noxious to health of persons in general dwellings or carrying on business in the neighbourhood or passing along a public way are punishable with three months imprisonment or with fine or with both in the earlier provision and in the latter only fine. The words “corrupts” or “fouls” means some acts which physically defiles or fouls the water. Bathing in a tank or spitting in to a public well fouls drinking water. But drawing water from a public well by a low caste person cannot be set to corrupt or foul the well. Fouling water of a public well will not make the act punishable. These

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179 Bhogi, (1900) 2 Bom LR 1078.
180 Muthian, (1897) 1 Weir 229.
provisions are in force for long times reflects the spirit of consumerism in one way or other. Those sections specifically may not mention the concept of consumer interest but they do have provisions to defend the cause of consumers in some manner.\textsuperscript{183}


(A) The Indian Contract Act, 1872

(iii) Fraud and Misrepresentation

A large number of general principles of the law of contract are applied in consumer disputes. The law of contract is a law of consent and privity is necessarily implied in every contract.\textsuperscript{184} A breach of contract is an infringement of \textit{right in personam} i.e. right available only against some determinate person or body.\textsuperscript{185} Thus, in a contract the duty is fixed by the will and consent of the parties and it is owed to a definite person or persons.\textsuperscript{186} In India general principles of contract and various principles relating to specific contract were codified through the Indian Contract Act, 1872. The Act defines in Section 17 the concept of fraud includes suggestion as a fact, which is not true, active concealment of a fact, a wrong promise, any act fitted to deceive and any declared unlawful act. The Section 17 does not qualify misrepresentation within the meaning of this provision.\textsuperscript{187} It is, therefore not incumbent in the defrauded party to establish that he had no means of discovering the truth with ordinary


\textsuperscript{187} \textit{Niaz Ahmed v. Prosatam Chandra}, AIR 1931 All 154.
diligence.\textsuperscript{188} Mere negligence is not fraud where there is a good element of moral blame. Fraudulent misrepresentation is covered by clause 1 of Section 17, while innocent misrepresentation is defined in Section 18 of the Act. These principles of contract law are applicable in consumer cases too.

Sections 17 and 18 provide for two \textit{jural} concepts in the field of formation of a contract. Law requires not only consent but also it must be free and induced by any vitiating element. Obviously \textit{suggestio folsi and suppressio veri} are glamorous illustrations of statutory fraud. The question of non disclosure of material facts in relation to fraud arisen in some insurance cases.\textsuperscript{189} In \textit{Life Insurance Corporation of India v. Narmoda Agarwalla},\textsuperscript{190} the Orissa High Court examined the issue whether the deceased was guilty of non-discloser of martial facts in the policy form regarding diabetes with which the insured was suffering? The High Court held that although the statement as to diabetes was a material matter there was no evidence to conclude that there was separation of facts. It was emphasised that the policy holder had no knowledge at the time of making the statement that it was false or that he suppressed facts which it was material to disclose. Hence, no fraud.

\textbf{(iv) Unjust Enrichment and Quasi-Contract}

There are situation which do not fall within the denomination of the term ‘contract’, but are analogous to it. These situations are termed quasi-contract under the contractual jurisprudence and are traditionally capsule within the confines of sections 68 to 72. Thus under section 72, a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay

\begin{itemize}
  \item \textsuperscript{188} \textit{John M. Apcar v. Louis C. Malchus}, AIR 1939 Cal 473.
  \item \textsuperscript{189} For example, \textit{Mithoo Lal v. LIC of India}, AIR 1962 SC 814.
  \item \textsuperscript{190} AIR 1993 Ori 103.
\end{itemize}
or return it. The doctrine of quasi contract is based on the theory of unjust enrichment which means that no person be allowed to be beneficiary with cost of others.¹⁹¹

In *Roplas (India) Ltd. v. Union of India*,¹⁹² the petitioner claimed refund of excess duty made under mistake for certain periods. The court found: “It is fairly conceded on behalf of the petitioners that they have recovered from their customers the whole of exercise duty involved in all the three claims.”¹⁹³ In view of this, the Bombay High Court disallowed the recovery because their claim for such refund amounted to a fraud on consumers, and the society. Any indulgence in their favour would amount to helping them to enrich themselves unjustly. Thus the claim under Section 72 was rejected. The instant court cited in support, the dicta of the Supreme Court reiterated from time to time. The courts have read in-built equitable limitations under Section 72 to stop unjust enrichment of the plaintiff-claimant.

In *Nagpur Golden Transport Co. v. M/s. Nath Traders*,¹⁹⁴ the respondent No.3 booked a consignment of monoblock pumps with the appellant for transportation from Coimbatore to respondent Nos.1 and 2 at Gwalior in March, 1997. While the appellant was transporting the consignment in a truck, there was an accident and the monoblock pumps were damaged. The respondent Nos.1 and 2, therefore, did not take delivery of the 198 damaged monoblock pumps at Gwalior. In the circumstances, the appellant returned the 198 damaged monoblock pumps to the respondent No.3. The respondent Nos.1 and 2 then filed complaint No.101 of 1998 before the consumer disputes redressal forum.


¹⁹² AIR 1989 Bom 183.


¹⁹⁴ AIR 2012 SC 357.
Gwalior, and their case in the complaint was that they had price of the consignment to respondent No.3 and were entitled to Rs.3,61,131 towards the price of the monoblock pumps and damages of Rs.70,000 loss of profit Rs.14,000 as well as cost of Rs.5,000 and interest @ 18% per annum on the amount claimed by them. The appellant resisted the claim contending that the claim was not maintainable under the Consumer Protection Act, 1986 (for short ‘the Act’). The district consumer disputes redressal forum, in its order dated 27.1.1999, held that the appellant as a common carrier was the insurer of the goods in transit and if the goods have been damaged, the appellant was liable to respondent Nos. 1 and 2 for negligence. The district consumer disputes forum, therefore, awarded a sum of Rs.3,60,131 along with interest @ 18% per annum from 01.4.1997 till the date of payment and Rs.500 as counsel fee and further sum of Rs.500 as cost of the case. Being aggrieved, the appellant filed appeal before the Madhya Pradesh State Consumer Redressal Commission, Bhopal and state commission upheld the district forum decision by reducing 12% interest. Then appellant filed a revision but the National Consumer Disputes Redressal Commission dismissed the revision.

Then in appeal the Supreme Court took note of the fact that the amount awarded in favour of the respondent Nos.1 and 2 by the district consumer disputes redressal forum had been deposited and the counsel for the appellant had no objection to the amount to be paid to respondent Nos. 1 and 2. Then the question of law was raised whether the appellant was entitled to receive 198 monoblock pumps from respondent No.3 when he is held to be liable to pay the price of the monoblock pumps to respondent’s No. 1 and 2. Finally Supreme Court ordered to return of the 198 damaged monoblock pumps by respondent No.3 to the appellant and if the 198 damaged monoblock pumps are not available with respondent No.3, to find out the value of the 198 damaged monoblock pumps realized by the respondent No.3 (unjustly enriched) and direct the respondent
No.3 to pay the said value to the appellant. The appeal is allowed to the extent indicated above. The appeal partly allowed.

(B) The Sale of Goods Act, 1930
(iv) Development of the Law of Sale of Goods

In India, some spirit of concept of consumerism is also evident in the Sale of Goods Act, 1930. The Act deals with sale of goods regarding which provisions were earlier contained in Sections 76-123 of the Indian Contract Act, 1872. Trade and traders have existed for centuries. Governing institutions came up with laws to settle disputes among the traders. Thus, commercial law developed wherever there was trade. However, it is the British experience through colonial expansion that was propagated to most parts of the world.\(^\text{195}\) Therefore, it is essential to locate the law with reference to evolution in England. English judges decided cases on the basis of usage and customs of the community, and the prevailing notions of reason and justice. The courts relied heavily upon prior judgments. As similar cases were similarly decided, certain kinds of reasoning and principles came to be formulated. The courts thereafter followed these principles as the law.\(^\text{196}\) Through this process of precedence, a body of judge-made law gradually developed that came to be called common law. The development took place in several fields, including in issues connected with contracts, sale of goods, carriage and transportation, negotiable instruments, banking and trademarks.\(^\text{197}\)


Contract was the general name used for different kinds of business relations, which included sales, leasing of land and premises, transportation of goods through rail and ship and money lending and pawning. The essential elements of this were offer, acceptance and consideration. Every dispute on a contract was thus also a dispute in the particular field to which it was related. Therefore, alongside contract laws, the courts also, through their decisions, formulated rules and principles to be followed while deciding disputes in those specific fields. With the development of trade, commerce and industry, the law for each such field became elaborate and specialized. One of the specialized laws to emerge was the law of sale of goods. The law of sale of goods, thus, built itself on the foundation of contract law. It took contract law as given and provided further details in relation to the specific nature of the contract. The rules and principles common law courts had formulated in relation to the sale of goods were codified as the Sale of Goods Act, 1893. This was widely adopted in the commonwealth countries and the United States of America. In India, the act was adopted with minor changes in the Sale of Goods Act, 1930. The Contract Act, 1872, had contained the law of sale of goods. This was deleted with the enactment of the Sale of Goods Act, 1930.

There are five distinct themes in the clustering of the principles on the sale of goods. First, a sale is a contract where ownership in goods is transferred for a price. The overreaching principle was composed of a network of principles on specific goods, non specific goods, and delivery of goods, possession, ascertainment, and risk. One part of Sale of Goods Act, 1930 is codified of these principles. Second, a sale is a contract of a specific kind; some principles can be

simply derived from contract law. For example, general principle for compensation for breach of contract is to put the party in the position they would be if the contract were not breached. As a contract for sale is for a price, the compensation becomes the difference in the price the innocent party would get for the same goods in the market. Some parts of the Sale of Goods Act, 1930 are simply from derived from contract law. Third, sale is a special form of contract, and thus the general principles of contract law would undoubtedly apply. Thus some provisions in the 1930 Act are nearly codification of contract law. Fourth, the concept of ownership is as old as the law of contract and sale, and no person could deprive another of his ownership. The protection of ownership runs through the 1930 Act. Fifth, ordinarily only an owner can transfer ownership in goods. With the development of trade and commerce, a conflict developed between two demands. Thus the provisions of the 1930 Act concentrated on resolving aforesaid conflict. The 1930 Act relating to sale of goods divided into VII Chapters. Chapter-I deals with the short title, extend and commencement of the Act and certain important definitions. Chapter-II provides the law relating to the formation of contract which includes formalities of contract, subject matter of contract, conditions and warranties, while Chapter-III deals with effects of the contract. Chapter-IV provides for general principles for performance of contract while Chapter-V deals with rights of unpaid sellers against the goods. Chapter-VI concentrates on suits for breach of contract and Chapter-VII is miscellaneous.202

(v) **Condition and Warranties**

The provisions of the Sale of Goods Act, 1930 covered under the head: “Conditions and Warranties” comprising Section 11 to 17 are very significant

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from the point of views of consumers. Section 11 lays down the time of payment is not a condition of the contract unless the parties make it so by their contract. The buyer’s failure to pay in time does not entitle the seller to repudiate the contract. The Section thus, leaves the whole thing upon the terms of the contract and the interpretation that the courts will place upon them. The principle adopted by the courts is that “in ordinary commercial contract for the sale of goods the rule clearly is that time is prima-facie of the essence with respect to delivery.”

“The reason is obvious. A mercantile contract is not always an isolated transaction, but a link in a chance of transactions, so that punctual performance may go to the whole consideration for the sale.”

Thus, time is considered to be of the essence in three cases: (i) where the parties have expressly agreed to treat it as of the essence; (ii) where delay operates as an injury; and (iii) where the nature and necessity of the contract require it to be so construed.


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204 McCardie J. observed in Hartley v. Hymans, (1920) 3 KB 475.


