Chapter-IV
State Consumer Protection Act- A Critique
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STATE CONSUMER PROTECTION ACT – A CRITIQUE

INTRODUCTION:- The legislature of the State of J & K enacted consumer protection Act on 19th of August 1987 which is equal to a similar Law passed by the Parliament in 1986. The Central Act applies to the whole of India except the State of J & K. State Act is same as the Central Act with a few variations as it provides only for separate two tire adjudicator machinery – Divisional Forum at divisional level and the State Commission for the whole State whereas the Central Act provides a separate three tire quasi-judicial machinery – National, State and District level among one of the measures (other measure include amendment of C.P.C and Cr. P.C, increase in the number of Posts and Judges and Judicial officers, establishment of easily accessible special Courts and Tribunals. Further, adoption of alternative modes of disputes resolution such as arbitration and conciliation, Lok Adalts etc.) taken by the State Govt. to provide cheap and accessible Justice to the downtrodden, backward and poor people is the enactment of the State Consumer Protection Act. The object of the Act as its preamble proclaims is the better protection of the interests of the consumer. The most important milestone in consumer movement in the State has been the enactment of the State Consumer Protection Act. The Act applies to all goods and services unless specifically exempted by the Govt. by notification in the Govt. Gazette. The Act vests forums and commission with quasi-judicial authority to settle consumer disputes and complaints by providing speedy, simple, timely and in expensive redressal. As this Act is directly and specifically on consumer protection in this chapter an attempt has been made to evaluate critically various provisions of this Act more conveniently. Further while analyzing various provisions relevant cases decided by the Apex Court, High Courts and Redressal agencies of various States have been quoted to support the arguments. I have not hesitated to express my own views on various sections of the Act.
PART I

(A). **Title, Extent and Preamble etc. of the Act:-** In this part title, extent and preamble etc. of the Act will be briefly outlined.

(1). **Title :-** Generally speaking various pronouncements of the Apex Court has made it clear that the title of a statute reflects its purpose. With this impression the title of the present Act gives a clear cut picture. Here title – Consumer Protection Act itself expresses the nature and purpose of the Act that it is meant to protect the interest of the consumers.

(2). **Territorial Extent:-** The Consumer Protection Act, 1987 extends to the whole of the State of J & K. What is the extent of Territory of the State a Section of the State constitution which deals with territory of the State will be quoted here (1)

   **Section – 4 :-** The territory of the State shall comprise all the territories which on the 15th day of August, 1947 were under the sovereignty or suzerainty of the Ruler of the State.

   The above definition of the State Territory as enshrined in the State constitution is not giving a correct picture (2). To have an view of territorial extent as envisaged by the instant Act of Consumer Protection but the Act as it is observed applies to all Districts of J & K including Poonch, Rajouri and also to Leh Ladakh.

(3). **Preamble :-** Preamble of the Act makes it clear that it seeks to

2. Id. The extent of the territory has not been given in the constitution. This has not been defined in the constitution of India either. The first schedule to the Constitution of India defines the territory of J & K as – ‘The Territory which immediately before the commencement of the constitution was comprised in the Indian State of J & K. Prior to the accession of the state to India and after the partition of British India into India and Pakistan on the 15th of August, 1947, some parts of the state fell into the hands of the invaders, but the instrument of accession of J&K State applied to the whole area of the state, including the area now under the occupation of Pakistan.
provide for better protection of the interests of Consumer and for that purpose it makes provision for the establishment of Consumer Councils and other Authorities for the settlement of Consumer disputes and for matters connected therewith. For brevity and convenience preamble of the Act will be reproduced here:

"An Act to provide for better protection of the interests of consumers and for purpose to make provisions for the establishment of Consumer Councils and other authorities for the settlement of Consumers disputes for matters connected therewith."

The use of the expression for the protection of the interests of consumers reveals that the interests of the consumers were also protected even earlier under the provisions of several legislations relating to standardization grading; packaging and branding; prevention of food adulteration; short weights and measures; hoarding; profiteering; restrictive and unfair trade practices etc. But these legislations failed to protect the ultimate consumers from defective goods or deficient services, over charging of prices and unscrupulous exploitation. The consumer needed better protection in all those matters which led to the enactment of the CP Act. The Act is the very important socio-economic legislation with its main thrust on giving speedy redressal and compensation to the consumer (3), Supreme Court while stressing the importance of the preamble in its decision in Lucknow Development Authority V/S M.K Gupta(4) said:-

A scrutiny of the various definitions such as ‘Consumer’ ‘Service’ ‘Trader’, ‘unfair practice’ indicates that the legislature has attempted to

widen the reach of the Act. Each of these definitions are in two parts, one explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such things which otherwise would be beyond its natural import.

(4). Application of the Act:- Bare reading of Section 1 sub-section 2 of the Act makes it clear that the Act applies all goods and services unless the State Govt. expressly exempts any category of goods or services from the applicability of this Act. Up to this time neither the Central Govt. nor the State Govt. has issued any notification but still conflicts and controversies created by some agencies and institutions have seriously affected the implementation of the Act. The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of the enactment as it is a Social benefit oriented legislation. The primary duty of the Court while construing the provisions of such an Act is to adopt a constructive approach without doing violence to the language of the provisions of the Act and producing a result contrary to the attempted objectives of the enactment.

(5). Salient Features of the Consumer Protection Act:- Following are the broad-based features of the Act:

i. For providing better interest to the consumers it provides quasi-judicial machinery in the shape of courts at Divisional and State level. Each divisional forum is presided over by the officer of the status of District Judge and that of State Commission (Forum) by the officer having rank of High Court Judge. These officials are designed as

5. Cases consisting such conflicts and controversies will be dealt later on in the next chapter-V.
Presidents of their respective Forums. In each of these forums there are two public persons of eminence in the field of trade education etc. to assist the Judges – Presidents.

ii. The Act has within its ambit the services supplied by the Govt. or the public sector apart from goods.

iii. The Act provides a cheap remedy to the consumer unlike the Courts, the complaints before the appropriate fora can be filed in written even by the consumer himself.

iv. It provides time bound disposal of cases. It lays down 90 days period from the receipt of notice by the opposite party (OP) within which to dispose of the case.

v. Much significance is attached to the fact that the CP Act provides for uniform period of limitation of 30 days for appeal from one forum to another thereby reducing time taken by the parties at the intermediate stages. It also discourages adjournments.

vi. It is procedural law namely CPC which governs all civil litigation and which in most cases is responsible for protracting proceedings resulting inevitably into delay. A good sense prevailed on the wisdom of legislature that it chose to keep the CPC with all its subtleties apart from the CP Act providing only for its limited application in matters of summoning and enforcing attendance of witnesses, discovery and production of documents etc.

vii. The CP Act also has penalty provision providing for imprisonment ranging from one month to three years and a fine from Rs. 2000 to Rs. 10,000 to punish the traders who do not comply with orders passed by the Authorities.

**Part II**

This part deals with the definitions. These definitions will be discussed with support of case law wherever possible.
(B). **Definitions:-** Following are the definitions as defined under Section 2 of the Act.

(1). **Appropriate Laboratory:-** Act defines the term ‘Appropriate Laboratory’ which includes any such laboratory or organization as is recognized by the Govt. and includes any such laboratory or organization established by or under any law for the time being in force. The definition further provides that the appropriate laboratory as envisaged by the Act must be one which is maintained, financed or aided by the Govt. Govt. under the Act means the Govt. of J & K. So any laboratory which is maintained or aided or financed by the State Govt. is the appropriate laboratory. Private Laboratories have no role to play under this Act. Any laboratory setup under The Food Adulteration Act etc. by the Govt. will be deemed appropriate laboratory. However, non availability of dependable and efficiently run testing laboratory has seriously handicapped law enforcement agency in the State.

(2). **Branch Office :-** The definition of ‘branch office’ has been inserted by the Amendment Act, 1997. Branch office under the Act means

i. Any establishment described as a branch by the opposite party; or

ii. Any establishment carrying on either the same or substantially the same activity as that carried by the head office of the establishment.

The first part of the definition reveals that any establishment described as a branch by the opposite party will be a branch office for the purpose of the Act. The second part of the definition provides that any

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8. Clause (a) of Section 2 (1) of Consumer Protection Act, 1987. (State Act).

establishment carrying on either the same or substantially the same activity as that carried on by the head office of the establishment will be taken as a branch office. The definition of ‘branch office’ as given by the Act is useful as now a consumer complainant can file complaint at any place where there is branch office and not necessarily where the cause of action arose. For this reason Section 9 clause (a) stands amended and now complaint will be lodged either at the place where the business is carried on directly or through a branch office.

(3). **Who is a Complainant?**

Under the Act ‘complainant’ does not mean the actual aggrieved person only. Here ‘Complainant’ is the Consumer himself or any Voluntary Consumer Association (Registered) and the Govt. if it makes a complaint. After the amendment in both the central and the State Act now any number of Consumers having the same interest may also be called complainant/complainants. Thus under the Act following categories fall under the definition of complainant-

i. A Consumer; or

ii. Any Voluntary Consumer Association registered under the Companies Act, 1956 or any other law for the time being in force;

iii. The Govt. who makes a complaint;

iv. One or more consumers where there are numerous consumers having the same interest with the permission of the Divisional Forum on behalf of or for the benefit of all consumers so interested.

The reason behind widened range of locus standi is obvious that our legislatures were conscious and felt need to have a variety of group

10. Id. Clause (b) of Section 2 (1).
or some organized persons who will set the law in motion because ordinarily consumers are reluctant to put their grievances before the competent authorities and before Courts. It is to be submitted here that in view of the spirit of the Act same meaning will be assigned to the word ‘Consumer’ as it meant under the definition of consumer as defined under Section 2 (1) (d) of the Act and not as provided under section 10 (a) which limits its scope while prescribing the manner of filing complaint by expressing that a complaint in relation to any goods sold or delivered or any service provided may be filed before a divisional forum by the consumer to whom such goods are sold or delivered or such services provided ... The definition of consumer U/S 2 (1) (d) is wide which covers even the user of goods and beneficiary of services also.

Regarding the voluntary consumer association it can be said with great pride that it is for the first time that these associations have been recognized and entrusted with an important task of protecting the consumers. However, it is the sorry State of Affairs that though in the rest of our country there are numerous voluntary consumer associations which are working for and on behalf of the consumers but in the State of J & K there is negligible number of these associations. It is not only consumer and voluntary consumer associations even Govt. (as consumer of Goods and Services) can file the complaint but it is learnt that the Govt. has never resorted to this provision so far. Now by way of amendment under the Central and State Act class action by consumers is permissible.

(4). **What is a Complaint?** - The ‘complaint’ under the Act means any allegation in writing made by a complainant in regard to one or more of the grounds enumerated in the definition in the complaint.

11. Id. Clause C of Section 2 (1).
Under the Act complaint must be made in writing specifying the name, description and address of the complainant and the opposite party. It must state those facts which arose and be supported by documents if any. It must also specify the relief which the complainant is seeking. Grounds for the complaint under the Act are enumerated in the Act itself which are as follows:-

a). **Complaint against unfair and restrictive trade practices**

The meaning of the expression unfair trade practices for the purpose of the State Consumer Protection Act is similar to the definition as given in the Central Act. Central Act has borrowed this definition from Section 36 of the MRTP Act. In the Central Act prior to the 1993 amendment – to make the complaint under the CP Act it was necessary that the complainant must have suffered loss or damage as a result of any unfair trade practice. Now by virtue of 1993 Amendment Act it has removed this difficulty and now a complaint can be made in respect of any unfair or restrictive trade practice whether the complainant has suffered loss or damage or not as a result of such trade practice. Under the State Act also such a provision shall be incorporated in future so that a consumer will file complaints not only for the loss or injury which he has already suffered but also in apprehension of that loss or injury. However, it may be noted that the scope of the State Act has been widened by 1997 Amendment, which covered within its ambit not only unfair trade practices but also restrictive trade practices adopted by the traders. The definition of restrictive trade practices has been incorporated in the newly inserted clause (nn) of Section 2 (1) of the Act.

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12. Id. Sub-Clause i of Section 2 (1) (c).
b). **Complaint against defective goods**\(^{13}\): A complaint may be made in respect of the goods which suffer from one or more defects. ‘Defect’ means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained under any law for the time being in force or under any contract express or implied or as is claimed by any trader. The term ‘Trader’ includes any seller, distributor, manufacturer and packer of goods. The 1997 amendment enables the consumer etc. to file complaints not only after he has bought the goods but even if there is an agreement by goods.

c). **Complaint against deficient services**\(^{14}\): Prior to the 1997 amendment, a complaint could be made only in respect of those services which were hired by the consumer and suffer from deficiency in any respect. But now a complaint can be made in respect the services hired or availed of or agreed to be hired or availed of suffer from deficiency in respect. Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance.

d). **Complaint against excess – price**\(^{15}\): A complaint may be made against a trader who has charged for the goods mentioned in the complaint a price in excess of the price

i. Fixed by or under any law for the time being in force; or

ii. Displayed on the goods; or

iii. Displayed on any package containing such goods.

Thus, when there is no fixing of price of an article by law, nor a display of price on the package containing the goods or on the goods

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\(^{13}\) Id. Sub-Clause (ii) of Section 2 (1) (c). Amendment Act, 1997 substituted the words ‘the goods bought by him or agreed to be bought by him’ for the words ‘the goods mentioned in the complaint’.

\(^{14}\) Id. Sub-Clause (iii) of Section 2 (1) (c), substituted the words, ‘the services hired or availed of or agreed to be hired or availed of by him’ for the words ‘the services mentioned in the complaint’.

\(^{15}\) Id. Sub-Clause (iv) of Section 2 (1) (c).
themselves, the Act does not contemplate any complaint being instituted in respect of the price charged for the article on the ground that the price charged is excessive. The consumer redressal forums constituted under the Act cannot undertake an investigation of the reasonableness of the price fixation made by a manufacturer, producer or dealer.

In a case a complaint was filed by the respondent questioning the action of the Mahboobnagar Milk Chilling Center in charging 15 paisa extra per half liter of milk supplied sachets to the consumers at Mahboobnagar. The State Commission of Andhra Pradesh proceeded to examine the reasonableness of the price structure for the different varieties of milk and ordered that the prices were excessive. The NC observed that no reference was made to any law in force in the state of Andhra Pradesh fixing the price at which the different varieties of milk were to be sold nor there was any mention of the price on the sachets containing the milk sold to the consumers. The NC held that in the absence of any law requiring an article to be sold at or below a particular price fixed there under and when there was no declaration of price on the packet containing the goods or on the goods themselves, the Act did not contemplate that the CDRF constituted under its provision should undertake an investigation of the reasonableness of the price fixation made by a manufacturer, producer or dealer. The NC therefore, declared that the order of the SC was unwarranted by law and accordingly set aside the order of the SC.

e). **Complaint against the hazardous goods**:

Sub class fifth inserted in clause C of Section 2 (1) by the amendment Act 1997 enables a person to file a complaint of any goods which will be hazardous to life.

17. Supra Note 14, Inserted Clause (v) of Section 2 (1) (c).
and safety, are being offered for sale to the public without giving adequate information about the contents, manner and effect of use of such goods. This is an important provision for the safety of the consumers from the hazardous goods. It may be noted that this provision should also have been made applicable to those services which may be of dangerous or hazardous nature invoking risk to life and safety of the people.

(5). **Who is a consumer?** Who is a 'consumer'\(^{(18)}\) under Act Section 2 (1) (d) gives a comprehensive definition. Actual definition of word consumer under the Act will be re-produced here—

> "Consumer" means any person who —
> i. buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
> ii. hires or avails\(^{(19)}\) of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or

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18. Id. Section 2 (1) (d).
19. Supra Note. 14, Inserted the words ‘or avails’ of after the word ‘hires’ in the definition of Consumer under the Act.
partly paid and partly promised or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

"Explanation:- For the purpose of sub- clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purposes of earning his livelihood, by means of self-employment."

The term "consumer" is defined in Section 2 (1) (d) of the CP Act in two parts – one in reference to a consumer who purchases goods and the second in reference to a person who hires services. Thus the Act covers transactions for supply of goods and rendering of services. It covers whole range of commodity market as well as service market. The definition is wide enough to include in 'Consumer' not only the person who buys any goods for consideration but also any user of such goods with the approval of the buyer. Similarly, it covers any person who hires or avails of any services for consideration and also includes any beneficiary of such services when availed with the approval of the hirer. Thus any user of goods or any beneficiary of services other than the actual buyer or hirer, is a consumer for the purpose of the Act and he is competent to make a complaint before the Consumer Disputes Redressal Forums under the Act\(^20\).