206 The modified Section 55 of the English Act, 1979 provides that any terms in the Contract exempting the seller from liability for the breach of implied conditions and warranties, in case of a consumer sale, would be void. Section 6 of the Unfair Contract Terms Act 1977 restricts exclusion of liability for breach of implied conditions and warranties relating to title confirming of goods with description or sample or quality or fitness for a particular purpose. Section 5(1) of the Act gives protection to consumers by prohibiting exclusion or restriction of liability of any manufacture or distributor arising out of supply of defective goods or due to negligence.
Contracts” has recommended that the Indian Contract Act, 1872 should be amended to protect consumers against unfair terms in contract imposed by business houses. So far the recommendation has not been translated into practice. The conditions and warranties in a contract of sale of goods as incorporated in the Sale of Goods Act, are primarily aimed at protecting the interest of consumers in the matters of:

1. The time for payment and delivery of goods;
2. Right to reject the goods or claim damages in certain situations;
3. Protection of title and possession of goods purchased;
4. Merchantability and fitness of goods, for the purpose of their sale; and
5. Correspondence of the goods sold with the description or sample as offered by the seller.

In contrast to the English on the “Unfair Trade Terms Act, 1977”, the Indian Act gives precedence to the terms on the Contract which may exclude implied terms and conditions regarding title, passion, peaceful enjoyment of Goods etc. Section 12 of the Indian Act defines “condition” as a stipulation essential to the main purpose of the Contract, the breach of which gives rise to a right to treat the contract as repudiated. A “warranty” is defined as a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated. The conditions and warranties in sale of goods may be either express or implied. Express conditions and warranties are those which are agreed upon by the parties to the contract either orally in writing and are to be performed in accordance with the terms of the contract. The conditions and warranties which are not express are termed as implied. Certain implied


208 Ibid., Section 12(3).
conditions and warranties are laid down by the Act itself. Whether a stipulation is a condition or warranty also depends upon its nature as reflected by the constriction of the contract rather than it is literally called so in a contract.\textsuperscript{209} At the discretion of the buyer a condition may be treated as a warranty. The Act guarantees protection for the breach of these conditions and warranties under separate provisions.

**(vi) Seeds of the Concept of Consumerism**

Before this enactment of the Sale of Goods Act, 1930 the situation was uncertain with regard to “sale of goods or movables, the law on the subject was not only uniform throughout the British India but was also outside the limits of the original jurisdiction of the High Court, extremely uncertain in its application.”\textsuperscript{210} In the presidency towns rules of English law including those of statute of Frauds were applied. But in mofussils towns it was not certain whether the statute of Frauds was applied, this was observed by the Indian Law Commissioners in their Report – “the judge was to a great extent without the guidance of any positive law beyond the rule” and he was guided by his sense of “justice, equity and good conscience”.

The consumer protection concept emerged that day in one sense when in British India, the central government appointed in 1929 a committee to consider generally the question of amending the law relating to sale of goods contained in Chapter VII of the Indian Contract Act, 1872 and the committee agreed to the proposed law relating to the sale of goods, should be separately enacted. The Bill as settled by the committee was introduced in the Central Legislative Assembly in 1929 and the Bill became an Act in 1930. The Sale of Goods Act contains the seeds of the concept of consumer protection in several provisions which include contract of sale, conditions and warranties in the sale, transfer of

\textsuperscript{209} Ibid., Section 12(4).

property between seller and buyer, duties of seller and buyers, right of unpaid sellers against the goods and suits for the breach of the contract. When there was a specific disputes raise regarding delivery of goods twice on a particular date, the burden of proof lies on the seller who sues for the price of goods delivered. The plaintiff-seller is expected to lead evidence. As he had failed to prove the delivery of goods twice on the same date, he would not be entitled to recover the amount twice over for the same date. Similarly in a claim for damages by buyer, if he fails to proof the alleged damaged caused because of short supplies of goods by seller and has not served notice under Section 55 of the Contract Act, 1872 to claim compensation for short supply of the goods, he cannot claim damages for the alleged short supply.


The law relating to food and other essential commodities is a branch of consumer law. After Indian independence a large number of legislations have been enacted for providing protection of consumers of food and other essential commodities. In this connection the sugar control legislations, the prevention of black-marketing and infant feeding and foods legislations plays an important role for protecting consumers in India. Besides these legislations, the Prevention of Food Adulteration Act, 1954 and the Essential Commodities Act,

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213 See, the Sugar (Special Excise Duty) Act, 1959; the Sugar (Regulation of Production) Act, 1961; the Levy Sugar Price and Equalization Fund Act, 1976.
1955 are two legislations protecting the interests of consumers. These two legislations need detail deliberation.

(A) The Prevention of Food Adulteration Act, 1954

The Prevention of Food Adulteration Act, 1954 is concerned with eradicating the evil of food adulteration which is rampant in the present times.²¹⁵ The Act, prohibits adulteration and misbranding of food stuff and prescribes punishment for food adulterators.²¹⁶ To some extent, it regulates consumer supplier relations. It tries to ensure that the food is prepared, packed and stored under sanitary conditions and accordingly made available to the people. It gives a comprehensive definition of the term “adulteration” because of which the adulterators find it difficult to escape from the offence on technical grounds the Act inter-alia provides for the establishment of central food laboratory to which food samples could be referred for analysis and final opinion in disputed cases. The Act, further provides for the constitution for central committee for food standards and has vested the central government with powers regarding setting of standards of quality for the articles of food and other related matters. The Act defines adulteration as well as recognises purchaser’s right to have food and also provides enforcement measures along with penalties.

(v) Meaning of Adulteration

Adulteration implies mixing of something inferior or spurious to any commodity which reduces its purity or makes it harmful for use. Any material


which is or could be employed for the purposes of adulteration is called adulterant.\textsuperscript{217} If an article of food is not of the quality demanded by the purchasers and is not of the quality which it purports or represents, it can be said to be adulterated.\textsuperscript{218} For the purpose of the Act the term “food” has been given very wide meaning. It connotes any article used as food or drink for human consumption other than drugs and water. It also includes any article which ordinarily enters into or is used in the composition or preparation of human food, any flavouring matter or condiments, any other article declared as such by central government.\textsuperscript{219} The central government is authorised to declare an article as food within the meaning of the Act. The Act also deals with misbranded food items.\textsuperscript{220} If an article of food is harmful to health or repugnant to human use, it is termed as “unwholesome” and “noxious” respectively.\textsuperscript{221} Liquor (including country liquor) is an article used as a drink and is meant for human consumption and for the purposes of the Act is included in the definition of “food”.\textsuperscript{222} Now question arises when an article of food can be said to be adulterated? In this connection a large number of judicial decisions are available on the subject.\textsuperscript{223} The Section 2 (ia) provides that an article of food can be said to be adulterated if:

\begin{itemize}
\item \textsuperscript{217} See the Prevention of Food Adulteration Act, 1954, Section 2(i).
\item \textsuperscript{218} Ibid., Section 2 (ii)(a).
\item \textsuperscript{219} Ibid., Section 2 (v).
\item \textsuperscript{220} Ibid., Section 2 (ix).
\item \textsuperscript{221} Ibid., Section 2 (xiii).
\item \textsuperscript{222} Ibid., Section 2 (v).
\end{itemize}
1. the article contains any other substance which affects, or if the article is so processed as to affect, injuriously the nature, substance or quality thereof; or
2. any inferior or cheaper substance has been substituted wholly or in part for the article so as to affect injuriously the nature, substance or quality thereof; or
3. any constituent of the article has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof; or
4. the article had been prepared, packed or kept under insanitary conditions whereby it has become contaminated or injurious to health; or
5. the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or vegetable substance or is insect-infested or is otherwise unfit for human consumption; or
6. the article is obtained from a diseased animal; or
7. the article contains any poisonous or other ingredient which renders it injurious to health; or
8. the container of the article is composed, whether wholly or in part, of any poisonous or deleterious substance which renders its contents injurious to health; or
9. any colouring matter other than that prescribed in respect thereof is present in the article, or if the amounts of the prescribed colouring matter which is present in the article are not within the prescribed limits of variability; or
10. the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits; or
11. the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability, but which renders it injurious to health; or
12. the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health.

However, the question remains open for consideration: when an article shall be deemed to be not adulterated? An article is not deemed to be adulterated where the quality for purity of article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limit of variability, solely due to natural causes and beyond the control of human agency. Also, where two or more articles of primary food are mixed together and the resultant article of food is stored, sold or distributed under a name which denotes the ingredients thereof; and is not injurious to health, such an article is not deemed to be adulterated.

(vi) Judiciary in Identifying Adulteration of Food Stuffs

Although the concept “adulteration” has been defined in the Prevention of Food Adulteration Act, 1954 a large number of issues has been examined by the courts in determining adulteration of food stuffs. In State of Maharastra v. Babu Rao, the question before the Supreme Court was whether the ice cream sold by the accused containing 5.95 per cent of milk fat as against prescribed 10 per cent was adulterated. The court speaking through O. Chinappa Reddy J raised the issue that how the standard of milk fat for buffalo milk 5 per cent should render it impossible for ice cream to contain a minimum percentage of 10 per cent milk fat. The court pointed out that by several methods higher percentage

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225 See the Prevention of Food Adulteration Act, 1954, Section 2(ia),(b) to (m).

226 AIR 1985 SC 104.
of milk fat in ice cream can be attained. For instance, the most common way is to heat milk to an extent so as to reduce the percentage of water and increase the percentage of milk fat. Another well known method is to add cream with higher percentage of milk fat. Another well known method is to add cream with higher percentage of milk fat into the milk before preparing ice cream.

Section 2(ia)(1) of the Act provides that an article of food shall be deemed to be adulterated if the quality or purity of the article of food falls below the prescribed standard, or its constituents are not within the prescribed limits of variability but this variability does not render it injurious to health. Section 2(ia)(m) provides that an article of food shall be deemed to be adulterated if the quality or purity of the article falls below the prescribed standard, but which does not render it injurious to health. The court said that there was nothing to show that low percentage of milk fat made the ice cream injurious to health. Inspite of this observation, the court held that ice cream sold by the first respondent was adulterated under Section 2(ia)(m). The first and the fourth respondents were, therefore, liable to be convicted under Section 16 (1)(a)(ii). So far as respondents 2 and 3 were concerned, there was nothing to indicate that they were in charge of or were in any way responsible for the conduct of the business of the firm.

In a case of adulteration of soyabean oil in which the food inspector collected the sample and forwarded it to the public analyst for analysis, the public analyst found the oil adulterated as it contained traces of cotton seed oil. Thereafter the seller was convicted under Section 16(1)(a)(i) and sentenced to rigorous imprisonment. His appeals at the session court and High Court were rejected; hence he came to the Supreme Court on the contention that rule 9 – A of the Prevention of Food Adulteration Rules as substituted for 9(j) in 1977, prescribed and imposed a duty on the local (health) authority to forward
“immediately” a copy of report of the public analyst, after the institution of the prosecution by registered post or hand, to the person from whom the sample was collected by the food inspector. In sending the report of public analyst there was a delay of 18 days. The question involved was about the interpretation of the expression “immediately” in *Tulsi Ram v. State of M.P.*[^227] Rule 9-A as amended does not mention any definite time limit which gave rise to the controversy whether it was mandatory or directory. The Supreme Court observed that the expression “immediately” should convey a sense of continuity rather than urgency. The court held:

> It is not to be understood to mean the very next instant, the very next hour, that very day or the very next day. It must be construed in its settings. It is no use to turning to dictionaries. Dictionaries give variegated meaning to word. What meaning is to be adopted depends on the context.

The court said that what was needed to be done was that the report should have been sent to the person from whom the sample was taken at the earliest opportunity so as to facilitate the exercise of the statutory right under Section 13(2) in good and sufficient time before the prosecution commenced leading evidence. The reasoned opinion of the Court construed the meaning of the word “immediately” in a logical and pragmatic manner.