It is thus evident that this definition gives an altogether new legal colour and scope to the term ‘Consumer’, which extends crystallized by this exhaustive definition. The legislature deliberately extends it to person who may have had no privity of contract with the original trader, manufacturer or the person who had hired out the service. On the other hand the definition limits the scope in the context of purchaser of goods,\(^20\)

\(^20\) Supra Note 3, P.59-60.
by excluding from its wide range those persons who buy such goods for re-sale or for any commercial purpose and expressly denies them the benefit of the Act. It would thus be seen that the Act introduces a new concept and class of consumers and gives them a very price legal connotation. The word ‘Consumer’ herein becomes a legal term of art having a meaning different and distinct from the used in loose common parlance. This is a significant development of the Act and concept radically different to the earlier and ordinary existing laws in the field.

The above definition of term ‘Consumer’ reveals that a person claiming himself ‘Consumer’ should satisfy that:

i. there must be a sale transaction between the seller and the buyer;

ii. the sale must be of goods;

iii. the buying of goods must be for consideration;

iv. the consideration has been paid or promised or partly paid and partly promised or under any system of deferred payment; and

v. the user of the goods may also be a consumer when such use is made with approval of the buyer.

Similarly, in case of services consumer under the Act is required to satisfy that:

i. the consumer hired the services;

ii. service is for consideration;

service is not rendering of any service free of charge or under a contract of personal service;

iii. Even beneficiary may be a consumer when services are availed.

21. Id. It is observed by S.S. Sandhawalia, J in Jagdamba Rice Mills V/S Union of India (1991) CPJ 273 (Haryan) CDRC 321CA.
22. Id. P.61.
of with the approval of the first mentioned person.

However, in view of explanation\(^{(23)}\) annexed to clause (d) of Section 2 (1) of the Act consumer is not the person who purchases goods for the resale or commercial purpose. Since this explanation has been inserted on the similar explanation inserted in central Act in both cases\(^{(23)}\) evident that Parliament/ Legislature has the intention to exclude commercial sale from the Act.

Now let us divide and discuss definition of consumer under the following sub-headings.

a) **Consumer of Goods**\(^{(24)}\):- A Consumer for the purpose of goods means any person, who-

- i. buys any goods for consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment; and
- ii. includes any user of such goods other than the person who buys them, when such use is made with the approval of the buyer, but;
- iii. does not include a person who obtains such goods for re-sale or for any commercial purpose. Commercial purpose does not include use by a consumer of goods bought by and used by him exclusively for the purpose of earning his livelihood by means of self-employment.

The above provision reveals that a person claiming himself ‘consumer’ should satisfy that –

- i. there must be a sale transaction between the seller and the buyer;

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\(^{(23)}\) Supra Note. 19

\(^{(24)}\) Supra Note. 22 P. 60.
ii. the sale must be of goods;
iii. the buying of goods must be for consideration;
iv. the consideration has been paid or promised or partly paid or partly promised or under any system of deferred payment; and
v. the user of the goods may also be a consumer when such use is made with approval of the buyer.

As already said the term ‘consumer’ does not include a person who obtains any goods for re-sale or for any commercial purpose. However, sometimes much difficulty arises in differentiating whether a sale is for personal use or for commercial purpose. The mere fact that a person buys a thing repeatedly is not sufficient to make it a trade sale or to take it out of the category of a consumer sale. In a case\(^{(25)}\) the Court observed that where an activity is merely incidental to the carrying on of a business, a degree of regularity has to be established before it can be said that the activity is an integral part of the business and therefore carried on in the course of a business.

b). **User of Goods\(^{(26)}\)**: The definition of consumer given in the Act makes it clear that it includes not only the person who buys any goods for consideration but also any user of such goods when such use is made with the approval of the buyer. This was necessary because the goods purchased by a buyer or most likely to be used by his family members, relatives and friends. Under the general principles of the Law of Contract such user of goods are not entitled to sue the supplier or trader of such goods on the ground of “Privity of Contract”. The rule of Privity of Contract provides that only parties to the contract can sue and not a stranger. Thus a third person who is not a party to the contract cannot

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25. Supra Note. 4 P. 16 ; R&B Customs Brokers Company V/S United Dominions Trust, (1988) 1WLR CA.
sue. But now under the provision of CP Act a complaint may be made by any user of goods with the approval of the buyer even though he is not a party to the contract for purchase of those goods.

c). **Goods Purchased for Earning Livelihood and Self-employment:**

By reason of the bewildering problem of distinguishing between business purchases and purchases for self-employment, the definition was amended in 1997 on similar lines as under the Central Amendment Act in 1993 by adding an explanation so as to include within the meaning of the term 'Consumer' a buyer for self-employment by providing that purchase for a commercial purpose would not include things purchased for earning livelihood by means of self-employment.

The 'Explanation' as added to Section 2(1)(d) seems to have been wisely inserted with a view to safeguard the interest of small consumers who buy goods for self-employment to earn their livelihood. Prior to the Amendment, a person buying any goods for commercial purpose was excluded from the definition of 'Consumer' and was not covered within the ambit of CP Act. This caused genuine difficulties to consumers who were purchasing goods for earning their livelihood say like a Taxi driver buying a car to run it as a taxi, or a rickshaw puller buying rickshaw for self-employment or a widow purchasing a sewing machine for her livelihood or a farmer purchasing fertilizers or seeds for his crops etc. It was not desirable to exclude these and similar other categories of person from the definition of consumer as they depend on the goods for earning their livelihood. At the same time, the intention behind the Act was to exclude big business and industrial houses carrying out business with profit motive from the purview of the Act. The insertion of the 'Explanation' has removed this difficulty and enables the consumers to file complaints before the CDRA under the Act where good bought by
them and exclusively for earning their livelihood by means of self-
employment suffer from any defect(27).

d). Consumer of Services:- Another category of consumer laid down
under the Act is that of hirer or user of services. Under sub-clause (ii) of
Section 2 (1) (d) of the Act, a consumer for the purpose of service means
any person, who –

i. hires or avails of any services for consideration which has been
paid or promised or partly paid and partly promised or under
any system of deferred payment; and

ii. includes any beneficiary of such services other than the person
who hires or avails of them, when such services are availed of
with the approval of the hirer.

As already discussed just above goods purchased for commercial
purposes are excluded from the purview of the Act but here the services
used for commercial purposes are not excluded from the scope of the CP
Act. A simple reading of the Act and especially the definition of a
consumer of service U/S 2 (1) (d) (ii) would show that a consumer of
service for commercial purpose is not barred from claiming protection
under the Act, on the contrary ‘consumer of goods’ for commercial
purpose is specifically excluded from the purview of the Act U/S 2(1) (d)
(i). However, the services rendered free of charge or under a contract of
personal service are outside the purview of the Act.

In order to know what type of service is envisaged by the Act let us
go briefly through the following sub-headings:-

(i). **What is Hiring of Services** (28) ?:- The words hires or avails
of any services occurring in Section 2 (1) (d) (ii) shows that the term
‘hire’ has also been used therein in the sense of ‘avail’ or ‘use’.

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(27) Id. P.69-70.
(28) Ibid.
Accordingly the definition should be understood as stating that 'consumer' means any person who avails or uses any service.

The term 'hire' has not been defined in Act. According to concise Oxford Dictionary, 'hire' means 'employ person for wages or fee'. In Collins English Dictionary 'hire' has been defined as 'to acquire the temporary use of a thing or the services of a person in exchange for payment or to provide something or the services of one self or others for an agreed payment usually for an agreed period'. As per Chambers Twentieth Century Dictionary 'hire' means to produce the use of services of at a price to grant temporary use of for compensation.

Hiring in its ordinary, plain and grammatical sense inter alia, involves letting of things or services for rent or wages. It is a payment for labour or for the use of goods. In economic parlance, it is the nature of rent and wages. 'Hiring' is thus, species of bailment and reward is an essential ingredient in hiring. Hiring creates a legal right in the hirer against the hirer for the latter to render service for which the former had paid the hirer.

(ii). **Taxes Whether Constitute Consideration for Service**

In a welfare State, it is the responsibility of the Govt. to provide adequate medical, health care and other facilities to all citizens. Such indeed has been the endeavor of all Governments both at the centre and at the State level even since the inception of a plain program of development. The hospitals established by the Govt. are funded from the consolidated funds of the Govt. of India / the State Govt. concerned and under the constitution these consolidated funds comprise the revenues which are raised in the form of direct taxes as well as indirect taxes. Every person who is resident of State pays taxes if not directly at least

29. Id. P. 72-73.
indirectly since excise duty, customs duty, sales tax etc. are levied on almost each and every single item of goods that a person has necessarily to purchase for one's day today requirements.