**(vii) Purchaser’s Right to Have Food**

In order to combat the menace of adulteration the consumers must be educated and made aware of their rights to sue the producers, distributors or traders or

[^227]: AIR 1985 SC 299.
any person or agency guilty of adulteration. The right to food\textsuperscript{228} is a fundamental right recognised under Article 21 of the Constitution of India. The issue relating to right to food was examined by the Supreme Court in Kishen Pattanayak \textit{v. State of Orissa}.\textsuperscript{229} In this case the Court issued directions to reconstitute natural calamities committee and various steps and social welfare measure to be taken by the Government for mitigating hunger, poverty and starvation deaths in the State of Orissa. The Court also directed the Government of Orissa that it shall within a month nominate the names of at least five persons belonging to the recognised voluntary organisations like Sarvodaya Gandhi Peace Foundation, Ramakrishna Mission, Bharat Sewa Sangh and Registered Voluntary agencies as members of the said natural calamities committee of the district. The Committee shall hold at least one meeting every two months. If such measures are taken there can be no doubt that it will alleviate to a great extent the miseries of the people. The right to food is an un-enumerated right under Article 21 of the Constitution. Thus, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.\textsuperscript{230}

For the purpose of realisation of the right to food, the Prevention of Food Adulteration Act, 1954 empowers the central government or the state government to appoint public analysts for different areas as may be assigned by the government.\textsuperscript{231} Food Inspector takes sample of food analysis\textsuperscript{232} and it is the

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid., Section 8.
\item Ibid., Section 11.
\end{enumerate}
\end{footnotesize}
responsibility of the food inspector only to send the sample immediately by the succeeding working day to the public analyst. An ordinary purchaser of any article of food other than a food inspector or a recognised consumer association, whether the purchaser is a member of that association or not, can also have article of food analysed by the public analyst on the payment of prescribed fee and receive from him a report of his analysis. The purchaser and recognise consumer association should inform the vendor, at the time of purchase of such article, of his or its intention to have such article so analysed.233

Any action of such purchaser for the recognised consumer association should be in accordance with the procedure as is applicable to a food inspector who takes a sample of a food analysis. If the report of public analyst shows that the article of food is adulterated, the purchaser or recognised consumer association would be entitled to get refund of the fees paid for the said purpose.234 The public analyst should deliver, the report of his analysis of the article submitted for analysis to the local (health) authority. If some prove of adulteration has been shown in the report, prosecution has to be initiated against the persons from whom the sample of the article of food was taken for purchase.235

(viii) Enforcement Measures and Penalties

Any manufacturer, distributor and dealer should give to a vendor, about every article of food warranty in writing in the prescribed form about nature and quality of such article of food. A bill, case memo or invoice in respect of a sale of any article of a food given by a manufacturer, distributor or dealer is deemed

233 Ibid., Section 12.

234 Ibid., Proviso to Section 12.

235 Ibid., Section 13 (2).
to be warranty given by such manufacturer, distributor or dealer under this Section.\textsuperscript{236} Every vendor of an article of food is duty bound to disclose to the food inspector the name, address and other particulars of the person from whom he purchased the article of food. The Act authorises the central government or the state government to involve local or medical petitioner of any area also in the process of prevention of food adulteration requiring them to report all occurrences of food poisoning coming within their cognizance to such officers as may be specified in the notification.\textsuperscript{237} If any person imports or makes any other person to import on his behalf into India or manufactures for sale or store, sells or distributes any adulterated or misbranded article of food in contravention of any of the provision of this Act, he can be punished with imprisonment for a term extending from six months to three years and a fine, not less than one thousand rupees.\textsuperscript{238}

(B) The Essential Commodities Act, 1955

(i) Scheme of the Act

There is a correlation between right to food, right to commodities and their fair prizes. The Essential Commodities Act, 1955 which was enacted by the central government aims at maintaining supplies of the essential commodities and to ensure their availability to all people at fair prices. For the fulfilment of its purposes, the Act confers regulatory powers on the central governments through licences, permits and others measures to control productions, storage, transport, distribution, acquisition and consumption of any essential commodity falling under the purview of the Act. Provisions have been made under the Act for the seizure of essential commodities traded in contravention of its provisions, and

\textsuperscript{236} Ibid., Section 14.

\textsuperscript{237} Ibid., Section 15.

\textsuperscript{238} Ibid., Section 16.
the mechanism thereof. The Act prescribes penalties for any contravention of orders passed under the Act and makes explicit provisions about the liability of companies. Procedure for the trial of persons contravening the orders under the Act has also been laid down. The recognized consumer associations have been empowered to make a report in writing of the facts constituting the offences under the Act for the purpose of taking cognizance by courts. Now we propose to discuss the commodities covered by the Act, regulatory powers of the central government and various amendments made to the Act.

(ii) Commodities Covered by the Act

The Essential Commodities Act provides for the control of the production, supply and distribution of and trade and commerce in certain commodities which can be categorised into three: firstly, food for human beings and cattle, secondly, raw materials for industries, and thirdly, products of industries controlled by the Parliament. Although, the list of essential commodities as incorporated to the Act is not exhaustive they include: (i) cattle fodder, including oilcakes and other concentrates; (ii) coal, including coke and other derivatives; (iii) component parts and accessories of automobiles; (iv) cotton and woollen textiles; (v) drugs; (vi) foodstuffs, including edible oilseeds and oils; (vii) iron and steel, including manufactured products of iron and steel; (viii) paper, including newsprint, paperboard and straw board; (ix) petroleum and petroleum products; (x) raw cotton, whether ginned or unginned, and cotton seed; (xi) raw jute.

As stated above the above list is not exhaustive the central government is authorised to declare, by notified order, any other commodity as an essential commodity for the purpose of the Act with respect to which the Parliament has

See Essential Commodities Act, 1955, Section, 11.
power to make laws by virtue of Entry 33, List III of the 7th Schedule of the Constitution of India.\textsuperscript{240}

(iii) \textbf{Regulatory Powers of the Central Government}

The central provision of the Act is Section 3 which provides for the powers to control production, supply and distribution of essential commodities. It authorises the Central Government to regulating or prohibiting the production, supply and distribution of an essential commodity and trade and commerce therein, inter-alia, for maintaining or increasing supplies thereof or for securing their availability at fair prices.\textsuperscript{241} For this purpose orders can be issued by the Central Government:\textsuperscript{242}

- (i) for regulating by licenses, permits or otherwise the production or manufacture of any essential commodity;
- (ii) for bringing under cultivation any waste or arable land for the growing thereon of food-crops or otherwise maintaining or increasing the cultivation of food-crops; and
- (iii) for controlling the price at which any essential commodity may be bought or sold.

The Central Government can also take steps for regulating by licences, permits for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal, acquisition use or consumption of any essential commodity; for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale. Any person holding in stock, or engaged in

\begin{itemize}
\item \textsuperscript{240} \textit{Ibid.}, Section 2(a)(xi).
\item \textsuperscript{241} \textit{Ibid.}, Section 3(1).
\item \textsuperscript{242} \textit{Ibid.}, Section 3(2).
\end{itemize}
the production, or in the business of buying or selling, of any essential commodity may be required: (i) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or (ii) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such person or class of arsons and in such circumstances as may be specified in the order. Where any person sells any essential commodity in compliance with an order made with reference to clause (f) of sub-section (2), there shall be paid to him the price: (a) where the price can, consistently with controlled price, if any fixed under this section, to be agreed upon, the agreed price; (b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any; (c) in other cases the price calculated at the market rate prevailing in the locality at the date of sale.

(iv) Amendment and Dimensions to the Act

The 1955 Essential Commodities Act has been amended in a number of times to make the act dynamic. Essential Commodities (Amendment) Act, 1957 was enacted because of excessive holding of food stuffs. To overcome this problem a stringent provision was added to Section 3 that the Central Government may direct the control the prices of food stuffs. The average market rate prevailing in the locality shall be determined by an officer authorized by the central

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243 Explanation 1 to Clause (f) of sub-section 2 of Section 3 of the Essential Commodities Act, 1955 runs: “An order made under this clause in relation to food grains, edible oilseeds or edible oils, may having regard to the estimated production, in the concerned area, of such food grains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of, such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation or the producers.”

244 Ibid., Section 3(3).
government in this behalf, with reference to the prevailing market rates for which published figures are available in respect of that locality or of a neighbouring locality. The average market rate so determined shall be final and shall not be called in question in any court.\textsuperscript{245} Any person required to sell to the central government or a state government or to any of its officers or agents or a corporation, any grade or variety of food grains, edible oilseeds or edible oils in the absence of a notification or having been issued, ceased to be in forced, should be paid and amount equal to the procurement price of such commodity.\textsuperscript{246} Different prices may be determined from time to time for different areas or for different factories or for different kind of sugar.\textsuperscript{247}

The Essential Commodities (Amendment) Act, 2003 has inserted sub-section 3D and 3E to Section 3 of the Act. These two sub-sections have been inserted to the principle Act, empowering the central government to direct the producer, importers or exporters of sugar to sell or otherwise dispose of or deliver any kind of sugar or remove any kind of sugar from the bonded godowns of the factory in which it is produced, only under and in accordance with the direction issued by the government. It is immaterial, whether such godowns are situated within the premises of the factory or outside or from the warehouses of the importer or exporters. However, this would not affect the pledging of such sugar in favour of any scheduled bank or any corresponding constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. The central government may also, from time to time, by general or special order, direct any producer or importer or exporter or recognized dealer or any class of producers or recognized dealers, to take action regarding production,

\textsuperscript{245} Ibid., Section 3(3A).

\textsuperscript{246} Ibid., Section 3(3B).

\textsuperscript{247} Ibid., Section 3(3C).
maintenance of stocks. Storage, sale, grading, packing, marking, weighing, disposal, delivery and distribution of any kind of sugar in any manner as may be specified in the direction.

The Essential Commodities (Amendment) Act, 2010 amends the Act of 1955. For the removal of doubts, it is hereby declared that the expression “fair and remunerative price” referred to in clause (a), “manufacturing cost of sugar” referred to clause (b) and “reasonable return on the capital employed” referred to clause (c), of this sub-section do not include the price paid or payable under any order or any enactment of any state government and any price agreed to between the producer and the grower or a sugar cane growers’ co-operative society.

(v) Judicial Dimensions of the Act

After the enactment of the Act the court has also interpreted it for making the Act dynamic. Whenever an essential commodity is seized in pursuance of an order made under section 3 a report of such seizure should be made to the collector concerned without unreasonable delay.\textsuperscript{248} The Madras High Court followed the principle in a right way, in \textit{Laksmi Rice Mills v. The District Revenue Officer},\textsuperscript{249} a case of seizure of goods. The court issued directions, requiring the respondents to pay the value of goods ascertained in terms of prevailing market value of the goods seized. An order of confiscation is not invalid merely by reason of any defect or irregularity in the notice if, in giving such notice, the requirements have been substantially complied with. The basic

\textsuperscript{248} Ibid., Section 6A.

\textsuperscript{249} AIR 1998 Mad.22.
purpose is that reasonable opportunity being heard is to be given before making any order confiscating any essential commodity.\footnote{Kiran Oil Industries v. District Collector, AIR 1997 Guj 1530.}

Production, supply and distribution of essential commodities are controlled under the Essential Commodities Act, 1955 according to which certain items of public consumption have been declared as essential commodities in the public interest. In \textit{Trans-Yamuna Cement Dealers Association v. Governor of Delhi},\footnote{AIR 1988 Del 247.} the question was whether a control order under Section 3(2)(d) of the Essential Commodities Act, 1955 could be issued for cement as an essential commodity. The Court held that cement was specified in the First Schedule to the Act. Therefore, both the requirements of Clause (xi) of Section 2(a) were fulfilled and cement was an essential commodities as defined under Section 2(a)(xi). The petition was dismissed by the Court. The Section 3 of the Act gives very wide powers to the central government, many cases have come before courts to find out whether these powers have been used fairly. In \textit{Reghu Seeds and Farm v. Union of India},\footnote{AIR 1994 SC 533.} while considering the validity of the Seeds (Control) Order, 1983, the court held that it is very much within the competence of Central Government to declare certain seeds as essential commodities in view of scope of Entry 33 of List-III of Schedule VII of the Constitution of India. Being so, the Seeds (Control) Order, 1983 is not \textit{ultra-virus} the powers of the Central Government under Section 3 of the Act. According to the Act consumer protection envisages production and regulated supply through well guaranteed distribution of the essential commodities to the general public at a reasonable price within easy reach of the common man in the country. In \textit{District

\footnotesize{\begin{itemize}
  \item \textit{Kiran Oil Industries v. District Collector, AIR 1997 Guj 1530.}
  \item AIR 1988 Del 247.
  \item AIR 1994 SC 533.
\end{itemize}}
Collector, Chittoor v. Chittoor District Groundnut Traders Association, the question was whether the direction issued by the State government which placed restrictions on the movement of oilseeds and edible oil to outside states and imposed compulsory levy and required millers and traders to sell oil seeds and oil at a price fixed by it without the prior concurrence of the central government where ultra-virus its power. The Supreme Court observed:

The state government was delegated limited power to make orders in relation to food stuffs subject to certain conditions specified in the notification after obtaining prior sanction of the central government. Any order made by the state government regulating matters specified in clause (2) of the Notification without obtaining the prior sanction of the central government would be in contravention of the delegated power.

The Court dismissed the appeal and confirm the order of the High Court that the impugned restriction placed by the government were ultra-virus. In State v. Ahmed, the controversy centred around the issue whether the report of the public analysed was admissible as substantive evidence to prove the fact that the specimen seal tallied with the seal affixed on the sample. The court held that the report of the public analyst was admissible as substantive evidence to prove the fact that specimen seal tallied with the seal affixed on the sample. It was a case of statutory interpretation vis-à-vis the duty of public analyst. On an issue whether tea is foodstuff or not the Supreme Court in S. Samuel, M. D. v. Union of India, held that tea is not foodstuff as it does not have any nutritive value. However, the word ‘oil’ was used in regard to foodstuff, thus, it pertains to only edible type of oils and not oils like kerosene. The ban imposed on

253 AIR 1989 SC 989.
254 AIR 1989 Kant 115.
manufacture of skimmed milk is illogical.\textsuperscript{257} In \textit{Manas Ranjan Das v. State of Orissa},\textsuperscript{258} the Court recognised the Public Distribution System an essential means for distribution of essential commodities and held that the object and purpose of Public Distribution System is that a common man should get the essential commodities easily and any inconvenience caused to him is against the system.

V. \textbf{The Monopolies and Restrictive Trade Practices Act, 1969 and the Competition Act, 2002}

It has been argued that the pro-consumer approach in any economic law is an emerging approach in the contemporary era. The Monopolies and Restrictive Trade Practices Act, 1969 was considered, \textit{inter-alia}, not maintaining pro-consumer approach. Hence the Act was repealed in the last decade. The Competition Act, 2002 is one of the most important legislations passed in India to regulate the new economic regime characterised by privatisation, liberalisation and completion. The Act was enacted in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure the freedom of trade carried on by other participants in market. The 2002 Act has replaced the Monopolies and Restrictive Trade Practices Act, 1969 which had been enacted to prevent concentration of economic power to the common detriment. The 1969 Act contained certain provisions for prevention of unfair trade practices, impacting consumer interest. Therefore, an attempt has been made in the following pages to examine both the Acts:

\textsuperscript{257} \textit{Daily Foods v. Union of India}, AIR 1993 Del 278.

\textsuperscript{258} AIR 2004 Orissa 62.
(A) The Monopolies and Restrictive Trade Practices Act, 1969
(i) The MRTP Act and 1984 Amendment

The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, 1969) originally enacted for providing the operation of the economic system ensuring that there was no concentration of economic power to common detriment. It also provided for the control of monopolies and prohibition of monopolistic and restrictive trade practices. In 1978, the High Powered Expert Committee on Companies and the MRTP Act, commonly known as the Sahara Committee expressed the view that consumers needed to be protected not only from the effects of restrictive trade practices but also from practices which were resorted to by the trade industry to mislead or dupe the consumers. Keeping in view the dangers of monopoly and monopolistic tendencies and need for curb on unfair trade practices for safeguarding the interest of consuming masses, MRTP Act, 1969 has been amended by the Monopolies and Restrictive Trade Practices (Amendment) Act, 1984. Through the 1984 amendment Act some provisions related to unfair trade practices were inserted in Chapter-V, Part-B, (Section 36A to 36E of the Act) on the pretext that the consumers could be granted protection against false or misleading advisements or other unfair trade practices.

(ii) Unfair Trade Practices
(a) Section 36A

Section 36A explains what “unfair trade practices” means for the purposes of the MRTP Act. The main purpose of the provisions is to effort some measure of protection to the ultimate consumers of goods or users of services the consumer

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must get what he is told he is getting. Where, by any method whatsoever, a belief is created in the minds of consumers as to some quality or utility of goods or services, and the goods actually fall short of those standards, this will be unfair to consumers. As a part of the statutory framework of the consumer protection programme, such a method has been regarded by the Act as an unfair trade practice. Such methods are listed in the Section 36A. The section says that where the methods stated in the section are adopted for the purpose of promoting the sale, use or supply of any goods or for the provision of any services and thereby some loss or injury is caused to the consumers of such goods or services, it is an unfair trade practice, whether the purpose is achieved by eliminating or restricting competition or otherwise. This is so because the primary theme of the provisions is to protect the consumer from the business community. The provisions became necessary because the provisions of the Contract Act, 1872 relating to Fraud and Misrepresentation and those of the Sale of Goods Act, 1930 relating to Conditions and Warranties have not been able to give adequate protection to consumers against deceptive trade practices. This is true primarily because of high cost and long delays of litigation. The practices mentioned in the Section 36A are grouped in five categories: (i) false representation, (ii) false offer of bargain price, (iii) schemes offering gifts, etc, (iv) non-compliance of prescribed standards, and (v) hoarding, destruction or refusal.

(b) Role of the Judiciary

The Indian Judiciary has decided not many cases of unfair trade practices may be due to the fact that Monopolies Restrictive Trade Practices Commission has

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*Where the quality contained in a packet is less than that stated on the packet but otherwise the goods are of prescribed standard, Food Specialties Ltd, Re, (1991) 71 Comp cas 564 (MRTPC) and where a company invites the public to subscribe for its share, Director General of Investigation and Registration v. Spring Steel Ltd, 71 Comp Cas 679 (MRTPC). The Sikkim High Court has held that the effect of the provision is to bar the jurisdiction of civil courts, I. T. C v. Krishna Moktan, AIR 1992 Sikkim 1.*
had a monopoly of dealing with such cases in the past. The definition of unfair trade practice has been fully incorporated into the Act and which was identical with the definition of unfair trade practices in the Monopolies Restrictive Trade Practices Act. In the judgement of far reaching implication, the Supreme Court has held that an intentional practice adopted by a trader in not making delivery of a vehicle booked by consumer amount to unfair trade practice under section 36-A has amended in 1991 of MRTP Act. A similar amendment had not then been effected in the definition of unfair trade practice in the Consumer Protection Act. The crucial part of the amended definition made unfair trade method also as an unfair trade practice. In the instant case which arose before the amendment of the definition of unfair trade practice in Consumer Protection Act the court held that it could not be held that intentional delay in making delivery by the trader would amount to unfair trade practice. With regard to amended definition of the expression in MRTP Act the Supreme Court has made an authoritative pronouncement:

After the introduction of aforesaid amendment, which provides that the unfair trade practice adopted by a trader vis-a-vis the consumer, the conduct and practice intentionally adopted by the respondent in not making delivery of the trader to the appellant shall certainly be deemed ‘unfair trade practice’ with the meaning of Section 36A of the Act.

In *Ishvarbhai P. Bejanwala v. Bajaj Auto Ltd.*, the Gujarat State Commission held that giving assurance to the consumer and recovering full price, giving

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262 The June 1993 amendment of Consumer Protection Act, 1986 the definition of unfair trade practice has been given in full in Section 2(1)(r). According to the Section 2(1)(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.


264 [IV] 1991 (I) CPR 720 (Guj).
receipt of particular chassis number, engine number in respect of vehicle and thereafter not making delivery of the same was clearly an unfair trade practice. In this case dealer had delayed delivery to charge higher price. In the facts of the case the commission concluded that having accepted the price by cheque it was not open for the dealer to demand increase of price even if the increase was made by the manufacturer because the later had send the vehicle to the dealer for delivery.

The National Commission has held that selling defective seeds after making false representation amounted to gross negligence. It is surprising that neither the State Commission nor the National Commission held it as an unfair trade practice.\textsuperscript{265} However in another case where a pharmacy college delayed granting of registration to students who had passed out the course, the National Commission held it was an unfair trade practice. It appears that the apex consumer court was referring to unfairness in its literal but not legal sense.\textsuperscript{266}

The Maharashtra State Commission had held that sale of kitply contrary to claims and representations made were unfair trade practice.\textsuperscript{267} Making a representation those services would be by dry cleaning when it is not done on that manner amounts to unfair trade practice as it amounts to false representation that “services are of particular standard, quality or grade”.\textsuperscript{268} It has been held by the Delhi State Commission that the claim on the part of a builder of 30 per cent of covered area on account of super area is unfair trade practice.\textsuperscript{269} Inducing persons through advertisements to part with money on the


\textsuperscript{266} Akhil Bhartiya Grahak Panchayat v. Secretary, Sharda Bhawan Education Society, F.A. No.15/92 Order dated 25.4.1994 (NC).

\textsuperscript{267} Jaswant Singh v. M.D. Kitply Industries, 1994 (3) CPR 9 (Mah).

\textsuperscript{268} Modern Dry Cleaners v. A. Kanniappan, [X] 1994 (3) CPR 230.

promise of securing a job for them in Muscat has also been held to be unfair trade practice.\(^{270}\)

(iii) MRTP Commission

Section 36B to 36E of the Monopolies and Restrictive Trade Practices (Amendment) Act, 1984 the power and functions of MRTP Commission have been explained. Under Section 36B of the Act the MRTP Commission was authorised to initiate an inquiry into any unfair trade practice: (i) on a complaint received from any trade association or any consumer or a registered consumers’ association; (ii) on a reference received from the central government or any state government; (iii) on an application received from the Director-General of Investigation and Registration; and (iv) on its own knowledge or information (i.e., *suo motu inquiry*). Before instituting an inquiry into an unfair trade practice, the MRTP Commission could get a preliminary investigation conducted by the Director-General, to satisfy itself that the case in point had any substance and deserved a statutory inquiry.\(^{271}\) The manner in which the investigation was to be conducted and the time within which the report was to be submitted had been left to the discretion of the Commission. It was to ensure that no frivolous complaint or reference was made. The preliminary investigation, as a fact-finding investigation, was, therefore, intended to assist the Commission in making the opinion that there existed a *prima facie* case for instituting an inquiry into unfair trade practice. On finding the impugned trade practice as prejudicial to the public interest or to the interest of any particular consumer or of consumer or of consumers in general, the Commission could issue ‘cease-and-desist’ orders about any such practice.\(^{272}\) Besides, it could

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\(^{270}\) *P.T. Pani v. Regency Travels*, [I] 1994 (2) CPR 130 (Del).

\(^{271}\) Monopolies and Restrictive Trade Practices Act, 1984, Section 36C.

\(^{272}\) Ibid., Section 36D.
declare the agreement relating to the impugned unfair trade practice as void or direct the parties to modify the impugned agreement in a certain manner. The Commission could also direct the person concerned to publish a corrective advertisement.