Now the question is whether the direct and indirect taxes paid to the State by a citizen constitute 'consideration' for the services ostensibly rendered by the State to its citizens. As pointed out by the Supreme Court in Commissioner, Hindu Religious Endowments, Madras V/s Sri Lakhsmindra Thirtha Swamiar, that tax is the compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for service rendered.

The legal position is now well settled that 'tax' in its true nature is a levy made by the State for the general purposes of Govt. and it cannot be regarded as payment for any particular or special service. While, it is undoubtedly true that the government in a welfare state is under a duty to provide various forms of facilities to citizens and the expenditure incurred there on will have to be met from out of consolidate funds of the State, it can not be said that a tax levied for the general purposes of the state construes 'consideration' for any specific purpose, benefit or service provided by the State.

Further, the consideration for hiring of services, be it called fee, charge or rent is that it is a voluntary payment, it is open to a person to make the payment and hire the services or to refuse to pay and forego the service. A tax on the other hand is a levy or imposition made by the Govt. for public purpose. There is no element of voluntariness in the payment of tax. No tax-payer has the option to refuse to pay the tax legally imposed on him. It is therefore, clear that payment of tax to the Govt. cannot be construed as consideration for the services rendered by

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the government.

(iii). **Court- Fee: Whether Constitute Consideration for Service**\(^{(31)}\) :- While dispensing the criminal justice the State is not charging any fee. The Court fee is charged from the litigants who intend to file action before the Civil Court. The question is whether the litigants are hiring services of the Civil Courts for consideration as contemplated under the CP Act.

In order to appreciate this issue, it would be necessary to examine certain provisions of our constitution\(^{(32)}\) under the constitution sovereign powers of the State has to be exercised through three agencies- Executive, Legislative and Judiciary. The said functions are thus divided amongst three organs of the state. Each has been given separate powers though not with mathematical precision e.g in a state of emergency the President can exercise the legislative power by making ordinance. In order to meet the expenses of the State the legislature has been given power to raise the revenues by means of taxes. Article 365 of the constitution provides that no tax shall be levied or collected except by authority of law. Again the legislative power has been divided between Union and State under Seventh schedule of the constitution. Item number 96 in the Union list, item number 66 in the State list and item number 47 in concurrent list reads as under:

"Fee in respect of any of the matters in this list but not including fee taken in any Court".

It may be seen that legislature has been given power to levy fees in respect of any matter over which it has legislative power except the fees taken in the Court.

\(^{31}\) Id. P. 75.

After knowing whether tax and fee constitute consideration it would not be out of place to mention and give a brief distinction between tax and fee briefly as possible.

(iv). **Tax and Fee – Distinguished** The distinction between a ‘tax’ and a ‘fee’ has been often considered by the Supreme Court of India and their observations are very valuable for distinguishing between the two. In its landmark judgment in *Commissioner, Hindu Religious Endowments V/S Sri Lakshmindra Thirtha Swamiar* (34), the Supreme Court observed:

A tax is the compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered ... A fee may generally be defined as a charge for a special service rendered to individuals by some Governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Govt. in rendering the service ... The distinction between a ‘tax’ and a ‘fee’ lies primarily in the fact that ‘tax’ is levied as part of a common burden, while a ‘fee’ is a payment for a special benefit or a privilege.

In the *Chief Commissioner of Delhi V/S D.C.* (35), the Supreme Court held a legal fee must satisfy two conditions, namely, (i) there must be an element of *quid pro quo*, that is to say the authority levying the fee must render some service for the fee levied, however, remote the source may be; (ii) that the fee raised must be spent for purposes of the imposition and should not form part of the general revenues of the state. In *Southern Pharmaceuticals & Chemicals V/S State of Kerla* (36) the Supreme Court set out the difference between ‘tax’ and ‘fee’ as under:

33. Supra Note 3; P. 75.
34. Supra Note 30.
35. Id. P 74(1978) 2 SCC 367.
**Tax - :-**

i. The essence of taxation is compulsion being imposed under statutory power.

ii. Imposition is for public purpose without reference to any special benefit to be conferred on the payer of the tax. In other words, levy of tax is for the purpose of general revenue and there is no element of *quid pro quo* between the tax payer and public authority.

iii. Tax is a part of the common burden and is regulated with reference to the capacity by the tax payer to pay.

**Fee - :-**

i. *Fee on the other hand is a charge for a special service rendered to individuals by some Govt. agency.*

ii. It is based on the expenses incurred by Govt. in rendering the service, though there may not be exact correlation between the expenses incurred and the quantum of fees collected.

iii. The fees are uniform without reference to the ability to the different recipients (of service) to pay.

In *Sreenivas General Traders V/S State of Andra Pradesh*\(^{(37)}\), the Supreme Court reiterated that the distinction between a tax and a fee lies primarily in the fact that tax is levied as part of common burden while a fee is for payment for specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the state predominates, the levy becomes a tax. The court further observed that in order to establish the *quid pro quo* concept, it is not necessary to establish exactly that the amount collected is spent on the services.

rendered. The authority collecting the fee must show that it is rendering a service in lieu of the fee that is giving some special benefit to the payer of the fee. The quantum of the fee collected and the expenses on the services rendered must have a mutual relationship, by and large the relationship between the levy and the services rendered is one of general correct not of mathematical exactitude. All that is necessary is that there would be a reasonable relationship between the levy of the fee and the service rendered.

In Consumer Unity and Trust Society, Jaipur V/s State of Rajasthan\(^{38}\), the NC after considering the above decisions observed that the legal position must now be taken to be well settled that unlike a ‘fee’ a ‘tax’ in its true nature is a levy made by the State for the general purposes of Govt. and it cannot be regarded as payment for any particular or special service while it is undoubtedly true that the Govt. in the welfare state is under a duty to provide various forms of facilities to citizens and the expenditure incurred there on will have to be met from out of the consolidated funds of the state. It cannot be said that a tax levied for the general purposes of the state constitutes ‘consideration’ for any specific facility, benefit or service provided by the state. It thus, follows that the payment of direct or indirect taxes by the public does not constitute ‘consideration’ paid for hiring the services rendered in the Govt. hospitals.

e). **Beneficiary of Services**\(^{39}\)- The Consumer of Services includes not only the hirer of services for consideration but also any beneficiary of such services provided that he is availing the services with the approval of the hirer. This is necessary to protect the interest of the user of services because under the general principles of the law of contract such

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38. Id. P.75; (1991) 1 CPR 241 (NC).
39. Id. P. 78.
user cannot sue the provider of services on the ground of ‘Privity of Contract’\(^{40}\). Thus under the law of contract only the hirer of the services can sue and not the user of such services. But now such a user or beneficiary may seek relief against the deficient services under the CP Act.

In Dr. B.S. Sidhu V/S Secretary, Central Govt. Post and Telegraphic Department\(^{41}\), the Haryana State Commission held that a person other than the original consumer, who hires services can maintain a complaint for the alleged deficiency. The commission observed—

*A plain reading of the aforesaid clause (ii) which specifically pertains to the hiring of services, would make it manifest that the statute visualizes two categories of ‘consumer’ thereby. Inevitably, the first one is the original consumer who hire such services for a consideration. The definition, however, does not stop at that. It provides further to bring within its ambit a second category also, namely, any beneficiary of such services, when these are availed with the approval of the original consumer. The definition, is thus, an inclusive and extensive one. Designedly it brings within its scope not only the person who has the privity of contract with the person hiring out the services, but also subsequent beneficiaries thereof, even though the latter may not be a party to the original contract or have a direct nexus therewith. In the true spirit of consumerism, the act has not confined itself to the original hirer alone, but equally extended it to the subsequent beneficiaries of the services as well.*

A nominee of an insurance policy being a person appointed by a policy holder to whom the payment of many secured by the policy is to

\(^{40}\) The Rule of Privity of Contract provides that only parties to the contract can sue and not a stranger.

\(^{41}\) Id. P. 78 (1991) 2 CPJ 90 (Haryana CDRC).
be made in the event of his death is beneficiary entitled to avail the services with the approval of the person who hired such services for consideration and is thus a consumer.

Similarly, a person who is using the telephone of a subscriber with his approval is a consumer of telephone services and is entitled to claim compensation under the Act for the period for which his complaints remained un-attended by the telephone department.