(iv) Failure of MRTP Act

During 1980s there was an increased demand for ensuring legal protection of consumers all over the world. Secondly, there was also a conflict between concept of monopoly and trade practise and fair competition. Economic analysis of competition shows that perfect competition can best run the market and benefit consumers. In this situation MRTP Act, 1969 faced challenges to survive. It has been noticed during the subsequent period of the 1984 Amendment of MRTP Act that the most effective method of safeguarding the interest of consumers is not greater intervention by the State but the active participation of voluntary consumer protection agencies and the consumers themselves in the free market. Many times governmental regulation is not effective although it purports to prevent harm to consumers. This is an usual argument always advance by the producers and sellers. If there is any progressive legislation to protect the interest of consumers then there is opposition in the name of populist measures or politically motivated. In this regards Madhya Pradesh Consumer Protection Bill, 1984 is the leading example. Madhya Pradesh in India is the only State which has initiated a comprehensive legislation for consumer protection which was prepared by the Madhya Pradesh Law Commission and accepted by the State Government.

273 Ibid., Section 36D(1)(b).
274 Ibid., Section 36D(3).
Bill was introduced in the State Legislative Assembly in April 1984 which was opposed by the Federation of Indian Chambers of Commerce and Industry (FICCI). The FICCI considers, the proposed legislation to check exploitation of consumers by traders, food adulteration and other unfair trade practices a populist measures motivated by political expediency rather than concerns for consumers’ interest. The FICCI further said:

(FICCI) the apex body representing a sizable section of trade and industry in the country, the interest of consumers are better served by the “enlighten self interest” of a business community, that evolves a self regulatory system than the consumer protection bill, introduced in the Madhya Pradesh Vidhan Sabha (Legislative Assembly) during its budget session in April last (1984).

The FICCI further express that it is doubtful whether the State is ripe for this type legislation considering its poverty level and relative backwardness of its economy. It cannot be doubted that “the producers or suppliers of the commodities are judges in their own cause and the balance of any scheme of self regulation will favour the suppliers rather than consumers: such is human nature”. This argument is advanced by those who know better how to serve their vested economic interest – not the community interest. Therefore, any


277 Ibid.

278 Ibid.

consumer protection measures in India should be appreciated and Madhya Pradesh Bill on the subject is a progressive welfare measure which requires consultation between the government and consumers on the other hand and producers, sellers and their agencies on the other to herald and era consumerism in the country in this regard the report of the Madhya Pradesh Consumer Protection Bill states very well the central point of the measure.\textsuperscript{280}

If the basic rights are assured to the consumers then it will certainly help them to raise their standard of living and they will appreciate and accept the concept of consumerism which is defined as a social movement intended to safeguard the interest of buyers throughout various social control measures. This will create a consciousness in the society which would generate a new force to reject the rule of \textit{caveat emptor} (let the buyer aware) and pave the way for the acceptance of the theory of \textit{caveat venditor} (let the seller beware) in the larger interest of coordinated economic growth. In view of this, it is necessary to evolve a comprehensive consumer court in order to suggest structural base and to rejuvenate the faith of common man in the efficacy of law and its instrumentalities.\textsuperscript{281}

In some total consumerism in the twentieth century is a social force within socio-economy and politico environment which is designed to protect the basic rights, aid, and advise the consumer against the exploitation of business through legal, moral, social and economic devices.\textsuperscript{282} On the other hand the performance of MRTP Act was also poor. One of the reasons for poor performance of the

\textsuperscript{280} See Report No.83 of the Madhya Pradesh Law Commission on Madhya Pradesh Consumer Protection Bill, 1984 at p. 3.

\textsuperscript{281} Ibid., Annexure-I.

MRTP Act was the absence of proper and adequate definitions in the Act. The Act did not contain certain definition to many of the Act which is essentially anti-competitive in nature like predatory pricing, cartel, collusion, bid-rigging etc. Among with this, the MRTP Commission was also very poorly resourced with adequate weapons while checking anti-competitive practices in the market. In 1991, rocked by balance of payment crisis, government of India introduced market oriented reforms aimed at dismantling the industrial licensing system, giving business the freedom to make investment decisions and the gradual opening of key infrastructure sectors to private investors. Since then, government has begun to lift many import controls, reduce tariffs and liberalization of economy. Ten years after this amendment, the Government understood that the whole set up had become an anachronism, and a committee was set up to suggest ways and means to promote competition and to advise a modern competition law for India in line with international developments and to suggest a legislative framework. In October 1999, the Government of India appointed a Committee, under the chairmanship of Mr. S. V. S. Raghawan, to propose a modern competition law suitable to new economic conditions in India. The Committee submitted its report to the Government on May 22, 2000, recommending the repeal of the MRTP Act and enactment of a new legislation in its place. The Central Government after considering this suggestion has enacted the Competition Act, 2002 and repeal the MRTP Act.

(B) The Competition Act, 2002

(i) Scheme of the Act


See also B. B. Chakrabarti and Mritunjoy Mohanty, “Risk, Regulation and Competition: A Different View on the Jalan Committee Report”, 46 Economic and Political Weekly, 2011(March) p. 72.
The Competition Act, 2002 provides protection of the interest for consumers. The main objects of the Competition Act, 2002 are: (a) promotion and sustenance of competition in markets; (b) prevention of practices having adverse effect on competition; (c) protection of consumer interest; and (d) ensuring freedom of trade. The Act also provides for the establishment of a Competition Commission of India (CCI) with specific powers and functions related to promotion of competition in India and control of practices adverse to it. There has been an amendment in 2007 to bring the Act in compliance with the Supreme Court mandate. Thus, the Competition (Amendment) Act, 2007 has altered the composition of the Commission and has made the offices and the Chairman and members as full time. It has also provided for the creation of a selection committee consisting of the Chief Justice of India as the Chairperson, to select the Chairman and the members of the Commission. The amendment, however, has not modified the substance of the legislation in anyway.

The successor to the Monopolies and Restrictive Trade Practices Act, the Competition Act, 2002 covers the following core enforcement–cum-regulatory issues, including the prohibitions of anti-competitive agreements, prohibition of abuse of dominance, regulation of merger and acquisitions. The Act adopts a substantive test for the prohibition of anti-competitive agreements – the key to the offence is the determination of whether the agreement has caused or

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286 Brahm Dutt v. Union of India, AIR 2005 SC 730.


288 The Competition Act, 2002, Section 3.

289 Ibid., Section 4.

290 Ibid., Section 5.
is likely to cause an appreciable adverse effect on competition within India.\textsuperscript{291} The entire concept of appreciable adverse effect on competition is made subjective that may vary from case to case. Section 19(3) of the Act provides that while determining whether an agreement has an appreciable adverse in pact on competition or not, the Competition Commission of India (CCI),\textsuperscript{292} the nodal agency, incorporated under the administrative set up of the Act, has to take into account, \textit{inter alia}, following factors:

1. Driving existing competitors out of the market\textsuperscript{293} or creating barriers for new entrants,\textsuperscript{294} both of which directly affect the range of choices the consumer has.

2. Technical, scientific and economic development, \textsuperscript{295} thereby leading to innovation in products or services which will benefit the consumer.

3. Improvements in production or distribution of goods and services\textsuperscript{296} or the accrual of any other benefit to the consumer.\textsuperscript{297}

With respect to abusing one’s dominant position in the market, the Act expressly states that under the following circumstances, it shall be considered an abused: (i) indulging in unfair and discriminatory condition in the purchase of goods or services; \textsuperscript{298} (ii) price discrimination, including predatory pricing;\textsuperscript{299}

\textsuperscript{291} Ibid., Section 3(1).


\textsuperscript{293} The Competition Act, 2002, Section 19(3)(b).

\textsuperscript{294} Ibid., Section 19(3)(a) and (c).

\textsuperscript{295} Ibid., Section 19(3)(f).

\textsuperscript{296} Ibid., Section 19(3)(e).

\textsuperscript{297} Ibid., Section 19(3)(d).

\textsuperscript{298} Ibid., Section 4(2)(a)(i).
(iii) limitation in output or restriction or scientific development to the prejudice of consumers;\(^{300}\) (iv) creating barriers for other players to enter the market,\(^{301}\) thereby limiting consumer choices. For obvious reasons, the above factors are directly related to consumer welfares. Similarly, the Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India.\(^{302}\) Such a combination satisfying the above test is void.\(^{303}\) Here again, the key to the offence is the determination of whether a combination has caused or is likely to cause an appreciable adverse effect on competition within India. The CCI must take into account whilst determining whether a combination would have an appreciable adverse effect on competition is specified in Section 20(4) of the Act. This includes, \textit{inter alia}, the likelihood that the combination would result in the parties being able to significantly and sustainably increased prices,\(^{304}\) extant to which substitutes are available or are likely to be available in the market\(^{305}\) and nature and extent of innovation.\(^{306}\) Since various provisions of the Competition Act are of great relevance to consumers, the Act has adopted its own definition of “consumer”.\(^{307}\) According to this definition, a buyer of any goods and the hirer of any

\(^{299}\) Ibid., Section 4(2)(a)(ii).

\(^{300}\) Ibid., Section 4(2)(a)(i) and (ii).

\(^{301}\) Ibid., Section 4(2)(c).

\(^{302}\) Ibid., Section 6.

\(^{303}\) Ibid., Section 6.

\(^{304}\) Ibid., Section 4(2)(e).

\(^{305}\) Ibid., Section 4(2)(g).

\(^{306}\) Ibid., Section 4(2)(1).

\(^{307}\) Ibid., Section 2(f).
services for consideration is a consumer. However, a consumer includes, besides the purchaser of goods or hirer of services, uses of goods and the beneficiaries of services who use or avail them with the approval of the first purchaser or the hirer. It is immaterial that such purchase of goods or hiring or availing of services was for resale or any commercial purpose or for personal use.\textsuperscript{308}

(ii) Anti-Competitive Agreements

Sections 3, 4, 5 of the Competition Act, 2002 exhaustively deal with anti-competition agreements, abuse of domain position and matters relating to combination. There is total prohibition against any enterprise or association of enterprises or a person or association of persons from entering into agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition within India. Any such agreement is declared as void. The crucial question is what constitutes adverse effect on competition which is a pre-condition for an agreement to be void. The parameters laid down in the Act are that any agreement (a) which directly or indirectly determines purchase or sale price, (b) limits or control production, supply, markets, technical development, investment or provision of services, (c) shares the market or service or sources of production or provision of services by way of allocation of geographical area of market or type of goods or number of customers in the market or any other similar way, (d) directly or indirectly results in bid rigging or collusive bidding. Rigging is defined to mean any agreement which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.

There is a silver lining to the effect that nothing of what is stated above will apply to any agreement entered into by way of joint ventures in such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Thus, joint venture agreements are saved from being declared as void provided it meets with the parameters mentioned above. However, the fact remains that the efficacy of a joint venture agreement can be proved only after implementing the agreement and not at the time of entering into the agreement. Again the forum for providing efficacy of joint venture agreement as the competition commission in case the commission takes the initiatives in this regard or on the basis of a complaint received by the commission. Another problem area is how to determine an agreement is not capable of producing considerable adverse effect on competition. The statute provides that the commission while considering such an agreement, it shall have to: (i) creation of barriers to new entrants in the market, (ii) driving existing competitors out of the market, (iii) foreclosure of competition by hindering entry into the market, (iv) accrual of benefits to consumers, (v) improvement in production and distribution of goods or provisions of services or (vi) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

_Vedant Bio-Sciences v. Chemists and Druggist Association of Baroda (CBAB)_309 is an important case on section 3 and 4. The informant, a distributor of a few pharmaceutical companies alleged that CDA, an unregistered body of stockiest, distributors and manufactures of pharmaceutical products in the district of Baroda, indulged in anti-competitive and unfair practices. CDA, according to the informant, indulged in many unfair and anti-competitive practices, some of them are as follows:

309 (2012) III CLA 446 (NULL).
1. A member, who wants to become a stockiest of a particular pharmaceutical product of a particular pharmaceutical company, must obtain a no objection certificate from CDA before becoming the stockiest of a particular product.