(6). **Consumer Dispute**\(^{(42)}\): The term 'Consumer Dispute' has been defined in clause (e) of Section 2 (1) of the Act. Consumer dispute means a dispute where the person against whom a complaint has been made denies or disputes the allegations contained in the complaint. The consumer dispute will arise when a complaint is made by a consumer before the consumer forums constituted under the Act and the opposite party denies or disputes the allegations contained in the complaint or omits or fails to respond within the stipulated time specified under section 11 of the Act\(^{(43)}\). In any of these situations the redressal forums will proceed to settle the consumer dispute in the manner specified in subsection (1) or (2) of section 11. It may be noted that even in case the opposite party omits or fails to take any action to represent his case, the forum has to proceed in a manner as if to settle the consumer dispute.

In **Executive Engineer Gosikhurd Dam Division Wahi** (Pawani) **V/S Shri Harigana Cement Ltd. Nagpur**\(^{(44)}\), the Irrigation Department of Govt. of Maharashtra has placed orders for the supply of 500 metric tons non-levy Cement for the Irrigation Project on the opposite party who is a manufacturer. An allotment of 3150 M.T was made and an amount

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42. Supra Note 18 Clause (e) of Section 2 (1).
43. Similar Provisions are available under Central Act on Consumer Protection.
of Rs. 43,02,040/- was paid being the 98% of the cost price of the non-levy cement agreed to be supplied by the opposite party. The OP supplied only 2020 metric tons. The complaint claimed the price of the balance quantity of cement with interest at the rate of 24% besides compensation of Rs. 3.00 lacs for breach of the contract. It was held that the complaint does not relate to any defects in the goods supplied but relates to a breach of contract of the sale of goods on the ground of failure to supply the full quantity of goods agreed to be supplied. So it was held that there is no consumer dispute as there was no allegation of any defective goods or deficiency in supply.

In A.N. Saigal V/S Delhi Development Authority, D.D.A was directed by D.F to refund the amount which was charged by the D.D.A from the complainant as interest. In appeal to SC the appeal was allowed partly but the complainant feeling aggrieved has came before the NC by way of revision petition. This commission held that the pricing of a flat or plot does not fall within the four corners of the CP Act. The decision given by this commission in Gurinder Bedi V/S Delhi Development Authority 1986 – 96 CONSUMER 3219(NS) has remarked in this case which is as follows:

_We are of the opinion that the forums constituted under the CPA are not empowered to go into the question of fixation of the price of the flats. Deficiency in relation to ‘service’ has been defined in clause (g) of section 2 (1) of the Act._

In a number of cases NC came to the conclusion on the fact and

45. Ibid. –1986-96 CONSUMER 3219 (NS).
46. Hiralal V/S The Administration, Municipal Council Bhilwara and Others 1986-95 CONSUMER 190 (NS); Kedar Nath Misra V/S Union of India and Others 1986-95 CONSUMER 1276 (NS); Industrial Development Bank of India V/S Shai Krishnemdu Ghosh and Another 1986-96 CONSUMER 2209 (NS); Vice Chairman Lucknow Vikas Pradhikaran V/S Prabhat Kumar Jha and Another 1986-96 CONSUMER 2463 (NS)
circumstances of the case that there is no consumer dispute and matters be agitated before other appropriate forums and not before the consumer forum.

In Union of India, through General Manager, Western Railway Bombay and another V/S Manoj H. Pathac\(^{(47)}\), complainant purchased railway tickets and had reserved slats. Some persons unauthorized entered the reserved compartment and forcibly occupied seats. When the complainant resisted he was attacked by them as a result suffered fracture leading permanent disability due to fracture of 0-12 vertebral column. It was held that the complainant had hired services of Railway Administration and if there is any negligence or deficiency in service on the part of the railway administration then it is a consumer dispute within the scope and ambit of Section 2(1) (d) of the Act.

(7). **What is defect ?**: The complaint under the CP Act can be made in relation to those goods which suffer from one or more defects. The term ‘defect’ has been defined in clause (f) of Section 2 (1) of the Act. ‘Defect’\(^{(48)}\) means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract express or implied\(^{(49)}\) or as is claimed by the trader in any manner whatsoever in relation to any goods.

The definition is wide enough to include any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard. The quality, quantity, potency, purity or standard should be such— which is required to be maintained by or under any contract express or implied or as is claimed by the trader in any manner whatsoever in relation to any

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47. Supra Note .44 1986-96 CONSUMER 2162 (NS).
48. Supra Note .18 Clause (e) of Section 2 (1).
49. Supra Note .19. Inserted.
goods. Where the quality, quantity, potency, purity or standard of any goods are not in accordance with law or promise made by the trader, the goods will be deemed as defective. There are many legislations\(^{(50)}\) which are providing standards, quality, quantity etc. of several goods. Where the goods did not fulfill the requirements of these legislation they will be defective for the purposes of the CP Act.

It has been observed that some times traders claimed particular quality, quantity of a product in the contract but it has not been followed in actual practice. The Amendment Act 1997 has inserted the words under any contract express or implied in clause f of Section 2 (1) with a view to bring such contractual claims of traders within the ambit of the CP Act.

Further, the standards quality, quantity etc. of the goods must correspond with the claims made by the trader in relation to those goods. Such claims may be made by advertisements, by printing on the packet of goods or otherwise. Where the standards, quality, quantity etc. of the goods are not in accordance with such claims, the goods will be considered as defective. The claims may be either express or implied. Thus, the true import of the word ‘defect’ as defined in Section 2 (1) (f) of the Act, is one of the widest amplitude and the standard prescribed may be either one specified by any law or as is claimed by the trader himself either expressly or impliedly.

(8). **What is Deficiency under the Act\(^{(51)}\)?** - The complaint under the CP Act can be made in respect of only those services which

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50. For example Drugs and Cosmetics Act; Drugs (Control) Act; Prevention of Food Adulteration Act; Essential Commodities Etc.

51. Supra Note, 48 Clause(g) of Section 2 (1).
suffer from any deficiency. The term ‘deficiency’ has been defined in Section 2(1) (g) of the Act. The literal meaning of ‘deficiency’ is— incomplete, defective, wanting in specified quality or insufficient in quality, force etc. The definition of ‘deficiency’ given above is wide enough to include any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance in relation to any service. The deficiency may be in quality, nature and manner of performance—

i. which is required to be maintained by or under any law for the time being in force; or

ii. which has been undertaken to be performed by a person in pursuance of contract or otherwise in relation to any service.

Thus the deficiency may occur due to the violation of any standards as to quality, nature and manner of performance laid down in any of the existing laws. The deficiency may also be caused owing to non-performance of the promise made as to quality, nature etc. of the services under the contract same cases of negligence in rendering the services may also fall within the ambit of the Act. For example, negligence by a doctor rendering medical services for consideration; an act of negligence by a repairer of goods; negligence by the telephone department in wrongful disconnection of telephone may amount to deficiency in service and are thus actionable within the purview of the Act.

(9). **Divisional Forum**

The Act originally provides for a divisional forums (which are presently working) instead of district level forums as in the rest of the Country. Here the State Act has made a big deviation from the Centre Consumer Protection Act. Under the central Act State Governments are required to setup district consumer forums and if in any district there is work load by virtue of Amendment Act, 1993 (Proviso has been inserted) State Govt. may if it deems fit,

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52. bid. Clause (h) of Section 2(1).
establish more than one district forum in a district. Earlier for establishment of district forum State Govt. was to take prior approval of the Central Govt. but Amendment Act has omitted these words and now State Governments under the Central Act of consumer protection have exclusive domain to setup district forum. Now though the recent Amendment, 2002 in the State Consumer Protection Act provides for establishment of district forums but Govt. has not taken steps to establish these forums so far.

(10). **Goods:** Clause (i) of Section 2(1) of the Act says ‘goods’ means goods as defined in the Sale of Goods Act. However, the definition of ‘goods’ excludes money and actionable claims. Money, being a legal tender is an essential element of sale. Money consideration is the ‘Price’ which is payable for the sale of goods. Therefore, money itself cannot be a subject-matter of sale. But if notes or coins (which have ceased to be legal tender) are sold as collectors items, there seems no reason why they should not be regarded as goods for that purpose.

The term ‘actionable claim’ has been defined under Section 3 of the Transfer of Property Act. According to that definition ‘actionable claim’ means a claim of any debt other than a debt secured by mortgage of immovable property or by hypothecation of pledge of movable property or to any beneficial interest in moveable property not in the possession, either actual or constructive of the claimant which the Civil Court recognize as affording grounds for relief whether such debt or beneficial interest be existent, accruing conditional or contingent. In brief, an actionable claim means

- i. any unsecured debt;

53. Ibid Clause (i) of Section 2 (1).
54. Supra Note. 43 P. 102.
ii. any interest in movable property not in possession of the claimant.