2. CDA insists that a new stockiest cannot sell a new product unless he obtains an NOC from the existing stockiest of that product in the district.

3. Before a pharmaceutical company launches a new product it must obtain an NOC from the CDA.

4. CDA also fixes the margins of profit for a product.

5. CDA charges Rs.2000/- per product from the pharmaceutical company for the purpose of advertisement in the CDA magazine.

There was an ample proof of the aforesaid practices in the form of circulars, rules, advertisements etc. CCI emphasized that when anti competitive practices, prohibited under section 3(3) are established AAEC is presumed and there is no need to prove it separately, though the Opposite Parties (OPs) have a right to rebut the existence of presumed AAEC. According to CCI, there is no substance in CDA defence that it was not an enterprise. Section 2(h) defines enterprise, thus ‘enterprise means ... any activity relating to production, supply, distributions, acquisition or control of articles or goods or provision of services’. CDA is an association of whole sellers and retailers in Baroda. CDA has an apex body at national and state levels. As they are engaged in supply and distribution of pharmaceutical products they are an enterprise. CDA takes decisions with regard to supply and distributions of pharmaceutical products. CDAB follow the norms of its national association through the state association. The norms and guidelines are restrictive and anti competitive since they have the effect of limiting and controlling supply and are anti competitive.
CCI discussed in detail that there is nexus between the national, the state association and CDAB. Pharmaceutical companies appoint stockiest and distributors only after taking clearance from the state and district associations. There is ample proof that no objection certificate from CDAB is needed (a) to launch a new product, (b) for appointing whole sellers and retailers. All this has the effect of limiting the supply of drug in the market. The CCI found violation of section 3 (3)(b), read with section 3(1) of the Act.

CDAB is also involved in fixing the margin of whole sellers and retailers to the extent of 10% and 20% respectively. According to CCI, it amounts to determination of sale or purchase price which is prohibited under section 3(3)(a) read with section 3(1). CCI imposed a penalty of Rs.53,837 at the rate of 10% of the receipts of the preceding three years. According to CCI, the anti-competition agreement was between the national, state and district association, but penalty was imposed only on the district association as it alone, in this case, practiced anti-competitive practices. There are certain aspects of the case which were not considered by the CCI. Looked from another point of view, there was also an anti competitive agreement between the members of the CDAB as all of them followed the rules and norms enforced by the national and district associations. In this case actually anti competition agreement was also between the members of CDAB. The case should also have been brought under section 3(4) in as much as there was an anti competition agreement at different levels of production and provision of service. The stockiest and retailers limited the market of the pharmaceuticals in violation of section 3(4)(b)(c) and (d) in as much as without an NOC a pharmaceutical company was not permitted to launch its product in the district of Baroda.

One of the members of CCI, R. Prasad in a separate opinion decided the case not under section 3 but under section 4. Prasad relies on the definition of ‘enterprise’ given under section 2(h) which defines enterprise ‘as a person...’
and on section 2(1)(v) which defines a person as ‘an association of persons of persons or a body of individuals, whether incorporated or not, in India or outside India’. According to him, CDAB is an enterprise because it is an unincorporated association of persons or body of individuals and is dominant in the product market of medicines in the geographic market of Baroda. The collective strength of CDAB is such that it can act independent of its competitors in Baroda in violation section 4 (2) (c) in as much as its discriminatory practices resulted in denial of market access to its rivals. As CDAB is a dominant enterprise in the geographic market of Baroda, its constituents cannot enter into anti competition agreements among themselves. Consequently, the case cannot be covered under section 3(3).

In the opinion of the author, Prasad while deciding CDAB as a single enterprise did not take into consideration the definition of ‘group’ given in section 5, which definition also applies to section 4. Applying the requirement of clause (b) of explanation of section 5, a group means two or more enterprises, which directly or indirectly are in a position to (a) exercise 26% or more of voting rights in the other enterprise (b) appoint more than 50% of the directors or (c) control the management or affairs of the other enterprise. Neither CDAB, nor its members in our opinion, are in a position to control or manage the affairs or the other enterprise. It is one thing to impose guidelines but quite different to manage or control the affairs of another enterprise. If one enterprise cannot be in the group of another enterprise unless it controls or manages the affairs on another, how is it possible for an association of two or more entities to be an enterprise if none of them manages or controls the affairs of another? As a matter of fact each member of the association can manage the affairs of his enterprise independently of others. Prasad’s interpretation of enterprise is too literal to be compatible with the realities of the economic entities. Perhaps
drafting of the Act is not happy. However, Prasad concluded that CDAB is dominant in the relevant market and abuses its dominant position.

Another member Geeta Gauri, in a separate opinion emphasizes that positive activities, in accordance with section 19 must be taken into consideration. Gauri emphasises that PIS (Public Information Service) charge of Rs. 2,000 per product for giving coverage in the journal of the association plays a very important role in leading transparency for the benefit of the stockiest, retailers, medical practitioners and patients on the medical properties of a particular drug. However, barring this, other activities of the association were considered to be anti competitive by Geeta Gauri.

In Reliance Big Entertainment v. Karnataka Firm Chambers of Commerce, a number of information was filed before the CCI, with similar grounds of complaints. However, in this survey only the information filed by Reliance Big Entertainment relating to Karnataka Film Chamber of commerce is being discussed. The informant in this case is a producer, distributor and exhibitor of films and is a company incorporated under the Companies Act; other Information Parties (IPs) are also in the similar business. Most of the opposite parties are associations of producers, distributors and exhibitors. These associations which operated in different territories of India made almost similar rules to regulate the conduct of their members. Some of the rules made by Karnataka Film Chamber of Commerce (KFCC) were as follows:

1. A film distributor can distribute his film in Karnataka only if he registers his film with the KFCC and becomes a member of the KFCC.

2. An exhibitor is penalized by the KFCC if he exhibits a film of a non-member distributor or a film not registered with the KFCC.

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310 2012 Comp LR 0269 (CCI).
3. If an exhibitor exhibits the film of a non-member distributor, the revenue share of the non-members distributor is put on hold.

The informant gave ample evidence in the form of rules of KFCC, directions issued by KFCC to prove that (a) KFCC enjoys a position of strength in the relevant market, and (b) abuses dominance as it resort to unfair and discriminatory practices and (c) members of the association entered into anti-competitive agreements. Thus the provisions of sections 3 and 4 have been violated. The matter was referred to the Director General (DG), whose findings briefly are as follows:

1. The associations, being non-commercial organizations, are not enterprises though the members of the associations are commercial organization.
2. The associations are not part of a group and therefore section 4 is not applicable in this case.

However, it is difficult to agree with the DG that the associations are not engaged in commercial activities in as much as the associations are directly engaged in activities relating to control of the provisions of commercial services. However, in our opinion the associations are not, though their members are, enterprises for the purpose of section 4 as the members of the association are not a group for the reasons stated while discussing Verdant Bioscience v. Chemists and Druggists Association of Baroda.  

According to the DG, the relevant market in KFCC case is ‘services rendered by the exhibitors in the exhibition of films in the territory under the control of KFCC’ Anti competitive practices with attract the provisions of Section 3(3) are as follows:

1. Members of KFCC not to deal with non-members.

311 (2012) III CLA 446 (NULL).
2. Mandatory registration of each film to be shown in the territory of KFCC.
3. Restriction on dubbing of non-kannada films in kannada.
4. Penalty on or boycott of the producers, distributors and exhibitors who violate the rule of KFCC.
5. With holding of share of revenue of the producers and distributors who do not obey the rules of KFCC.

CCI framed certain issues and held that associations are not enterprises in as much as they are neither producers, nor distributors nor exhibitors and are not engaged in any commercial activity. Significantly, CCI is silent that though the associations themselves are not producers, distributors and exhibitors, at the same time they control production, distribution and exhibition of films. But we agree that associations are not enterprises as the individual members’ affairs are neither controlled nor managed by the associations. The associations cannot be considered to be enterprises if they cannot satisfy the group test given in Section 5. An association cannot become an enterprise simply because it controls distribution etc., unless it is able to control the affairs of the members. According to CCI, the KFCC is not a commercial enterprise hence section 4 is not applicable to it as well as because the Competition Act, 2002 does not provide for the concept of collective dominance. CCI also held that there was no vertical agreement as the associations are not at any level of production. It is difficult to agree with CCI that there is no vertical agreement. Producers, distributors and exhibitors are at different levels of provisions of services. When the association takes a decision not distribute or exhibit the film of a particular non-member producer, it is a case of vertical agreement also. It is refusal to deal.

However, CCI was of the view that KFCC violated the provisions of Section 3(3) when it decided that (a) a film not registered with KFCC cannot be
exhibited, (b) priority for exhibition is given to Kannada films (c) The association fixes number of release and number of prints (d) A film will not be released to TV or video for a particular duration etc. All this amounted to horizontal anti-competitive agreement. Referring to Section 19(3), CCI held that the activities of KFCC are not beneficial to the consumer in as much as they limit or control production, supply, market or provision of services in violation of Section 3(3)(b). Apart from passing a cease and desist order, CCI imposed a fine at the rate of 10% of the annual average of revenue earned during the last three years.

R. Prasad, in a dissenting opinion, differs from the majority. According to him, the case falls under Section 4 and not under Section 3. However, he asserts that film making is a risky business. It is difficult to get credit from financial institution except at exorbitant rates. Hence there is a close cooperation between producers, distributors and exhibitors in as much as distributors and exhibitors invest in production of films in a number of cases. Hence interests of all of them are connected with each other. The author is of the opinion that the fact that there is close cooperation between producers, distributors and exhibitors does not help us to reach the conclusion that the associations are enterprises.

Referring to Section 2(h) and 2(1)(v) he comes to the conclusion that the association is an enterprises. His logic of such an opinion that the associations are enterprises and our disagreement with this opinion has already been discussed in Vedanat Bio-sciences v. CDAB. As Prasad held that KFCC is an enterprise, Section 3 does not apply as KFCC cannot enter into agreement with itself. KFCC is capable of acting independent of the competitive forces in the relevant market and is dominant and KFCC is guilty of denial of market access in violation of section 4(2) (c), restricting provision of services in violation of

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312 (2012) III CLA 446 (NULL).
Section 4(2) (b) (1) and of unfair and discriminatory practices in violation of Section 4(2) (a) (i).

(iii) Other Agreements
There is another category of agreements which may be hit by the provision of anti-competition agreements, if they cause or is likely to cause an appreciable adverse effect on competition. They are (i) tie-in agreements which includes any agreement requiring a purchaser of goods, as a condition of such purchase to purchase some other goods, (ii) exclusive supply agreement which includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person, (iii) exclusive distributor, agreement which includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sell of the goods, (iv) refusal to deal which includes any agreement which restrict or is likely to restrict by any method the person or classes of persons to whom goods or salt or from whom goods or brought, (v) resale price maintenance which includes any agreement to sell goods on condition that the prices to be charged on the re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. Nothing of what is stated above will restrict the right of a person to restraint any infringement or impose reasonable conditions as may be necessary for protecting his interest conferred on him by the Copyright Act, 1957, the Patents Act, 1970, the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Designs Act, 2000, and Semiconductor Integrated Circuits Layout Design Act, 2000. The right of a person to export goods from India exclusively in regard to production, supply, distribution, or control of goods or provision of services from such exports also remain unaffected by the prohibitory provisions of the Act.
Ram Niwas Gupta v. Omaxe Ltd New Delhi\textsuperscript{313} is a case on tie in arrangement which is prohibited under section 3(4) (a). In this case the CCI took a very strict view of the application of section 3(4) (a) almost forgetting that CCI’s primary duty is to interpret the provisions of the Act in a way as not to frustrate the objectives of the Act. Opposite Party (OP) in this case is a construction company, in the business of construction of residential houses. The informant is a consumer of the provision of residential units for a price. As usual the construction company made the informant to sign a standardized contract, in which the terms for all practical purposes are dictated by the party, with greater bargaining power. In spite of the protest by the informant the agreement between the OP and the informant provided that the maintenance work shall be done by an agency of the choice of the OP and the informant provided that the maintenance work shall be done by an agency of the choice of the OP for the next five years or till the Residents welfare Agency decides to appoint another agency.