Such claims are to be governed by the provision containing in sections 130-137 of the TP Act and therefore, they are outside the purview of the Sale of Goods Act.

(11). **Who is a Manufacturer**\(^{(55)}\) -

The term ‘Manufacturer’ has been defined in clause (k) of Section 2 (1) of the Act. Manufacturer means a person who –

i. makes or manufacturers any goods or parts thereof, or;

ii. does not make or manufacture any goods but assembles parts thereof made or manufactured by others and claims the end product to be goods manufactured by himself; or

iii. puts or causes to be put his own mark or trade marks on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself.

Thus the manufacturer is the person who produces any goods or parts thereof or assembles any goods or parts manufactured by others or puts his own mark or trade marks on the goods manufactured by others.

The definition is wide and it is quite clear that in certain circumstances a person will be deemed for the purpose of the Act a manufacturer when in fact he does not done so. The reference to assemble goods makes it clear that person who produces a final product from components manufactured by others is to be treated as having manufactured that product. Similarly, in such cases there is no indication that actual manufacturer is also not liable and it would follow that for the purpose of Act a particular product may be regarded as having been manufactured by two or more manufacturers. It would therefore seem that where a component/part is defective, then prima-facie the consumer

\(^{55}\) Supra Note. 53 Clause (j) of Section 2 (1).
could at his choice make a complaint either against the manufacturer of the component or against the manufacturer of the final product. In more cases, the consumer will no doubt prefer to make a complaint against the final manufacturer rather than the manufacturer of the component either because he may have difficulty in identifying the component manufacturer or because while it may be clear that the final product was defective, it may be difficult to establish that the defect was caused by a fault in a particular component rather than faulty installation of that component or some other factor.

A person is deemed to have manufactured goods if he puts or causes to be put his own mark (e.g., name or brand or trademark) on the goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself. In fact, such a person by putting his name or mark holds himself out to the public as the manufacturer of the goods. It seems reasonable that such a person should be treated as though he is the actual manufacturer where, for legitimate marketing reasons he chooses to induce the ultimate buyer to rely on his reputation rather than that of the real manufacturer whose identity is usually unknown to the buyer. Thus, if for example, a supermarket claim sells its own branded goods without revealing the actual manufacturer. If the actual manufacturer's name is indicated, then the supermarket simply will be a supplier.

A mark (whether name, brand or trademark) is deemed to be applied to goods if it is woven in, impressed on, worked into or annexed or affixed to the goods or if it is applied to a covering, label, reel or thing in or with which the goods are supplied. Covering includes bottle, glass, stopper, vessel, box, capsule, case, frame or wrapper and label includes a band or ticket.
The explanation appended to the definition of ‘Manufacturer’ clearly provides that where a manufacturer despatches any goods or part thereof to any branch office maintained by him, such branch office shall not be the manufacturer even though the parts so despatched to it are assembled at such branch office and are sold or distributed from such branch office. The basic idea of this explanation is to clarify that the liability of a manufacturer will continue even if he gets the goods or part thereof assembled, sold or distributed at any branch office maintained by him. Such branch office shall not be deemed to be a manufacturer.

(12). **Who is Member of Consumer Forum?**

The amendment Act, 1997 has inserted a new clause (kk) in Section 2 (1) defining the term ‘member’. According to the definition, ‘member’ includes the President and member of the State Commission or a Divisional Forum as the case may be.

(13). **What Notification Stands Under The Act ?**

Clause (l) of Section 2 (l) of the Act defines the term ‘notification’. It means a notification published in the Govt. gazette. Here Govt. is the Govt. of State of J & K only.

(14). **Who is a Person Under the Act?**

The term ‘Person’ has been defined in clause (m) of Section 2 (1) of the Act. ‘Person’ includes –

i. a firm whether registered or not; or

ii. a Hindu un-divided family;

iii. a Co-operative Society;

iv. every other association of persons whether registered under the Societies Registration Act or not.

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56. Id. Clause (kk) of Section 2 (1) Inserted.
57. Id. Clause (l) of Section 2 (1).
58. Id. Clause (m) of Section 2 (1).
The definition is an inclusive one and not exhaustive. Thus, any person, not falling in the categories mentioned above, may still be a person within the meaning of the Act. In addition to an individual or natural person, the definition includes – a firm whether registered or not, Hindu un-divided family, a co-operative society, every other association of persons whether registered or not. The ‘association of persons’ means an association in which two or more persons join in common purpose or common action. Thus, the definition of ‘person’ extends to companies, firms, cooperative societies, joint families, any other association of persons.

(15). **What is known by the term Prescribed**\(^{(59)}\)?- The term ‘prescribed’ means prescribed by rules made by the State Govt. of J & K under the Act. Section 24 of Act empowers the State Govt. of J & K to make rules for carrying out the provisions of Act. Thus the term ‘prescribed’ means prescribed by these rules made by the State Govt. The Govt. of State of J & K passed rules by a proper notification on 10\(^{th}\) of March 1988 which are in force since the date.

(16). **What the term Restrictive Trade Practice indicates under the Act ?:-** The Amendment Act, 1997 has inserted a new clause\(^{(60)}\) in Section 2 (1) of the Act defining the term ‘restrictive trade practice’. According to the definition ‘restrictive trade practice’ means any trade practice which requires a consumer to buy, hire or avail of any goods or as the case may be services as a condition precedent for buying, hiring or availing of any other goods or services.

The insertion of clause (nn) in Section2 (1) is significant as it enlarges the scope of the CP Act by covering restrictive trade practices.

\(^{59}\) Id. Clause (n) of Section 2 (1).

\(^{60}\) Id. Clause (nn) of Section 2 (1) Inserted.
within its ambit. Generally, such trade practices are against the interest of consumers.

(17). **What is the Service under the Act?** According to clause (0) of Section 2 (1) of the Act, ‘service’ means –

i. service of any description which is made available to potential users; and

ii. includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying of news or other information but

iii. does not include the rendering of any service free of charge or under a contract of personal service.

The service must be available to potential users who are willing to pay for the service. The service must be rendered for remuneration. Thus, if a company is running a bus which is meant to be used by the staff of that company only or it is running a canteen exclusively for its staff will not constitute rendering ‘service’ for the simple reason that the facilities are not meant to be hired by the potential users. The term ‘service’ as defined in the Act means ‘service of any description’. Thus the service may not be rendered free of charge. The definition is wide but not exhaustive. It includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information. These facilities are merely illustrative. In addition to these facilities there can be many more facilities which may be available to potential users and

61. Id. Clause (o) of Section 2 (1) Inserted ‘housing construction’ after the words ‘board or lodging or both’.
thus they may fall within the meaning of ‘service’ for the purpose of the Act. The services rendered by hotels, cinemas, laundries etc. are also covered by the above definition. Though the services like medicine, law, accountancy, engineering, architect, estate agent etc. have not been specifically enumerated in the above definition but it seems that these services are covered within the scope of the definition because these are available to potential users. However, the definition excludes two types of services, namely –

i. rendering of any service free of charge; or

ii. under a contract of personal service.

a). Service Rendered Free of Charge:—\(^{(62)}\) Any service rendered free of charge is outside the scope of the CP Act. It means for the purpose of this Act the service must be rendered for payment. It is a payment for labour, facility or use of goods. Where there is nothing on record to establish that the services rendered by the opposite party were hired for consideration, the complainant cannot maintain claim for any deficiency in service against opposite party.

b). Contract of Personal Service:—\(^{(63)}\) The expression ‘under a contract of personal service’ has not been defined in the Act. However, The specific relief Act provides that a contract cannot be specifically enforced if it is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms.

The contract of personal service is a contract to render the service in a private capacity to an individual excluding all others. It is somewhat plain that the phrase ‘contract of personal service’ in the definition would refer inter-alia to the relationship of a matter and servant where the latter

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\(^{(62)}\) Id. Last portion of the definition of service as defined above under Clause (o) of Section 2 (1)

\(^{(63)}\) Ibid.
has entered into an agreement with the former for employment.

(18). **What is State Commission**\(^{64}\) :- State Commission has been established in the State of J & K under clause (b) of Section 7 of the Act. In the State, State Commission sits in the Summer zone at the Srinagar and for the period of Winter at Jammu. The State Commission in the State of J & K is for the whole State as in other States there is one State Commission for the whole State consisting original, appellate and revisional powers. In the State of J & K State Commission is the final appellate consumer forum. For the rest of the Country National commission is the higher appellate consumer forum. Here in the State of J & K appeals from the orders of State Commission lie directly to the J & K High Court.

(19). **Who is Trader**: Clause (q) of Section 2 (1) of the Act defines the term ‘trader’\(^{65}\) to mean a person who sells or distributes any goods for sale and includes the manufacturer thereof, and where such goods are sold or distributed in package form includes the packer thereof. Generally speaking, ‘trader’ means one who carries on trade. The definition of term ‘trader’ under the CP Act is confined to goods only. Under this Act trader means any person who –

i. Sells or distributes any goods for sale; and  
ii. Includes the manufacturer thereof; and  
iii. Where such goods are sold or distributed in package form includes packer thereof.

(20). **What is Unfair Trade Practices :-** The definition incorporated in clause r is apparently reproduction of the definition of

\(^{64}\) Id. Clause (p) of Section 2 (1).
\(^{65}\) Id. Clause (q) of Section 2 (1).
'unfair trade practice'\(^{(66)}\) under the Central Act on Consumer Protection. As the Central Amendment Act, 1993 brought a change in the definition of unfair trade practice in the Central Act in the same way State Amendment, 1997 in the State Consumer Protection Act brought a change to the effect words "adopts any unfair method or deceptive practice including any of the following practices" have been substituted for the words "adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise". Before knowing these categories of unfair trade practices it is better to know first what is the meaning of expression 'unfair trade practices'.

a). **Meaning of Unfair Trade Practices:** False means which is not true. The expression 'falsely represents' indicates that the representation is contrary to facts. A representation will be deemed to be false, if it is false in substance and in fact.

The term 'misleading' means capable of leading into error. There is an obligation on the seller that if he advertises or otherwise represents, he must speak the truth. This obligation also requires that the representation must avoid half-truths. Sometimes, a statement may be literally true and yet may be false or misleading. An advertisement may be misleading because things are omitted that should be said or because advertisements are composed or purposely printed in such a way as to mislead. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the consumer by using the tricky language. It is therefore, necessary to determine whether the representation complained of carries the possibility of misleading the buyer. The meaning of advertisements or other representations to the

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\(^{(66)}\) Id. Clause (r) of Section 2 (1) Inserted words adopts any unfair method or unfair or deceptive practices including any of the following practices.
public, and their tendency to mislead or deceive are questions of fact to be determined by the consumer redressal forums.

b). **Specific Categories of Unfair Trade Practices** Following are some specific categories of unfair trade practices as given under the Act. The first category of unfair trade practice which are laid down in clause i of Section 2 (1)(r) which relates to the practice of making false or misleading representation. All the sub-clauses (i)-(x) of this provision have a common element of factum of representation which must be false or misleading.

Thus, the representation may be made by making any statement, whether orally or in writing or by visible representation. It embraces not only words but also pictures associated therewith. The various forms of prohibition enumerated in clause i of Section 2(1) (r) have been discussed as follows:

i. The provision prohibits such representation as that the goods are of a specified standard, quality, quantity and grade etc. when that is not the case. A false representation as to the composition or ingredient of any goods will also fall under this sub-clause. A false representation would occur if a model is represented as a latest model or if a car is represented as been a particular year’s model when it is in fact a model of an earlier year. All the components namely, standard, quality, grade, composition, style or model are not mutually exclusively rather they overlap in many situations. False representation as to silver content of utensils, silk contents of carpets, contents of juice etc. are the instances which would fall within the ambit of this sub-clause.

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68. Supra Note 37.
69. Id. P 156–167.
ii. This provision is intended to cover any statement wish falsely suggests that the services are of a particular standard, quality, or grade. Sub-clause (i) is applicable to goods and sub-clause (ii) is applicable to services. For example, if private schools provide service, hold out certain promises to parents and charge for it. If they do not provide the promised service then it is a false representation and thus an unfair trade practice. Any arbitrary increase in the fees, imposition of charges for some non-existent facilities like liberty, sports and medical care will be cases of unfair trade practice.

iii. This sub-clause is clearly aimed at prohibiting such practices as describing re-built, second-hand, renovated, reconditioned or old goods as new goods. The word 'new' has many meanings and therefore it is necessary to determine its meaning in the context of a given case. The 'new' is most frequently used in the sense that the goods are not old or un-used or not second-hand. The goods which have been used are not new. However, as stated above, much will depend on the particular facts. When a motor car is represented as 'latest model' it will be within the ambit of sub-clause iii.

iv. This sub-clause prohibits the representation that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which they do not have. Thus, a false representation that an electric machine has approval of the State Electricity Board, or any goods have ISI mark which they do not have etc. are the instances of unfair trade practices falling within the scope of this sub-clause. A false representation that goods had been manufactured by

well,
known company could well be regarded as a representation as to ‘sponsorship’ or ‘approval’. A representation as to performance or characteristics may be falsely in a variety of ways. It may relate to durability of goods or efficacy of services etc. The provision also applies to representation that the goods or services have uses or benefits which they do not have.

v. A seller or the supplier falsely claiming that he has a sponsorship or approval or affiliation which he does not have would be caught by this sub-clause. The provision overlaps to some extent with the provision of sub-clause iv. Sub-clause iv is applicable when the statement represents that the ‘goods’ or ‘services’ have sponsorship or approval which they do not have.

But sub-clause v applies to the statement which represents that the seller or the supplier has a sponsorship or approval which he does not have.

vi. This sub-clause prohibits the practice of making false or misleading representation concerning the need for or the usefulness of any goods or services. It seems that the word ‘need’ is to be read in a broad sense in the context of sub-clause vi and that consequently need will be established if goods or services are desirable or preferable and the word does not imply any motion of an imperative question or necessity. This sub-clause has been designed to prohibit such practices and misrepresenting that certain repairs or the replacement of certain parts are necessary or useful when this is in fact the case.

vii. This sub-clause requires that every warranty or guarantee of the performance, efficacy of length of life of a product or goods should be based on adequate or proper test. When such a
warranty or guarantee is not supported by the proper test, it will be an unfair trade practice under this sub-clause. However, no standards or guidelines have been provided to determine the nature of adequate or proper test. Where a defense is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defense shall lie on the person raising the defense.

viii. This sub-clause speaks of a warranty or guarantee or promise which is either materially misleading or there is no reasonable prospect of carrying out it. It also speaks of a promise to replace, maintain or repair an article or to provide certain service. Further this sub-clause deals with a warranty or guarantee of the performance, efficacy or length of life of a product or any goods that is not bared on adequate or proper test but under sub-clause viii the representation must be materially misleading or that there was no reasonable prospect of carrying out it. Moreover, sub-clause vii is restricted only to the product or goods and does not apply to services whereas sub-clause viii covers service also.

ix. This sub-clause prohibits the claims which materially misleads the public concerning the price at which a product or like products or goods or services have been or are ordinarily sold or provided. This sub-clause will clearly apply if an advertiser falsely claims that the price offered is less than his own previous or normal selling price. The claims as that 'goods' worth of Rs.100, now Rs. 50 are prohibited if no such reduction has really been made. Where the reduction is actually made but it is so in significant that the customer would not normally regard it as a bargain price, the statement would be considered
as misleading if the amount of reduction is not prominently stated or displayed.

x. This sub-clause is intended to prohibit the practice of making any statement which gives false or misleading fact disparaging the goods, services or trade of another person. It may be direct statement or it may be indirectly or inferentially disparage the trade or business of another. Disparagement however, is distinguishable from other types of false advertising. 'Disparagement' generally involves casting aspersions on the quality or characteristics of goods or services of another where as other types of false advertising usually comprise assertions of superior attitude for the advertiser's own goods or services. In spite of this basic distinction commercial disparagement and false advertisement have the same effect as one's goods or services are falsely presented to the potential customers in a more favourable right than those of another.

c). **Overriding Effect of the Act** (70) The Act in Section 3 makes it clear that the provisions of the CP Act are in addition to the existing laws and they are to be applied harmoniously with a provisions of other legislations. Section 3 is reproduced here as follows:

> **Section 3 Act not in derogation of any other law**: The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

From the language of the above mentioned section it is clear that the provisions of the instant Act are supplementary in nature and have no overriding effect. The Act does not impede the remedies available to the consumer under the provisions of any other law for the time being in force. For example, a consumer may initiate proceedings in a Civil Court.

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(70) Supra Note. 66 Section 3.
under the Law of Contract or Sale of Goods Act or any other existing law. The provision of Section 3 clearly indicates that the forum, remedies, adjudication, procedure etc. provided under the Act is an additional dispensation. It is thus clear that the provisions contained in CP Act do not in anyway abrogate the provisions of any other law for the time being in force.