The informant’s grievance is that imposition of maintenance agency by the OP is a tie in arrangement in as much as maintenance is a tied product with the residential unit. CCI held that, there is no tie in arrangement in this case for two reasons. (a) section 3(4) provides that tie in arrangement is between different stages or levels of production and consumer is not a stage or level of production and (b) there is no tie in arrangement in this case as clause (a) of the explanation of section 3(4) defines tie in arrangement to include any agreement requiring the purchaser of goods, as a condition of such purchase, to purchase some other goods, and maintenance service is not a good.

The decision of the CCI against holding the agreement between the OP and informant, as a tie in arrangement, in our opinion, is not a correct interpretation of section 3(4) and is not warranted by language of section 3(4). It is

\textsuperscript{313} 2012 Comp LR 1132.
inconceivable that the consumer is not a stage or level of provision of service. Without the consumer no production of goods or provision of service can exist. If a consumer goes to purchase potatoes from a green grocer, the green grocer cannot impose a condition that the consumer will have to purchase onions as well as potatoes, would it not be tie in arrangement? (It would be a different matter that it is from the point of view of the consumer, a case under the Consumer Protection Act) In this case the consumer is a necessary level of provision of the service and hence section 3(4) (a) would be applied to avoid tying in at mass scale.

It is strange that CCI while defining tie in arrangement ignored the opening sentences of section 3(4) which provides that ‘any agreement among enterprises or person at different stages or levels ...in respect of ....provision of service’. CCI should have taken into consideration these opening words of section 3(4) while interpreting tie in arrangement. The opening words control the inclusive definition given in clause (a) of the explanation of section 3(4). The interpretation of tie in arrangement must include provision of services as envisaged by the controlling of words of section 3(4). The ‘individual’ consumer according to section 2(1) (i) is a person and hence is covered by the opening words of section 3(4).

However, R. Prasad gave a dissent in this case. Instead of section 3(4), he applies section 4 in this case. Prasad also applied the concept of captive consumers in this case. Prasad said that (a) at the time of booking of the membership for the ownership of the house, the OP did not disclose the terms of the contract as well as the terms of the contract for maintenance. (b) Long after when almost all the payments were made, the consumers were asked to sign the
contract including the contract for maintenance. (c) At this state it was very costly for the consumers to exit, the consumers become captive.\textsuperscript{314}

In view of the fact that the consumers are captive, the relevant market would be ‘this particular building project of Omaxe’ in which Omaxe is dominant. Many of the terms of the contract are unfair and, therefore, amount to abuse of dominant position. These unfair terms are (a) buyers are not involved in the selection and appointment of maintenance agency, (b) the term of the contract of maintenance, which provided that the consumer has to pay maintenance charges for one year in advance, that is the payment for service not yet rendered, (c) the insistence of OP that IP must get an NOC from the maintenance agency before the registration of the flat purchased by the IP. However, Prasad has not discussed the applicability of section 3(4) in this case for obvious reasons.

(iv) **Abuse of Dominant Position**

Section 4 of the Competition Act, 2002 provides for abuse of dominant position. According to the explanation of Section 4 dominant position means a position of strength enjoyed by an enterprise in the market in India which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. The parameters set out in the Act to detect dominant position are abuse of such a petition in regard to (i) imposition by an enterprise directly or indirectly unfair or discriminatory condition in the matter of purchase or sale of goods or services or in regard to prices including predatory price or (ii) limits or restricts production of goods or provision of services or the market therefore, or technical or scientific development relating to goods or services to the prejudice of consumers or (iii) indulges in practice or practices resulting in denial of market access or (iv) makes conclusion of contracts subject to acceptance by

other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts and (v) uses the dominant position in one relevant market to enter into or protect other relevant market. The Act defines “Relevant market” as the market which may be determined by the Commission with reference to the relevant product market in the relevant geographic market or with reference to both the markets.

*Association of Third Party Administrators v. General Insurers (Public Sector) Association of India*[^2] is a case that proves that substantive outcome of a case to a great extent depends on how relevant market is defined, specially when the question relates to abuse of dominant position. In this case the majority and minority reached to different conclusions because they defined relevant markets differently.

In this case IP was an association of Third Party Administrator (TPA) for processing medical claims of the policy holders, insured by public sector General Insurance Corporation for a fee paid by the corporation. OP was an association of four insurance companies of public sector General Insurance Corporation of India.

IP alleged that the OP floated an expression of interest in forming a joint stock company of TTA providing medical claim management services. The qualifications were such as no existing individual TPA could fulfil them. The qualifications required net capital worth of 25 crore and experience of working in foreign countries. Consequently all the existing TPA would be eliminated. Two allegations were made (a) Discriminatory pre- qualifications are abuse of dominant position as it limits the production of service and (b) it is an anti competition agreement between four companies of General Insurance Corporation.

[^2]: 2011 CompLR 0371 (CCI).
CCI rejected both the contentions of the IP. “Service provided by TPA to various insurers (non-life) in health care insurance in India” is the relevant market. There are more than 27 TPA in India. According to IRDA regulations an insurer can appoint even a company, TPA.

As per regulations all four can appoint any TPA. The consumer has no role in appointing TPA’s. TPA’s recover from the insurance company hence the insured has no role in appointing TPA as the insurer is consumer of TPA service. Hence concern of anti competition agreement does not arise. It is difficult to agree with the CCI on two grounds: (a) simply because IRDA regulations permit the insurers to appoint TPA of their choice, competitions concerns specially of cartelization and dominance cannot be bye passed. IRDA regulations do not trump the Competition Act (b) simply because the fee to the TPA is paid by the insurer the insured does not cease to be a consumer. Under Section 29(B) (II) any beneficiary of such services other than the person who hires or avails of the services for consideration is also a consumer. The service of TPA not only benefits the insurers but insured also. As the pre-qualifications stipulate foreign experience, the existing TPA’s are likely to suffer. A joint stock company performing the functions of TPA may stifle the competition as it would effect the competition and the existing TPA’s specially because the four insurance companies who appoint TPA to a specific case would be biased as the joint stock company would be a joint venture with four insurance companies. This would be unfair.

However, the CCI thought otherwise, they thought that joint venture would enhance efficiency. Regarding abuse of dominance CCI said that the GIC is dominant but there is no abuse.

Minority dissent was represented by P.N. Parashar and R. Prasad. They held that TPA provides service to the insured (contra-majority). For them there were
to relevant markets: (a) insurers provide health care insurance in India, (b) TPA processing insurance claim is another market. In the insurance of health care market four companies are dominant. There is nothing wrong in the objective of joint venture that they will increase profitability, improve service to insured but denying market access to the existing TPA’s is an abuse by four dominant companies. In this case dominance in the market of health care insurance is being used to enter into TPA market.

*Neeraj Malhotra v. North Delhi Power Ltd.*[^316] is a case on parallelism and the dynamism of definition of relevant market. The IP alleged that the conduct of (a) North Delhi Power Ltd.,(b) BSES Rajdhani Power Ltd., and (c) BSES Yamuna Power Ltd. is anti competitive in violation of Section 3 and amounted to abuse of dominant position in violation of Section 4.

The “discoms” are into the business of supply and distribution of electricity through meters. The consumer has a choice either to purchase a meter from the market get it tested and sealed by the discom before being installed or take the meter on rent from the discom. An erroneous impression was given to the consumers by the discoms, IP alleged, that they could purchase meters only from the penal approved by the discom. IP also alleged that most of the meters functioned on the plus side of permissible limit of error. Unfair conditions such as afore mentioned were alleged to be abuse of dominant position and as the practice was followed by all the discoms, it was also an anti-competitive agreement.

However, the CCI did not find any evidence of anti-competitive agreement between the discoms. The majority as discussed earlier needed a clear proof of meeting of minds and as already discussed in the survey in analysing other

[^316]: 2011 CmpLR 0128 9CCI10.
cases the importance of ‘practice carried on’ and ‘decision taken’ in addition to ‘agreement’ as defined in section 2(b) was not taken into consideration.

The majority found that there was only one relevant market of supply and distribution of electricity in the discom area. In the relevant market every discom was dominant. There was no separate market of meters as the discoms did not manufacture them. It is asserted that though the meters are not manufactured by the discom, they gave the impression that they alone can supply them or the consumer must purchase out of the panel decided by the discom. Consequently the discoms are the supplier of meters.

The majority upheld the panel made by discoms on grounds that every meter manufacturer with BIS mark was given an opportunity to participate in bidding the discom being consumers of meters have a consumers’ choice. This choice should not adversely effect the welfare of the consumers because in accordance with Section 2(f)(ii) the consumers being beneficiaries of meters are also consumers of meters. The majority also rejected that there was any abuse of dominant position. They held that the sample was too small to warrant the conclusion that meters were running on the positive side of the permissible limits of error. There was dominance, but no abuse according to the majority. According to the majority, there was also no evidence of any anti-competition agreement.

Geeta Gauri, in her separate and concurring opinion differed from the majority in as much as there existed two separate markets for meters, whole sale and retail. All discoms are dominant in the retail market but there was no abuse of this dominant position in as much as it makes economic sense for the consumers to get meters installed by the discom.

On the other hand, P.N. Parashar gave a dissent, with whom R. Prasad broadly agreed. His identified three relevant markets: (a) distribution and supply of
electricity, (b) supply of meters and (c) billing. In all these three markets discoms are dominant. The discoms did not make the consumers aware that they had the option to purchase their own meters with BIS mark. The discoms prepared their own panel of meters, which legally they were not authorised to do. They are guilty of abuse of dominant position.

P.N. Parashar did not agree with the finding of the majority that the data was too small to lead to the conclusion that meters were running on the positive side of the limit of permissible error. He said that even a small data must be relied if it points to a definite conclusion. The data points to the fact that the consumers paid for the electricity they did not consume. This amounts to abuse of dominant position in the relevant market of supply of meters.

A number of cases were decided by CCI on violation of Section 4. One of such case is *Kansan News (P) Ltd. through Pradeep Bakship, R.S. Bakshi and Co. v. Fastway Transmission (P) Limited.*[^317] IP is a broadcaster of news and current affairs through its channel Day and Night News and operates primarily in Punjab, Haryana and Chandigarh. OP1, Fastway Transmission, is in the business of transmission. OP2 Hathway Sukhamrit Cable and OP3, Creative Cable Network are cable operators. OP4 operates through OP3 in Punjab, Haryana and Chandigarh. OP5 Mr. Gurdeep Singh is the managing Director of OP1 and also manages the affairs of OP2 and OP3.

OP1, OP2 and OP3 control over 95% of business in Punjab and Chandigarh. In Punjab and Chandigarh there are approximately 43 lakh TV viewers out of which about 35 lakh are served by OP1 – OP4. Any broadcaster who wished to broadcast in Punjab and Chandigarh is heavily dependent on OP1 – OP5 and OP1 holds majority shares of OP1-OP4.

[^317]: 2012 Ind law CCI 18.
The informant alleged as follow: (a) OP1-OP5 formed a cartel. (b) They are dominant in the relevant market. (c) OPs abused their dominant position. IP alleged that they entered into an agreement with OP1 for transmission of their news channel. Pursuant to the agreement with OP1 began transmitting the channel in August 2010. For the next two months the sailing was smooth. IP made all stipulated payments in time. But from October, 2010 onward OP1 began disrupting and distorting the transmission. In December, 2010 when the channel broadcasted the road show of the Indian National Congress, OP-1 blocked the road show and muted the audio. Since then audio continue to remain muted. When IP served a legal notice to them, OP1 unilaterally terminated the agreement.

The IP charged the OPs (a) of violating Sections 3 and 4, (b) of forming a cartel, (c) of limiting access to the relevant market and denying service and (d) of unilaterally terminating the agreement in violation of Section 3(4) (d), i.e., refusal to deal.

The DG in his report first clarified the functioning of the system. (a) The Broadcaster uplinks the contents. (b) The Aggregator distributes the channels for one or more broadcasters. (c) The multi-system operator (MSO) downlinks, decrypts or encrypts and feed bundle to last mile cable operator (LCO). (d) (LC) transmits to the subscribers.

According to DG, DTGH or IPTV are not substitutes of cable TV especially because of the price difference to the subscribers between two services i.e., DTH and cable. Therefore, cable constitutes the product market and Punjab and Chandigarh geographic market because of cultural and language requirements. DG concluded that OP1, OP2 and OP3 constitute a group as OP5 does not control 26% of the shares of OP4 and cannot appoint 50% of its directors, OP4 is not part of this group within the meaning of Sections 4 or 5. The Fastway
group consisting of OP1, OP2 and OP3, controlled by OP5, controls 85% of the relevant market in Punjab and Chandigarh. The Fastway group is dominant in this market and can create entry barriers for the IP.

DG also concluded that (i) there was not any valid reason for terminating the contract. The defence given by the OP that the agreement was terminated because of the unpopularity of the channel is not a valid ground for the termination of the agreement (ii). The contention of the OP that disruption in transmission occurred because of technical reasons was rejected by the DG on ground that in the transmission of other channels there was no disruption.

The CCI first decided as to what is the relevant market. According to the CCI, cable TV is a distinct product. It is not a substitute for DTH for several reasons. DTH gives a better picture quality, and offers more channels and has a facility of recording the programme. Unlike cable TV the reach of DTH is not limited. But people with limited budget prefer cable TV and because of local preference for local content the geographic market is limited to the Punjab and Chandigarh. CCI next considered the question whether P1, P2 and P3 constitute a group for purposes of section 4. CCI agreed with DG that P1, P2 and P3 constitute a group as their affairs are controlled and managed by OP5 but P1 is not part of this group as neither 26% of voting power is not with OP5 appoint 50% of the directors of OP4.

CCI considered whether the Fastway group consisting of OP1, OP2 and OP3 is dominant within the relevant market. CCI agreed with DG that the group can act independently of the rivals but held the OP4 is not dominant as it cannot act independently of its competitors. Regarding abuse of dominant position CCI disagreed with DG that the provisions of section 4(2) (a) (1) or 4(2) (b) (1) have been violated. CCI held that section 4(2)(a)(1) is not applicable as unfair or discriminatory condition in the placement fee (for
transmitting) has not been imposed by OP, because it was not proved as to what fair placement fee is. Section 4(2)(b)(1) is also not violated as OP did not put any limit on production by IP on ground that IP was not a participant in the relevant market in which OP group operated. It is difficult to appreciate the opinion of the CCI that OP did not put any limit on production by IP because IP was not a participant in the relevant market in which OP operates, for the simple reason that without transmission IP would not be able to produce. Though the IP did not operate in the product market of cable TV, IP operated only in the broadcast of news, yet IP’s production would be seriously limited if IP does not get access to the relevant market in which OP group is dominant. At least CCI should have concluded that it was a case of refusal to deal under section 3(4)(d). However, CCI agreed that the provisions of section 4(2) (c) have been violated in as much as the termination of agreement resulted in denial of market access to IP.

CCI apart from cease and distinct order, imposed a penalty at the rate of 6% of the average annual receipts for the last three years amounting to Rs.80,401,141/-. CCI came to the conclusion that there cannot be any anti-competition agreement between OP1, OP2, OP3 and OP5 as they are all part of a group. However, CCI did not say anything about OP4 against which IP alleged indulging in anti-competitive agreement with OP1-OP2-OP3, especially when CCI held that OP4 was not a part of Fast Way Group.

Another case on abuse of dominant position is Magnolia Flat Owners Association v. DLF Universal Ltd. The facts and decision of this case are similar to that of Bellaire’s case. In this case also terms of the agreement between the builder and the consumers were one sided and heavily tilted in

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318 2012 Comp LR 0504.
319 2011 Comp LR 0239 (CCI) ILI.
favour of the builder. As a matter of fact, the consumer was asked to sign the agreement when almost all the payments were made by the consumers. In this case also the CCI held that the relevant market was ‘high end residential apartment in Gurgaon’ in which OP was dominant. All the terms of the agreement were similar to those of the agreement between DLF and the consumers in Belaire case. These terms have been discussed in the Annual survey of 2011 and therefore need not be repeated again. CCI after finding DLF dominant in the relevant market found it guilty of abuse of dominant position, but ordered that as a penalty in Belaire’s case has already been imposed no further penalty is needed to be imposed.

Another case in which Belaire decision was applied in two flats in housing complex Belaire build by building Haravatar Singh v. DLF Ltd. and DLF Centre. Haravatar Singh and his wife booked major DLF. Haravatar and his wife paid earnest money but refused to make further payments on the ground that there was unreasonable delay in the construction work and payment was not related to progress in construction. DLF confiscated the earnest money and cancelled the allotment of the flats without given any notice to Haravatr Singh and his wife. Applying Belaire’s decision CCI found DLF guilty of abuse of dominant position and gave cease and desist order but did not impose any further penalty as the penalty has already been imposed in Belaire’s case.

(v) Combination

320 Ibid.
321 Ibid.
323 2012 Comp LR 0384 (CCI).
324 Magnolia Flat Owners Association v. DLF Universal Ltd., 2012 COMPLR LR 0504.
325 Ibid.
Section 5 of the Competition Act, 2002 provides that the acquisition of one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if such acquisitions results in acquisition of assets in cases where the value is of more than Rupees one thousand crores or turnover more than rupees three thousand crores; or in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars. In case the enterprise belongs to a separate acquisition, the value of assets acquires jointly should be more than rupees four thousand crores or turnover of more than twelve thousand crores or the value of assets more than two billion US dollars or turnover more than six billion US dollars. Another measurement of combination in direct acquisition of centres over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars. In case of acquisition by a group to which the enterprise belongs, the value of assets acquired in India should be more than rupees four thousand crores or turnover or more than rupees twelve thousand crores. Or alternatively, the assets acquired both in India or outside India should be of an aggregate value of more than two billion US dollars or turnover of more than six billion US dollars.
Yet another criteria for determination of combination is the merger or amalgamation of enterprises. In this case the enterprise remaining after merger should have assets in India the value of which should be more than rupees one thousand crores or where the assets of the enterprise are both in India and outside India, the aggregate value of the assets should be more than five million US dollars or turnover of more than fifteen hundred million US dollars. These are some of the parameters laid down in the Act to determine the categories of combinations which should be subjected to the regulatory provisions of the Act. There are threshold limits for drawing up a line of demarcation of what should be regulated. The word “control” has been used as controlling the affairs or management by one or more enterprises either singly or jointly over another enterprise or group or one or more groups exercising control over another group or enterprise. “Group” means two or more enterprises which directly or indirectly are in a position to exercise 26% or more of the voting power in the other enterprise or be in a position to appoint more than fifty percent of the members of the Board of directors in the other enterprise or control the management or affairs of the other enterprise. The size of an enterprise is proposed to be measured with reference to the value of assets acquired for applicability of relevant provisions of the Act.

According to Section 5 a combination if crosses the prescribed monetary threshold, must seek the permission of the CCI, which shall assess if the combination causes or is likely to cause an AAEC within the relevant market in India. In some cases the CCI granted permission to the combination and no important law point was laid down by the CCI. In all these cases the commission did not find any AAEC. In CCI V. Bombay Burmah Trading Corporation Ltd., 326 CCI received a notice of proposed acquisition of BCL Spring Division of Bombay Burmah Trading Company by NHK Automobile

326 MANU/CO/0062/2011 : Combination Registration No.C-2011/10/05, decided on 04.11.2011.
Components India Pvt. Ltd., a wholly owned subsidiary of NHK Japan, which does not have any business in India. NHK Japan is present in India through NHK Spring India Ltd., a joint venture with two other companies. CCI found that neither the acquirer nor the acquired manufactured identical components. CCI also defined relevant market. According to CCI there are two relevant markets (a) market of original equipment for automobile manufacturer, (b) market of original replacement parts. The first market was highly competitive. The acquirer and the acquired both manufacture springs but they are differently processed and the use of springs manufactured by them is also different. There are many competitors for both the types of springs. The proposed combination does not and is not likely to cause any AAEC. The proposed combination was approved. *Alstom Holding (India) Ltd. v. Alstom Project India Ltd.*\(^\text{327}\) is also a case on combinations. Alstom Holding (India) Ltd. (AHIL) and Alstom project India Ltd. (APIL) both carried on different business and were ultimate subsidiaries of Alstom Holding France. CCI held that the proposed combination does not cause or is not likely to cause AAEC in India.

It emerges from the above discussion that the interest of consumers has been protected in India through appropriate legislations since the time British people in produced codified law in India. The Indian Penal Code was enacted in 1860 under which certain Sections of law are useful for the protection of consumer interest. Similarly, the Indian Contract Act, 1872 contains a large number of general principles of law which are still applied in deciding consumer disputes. In the beginning of the twentieth century Sales of Goods Act was enacted in 1930 under which certain principles of consumer protection law were incorporated. After India’s independence the Constitution of India contains certain principles which are consumer protection friendly. Therefore, Indian

\(^{327}\) MANU/CO/00611/2011 : Combination Registration No.C-2011/10/06, decided on 19.10.2011.
Parliament has enacted a large number of legislation in the field of food and other essential commodities, maintenance of standards weights, measures, marketing and packaging, standard of drugs and medicines as well as quality of goods, services and competition. Though the Competition Act, 2002 is successor to the Monopolies and Restrictive Trade Practices Act (MRTP Act), the scope of both the Acts are completely different. The change in economic policies reflects change in legal regime. After 1990’s onward India changed her economic from protection, insulation and regulation to free market economy. This change finds reflection in the objectives of the MRTP Act and the Competition Act, 2002.

Besides the above stated legislative framework of consumer protection law the Consumer Protection Act, 1986 is another development in the field of consumer protection law. The Consumer Protection Act is enacted in order to provide better protection to the interest of the consumers. The Act was enacted in order to provide better protection to the interests of the consumers. This is a comprehensive legislation with main thrust on providing simple and inexpensive redressal of consumer grievances. This provision of the Act is in addition to and not in derogation of the provisions of any other law for the time being in force. The provisions of the Act are supplementary in nature and have no over-riding effect as the consumer interests are protected by various other enactments. The basic scope of the Act extends to providing speedy remedy to the consumer against (i) unfair trade practices or restrictive trade practices by and trader. (ii) the goods purchased by a consumer suffers from one or more defects, (iii) the services hired or availed or agreed to be hired or availed by the consumer suffer from deficiency in any respect, (iv) the price charged is in excess of the price fixed by or under any law for the time being in force or displayed on the goods or on any package containing such goods and goods which will be hazardous to life and safety when used are being offered for sale.
to the public etc. By an amendment to the Act in 1993, the scope of the Act was enlarged to enable one or more consumers to file class action complaints on behalf of group of consumers having common interest. The scope of “service” was also enlarged by including housing construction in the definition of service. The Act is being administered by three-tier quasi-judicial machinery at the National, State and District levels for redressing consumer grievances. It is significant that the Act recognizes the role of consumer organizations in assisting the consumer in seeking justice through the nation-wide network of consumer disputes redressal agencies.