(1). **Breach of Contract and Consumer Protection Act**

The defect or default in goods or deficiency in service on the part of the opposite party may also amount a breach of contract under the general law but it will not in any way affect the jurisdiction of the consumer disputes redressal forums setup under CP Act. Once it is found that there is a purchase of goods or hiring of services for consideration and that loss has been caused to the complainant on account of defect in the goods or deficiency in services or unfair trade practices the aggrieved consumer is entitled to seek his remedy under the CP Act by approaching appropriate redressal forum.

(2). **No conflict with other Laws**

The provisions of the CP Act do not come in conflict with the provisions of any other law for the time being in force. These provisions are in addition to the provisions of any other law for the time being in force. It is for the consumer to choose a forum convenient to him to seek remedy for the loss suffered by him.

Here it would not be out of place to have an view about the scope of Section 3 of the Act in hand. The provisions of this section makes it clear that the provisions of this Act are intended to provide inexpensive and expeditious alternative remedy for consumers. Among all the provisions of Consumer Protection Act Section 3 is an important one dealing with the scope of the Act. The section provides that this Act

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71. B Sundharam Northy Section 3 of Consumer Protection Act 1997 (2) CPR 112.
72. Ibid.
is intended not to supplant but to supplement the existing laws. This Act therefore, does not touch or affect the rights created and the obligations imposed by other laws including the Law of Limitation. The Supreme Court in a judgment in M/S Fair Air Engineer P. Ltd. & Another v/S N.K. Modi, held that—

"The provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of this Act are in addition to and not in derogation of any other law in force... It would therefore, be clear that the legislature intended to provide a remedy in addition to the Consentient arbitration which could be enforced under the Arbitration Act or civil action in a suit under the provisions of the Code of Civil Procedure. We hold that the DF, SC and NC are judicial authorities for the purpose of Arbitration Act in view of the object of the Act and by operation of Section 3 thereof. We are of the considered view, it would be appropriate that these forums created under the Act are at liberty to proceed with these matters in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceeding pursuant to a contract entered into between the parties."

Thus the Supreme Court held that the forums under the Act are additional forums for cases coming within the purview of the Arbitration Act and Civil Courts.

From the above discussion briefly to say here that the Act has not overriding effect and is not in derogation of any other law for the time being in force.

73. 1996 III CPJ I
Part III

In this part brief account of establishment of State Consumer Protection Council and Redressal Agencies will be enunciated.

(A). **State Consumer Protection Council**\(^{(74)}\): The Central Act on Consumer Protection envisages the setting up of the consumer protection councils at centre and States. The State Act of J & K also provides for establishment of State Consumer Council\(^{(73)}\). The State Consumer Protection Council as in rest of the Country is a very important and potent body for promoting Consumer interests in the State.

(1). **Composition of State Consumer Protection Council**\(^{(75)}\): Proviso to the J & K Consumer Protection (Amendment) Act, 1997 The State Council was required to consist of the following members, namely,

i. The Minister in charge of the Department of Food and Civil Supplies in the Govt. … Chairman

ii. Such number of other official or non-official members representing such interests as may be prescribed … Members

Now by virtue of rules\(^{(76)}\) in addition to the above members it shall consist of the following members, namely

iii. Three Representatives of Autonomous Organizations concerned with consumer interests … Members

iv. Three Representatives of consumer organizations or consumers … Members

v. Two Representatives of women … Members

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74. Supra Note. 70 . Section 4
75. Though now Consumer Protection (Amendment) Act, 1997 inserts Section 6–a which provides for establishment of district consumers councils in each district but no steps have been taken to implement these provisions up to this time.
vi. Three Representatives of farmers, traders and industrialists, one from each category ... Members

vii. Three persons capable to represent consumer interests not specified above ... Members

viii. The Secretary to Govt. , Food and Supplies Department ... Member

(2). **Number of Meeting of State Council** (77):- Sub-section 1 of Section 5 of the Act makes it obligatory on the State Council to meet as and when necessary but not less than 3 meetings of the Council shall be held every year.

(3). **Procedure for Meeting** (78):- For better understanding the procedure as to how meetings are to be conducted by the State Council Rule 4 of the Jammu and Kashmir Rules, 1988 providing the procedure regarding the transaction of its business will be understood in this way that the meeting of the State Council shall be presided over by the Chairman, in his absence the Vice Chairman, in the absence of the Chairman and the Vice Chairman it is obligatory that the council shall elect a member to preside over the meeting. Each meeting of the State Council shall be called by giving not less than 10 days notice in writing to every member. However, the notice shall specify the place, the day, hour and statement of business to be transacted thereat. The same rule provides that no proceedings of the State Council shall be held invalid merely by reasons of any vacancy or defect in the constitution of the Council. The instant rule also provides that for the purpose of performing its functions under the Act. The State Council may constitute from amongst its members such working groups as it may deem necessary.

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77. Sub section (1) of Section 5.
78. Section 5 of the Act and Rule 4.
and every working group so constituted shall perform such functions as are assigned to it by the State Council. The findings of such working group shall be placed before the State Council for its consideration and the resolution passed by the State Council shall be recommendatory in nature.

(4). Tenure and Vacancy of Office of the State Council\(^{(79)}\): The term of the members of the State Council under rules is fixed 3 years. However, any member may resign from the office before the above mentioned term. The vacancies so caused or otherwise, shall be filled from the same category by the Govt. and such person shall hold office so long as the member whose place he fills would have been entitled to hold office if the vacancy had not occurred.

(5). Objects of the State Council\(^{(80)}\): Objects of the State Council will be discussed here under two Sub-headings- General Objects and Specific Objects.

a). General Objects\(^{(81)}\): The State Council has been charged with promotion and protection of the rights of the consumers. Broadly speaking the function of the Council is to investigate and make policy recommendations on the need for legislative or administrative action in the interest of consumers. This body has to play an important role in giving publicity to matters of consumer concern, furthering consumer education and protecting consumer from unscrupulous exploitation. The Amendment in both central and state Act has extended the scope of these rights by including ‘services’ and ‘restrictive trade practices’ in Section 6 of the Act. The Council has to perform a very responsible and important task in the consumer protection movement. The Council has to function

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79. Ibid. Rule 5
80. Id. Section 6
81. Supra Note.66 P. 193.
as a catalyst in the consumer protection plan and to safeguard the interest of the consumers in the State. The Council can contribute significantly in providing better protection to the consumers in matters of availability, quality, quantity and prices of goods and services.

b). **Specific Objects of the State Council**: The Act has recognized six rights of the consumers, namely – right to safety, right to be informed, right to choose, right to be heard, right to seek redressal and right to consumer education. The Primary object of the council is to protect these rights of the consumers.

(i). **Right to Safety**: The right to safety means the right to be protected against the marketing of goods and services which are hazardous to life and property. Perhaps the most urgent need is for effective enforcement. While it is the concern of the Govt. and its authorities to prevent dangerous goods from finding their way into markets the consumer is assured by this Act that if he has been victimized into purchasing goods which have injured his person or property, he will have a speedy and effectively remedy under the redressal hierarchy constituted under the Act. For example, adulterated food is dangerous to life and weak cement is dangerous to life as well as to property. The subject-matter of dangerous goods is generally taken care of under the Law of Torts since the time of Donough V/S Stevenson. In the words of Win Field the principles has been extended from articles of food and drink and includes inter-alia tombstones, hair dye, industrial chemicals, lifts, motor cars and scented erasers and poisons pencils. Likewise the term ‘consumer’ includes the ultimate user of the article or any one who is within physical proximity to it. Apart from these specific instances, the general principle of liability is the duty
not to supply any consumer goods which fail to comply with the general safety requirements by not being reasonably safe having regard to all circumstances.

(ii). **Right to Information** :- The consumer has been given the right to be informed by the producer about the quality, quantity, potency, purity, standard and prices of goods he buys so as to protect the consumer against unfair trade practices like false and misleading descriptions about the nature and quality of goods, exaggerated statements about their power or potency for example that the hair oil is capable of promoting hair growth or preventing hair loss, where there is no such power to an appreciable extent or that the medical preparation is capable of curing baldness or that the goods are of some standard of purity when in fact the goods are not of that standard or purity. A misrepresentation as to price may occur, for example in a concealed way in throwing open clearance, grand clearance or reduction sales or in an offer of a free gift along with particular product when in fact neither the prices are less than the original one’s nor the so-called free gift is really free. Under these circumstances the right to obtain adequate information is an important right which enables the consumer to take intelligent decisions at the time of purchasing any goods or hiring any services.

Thus the consumers must be assured of informative marketing and effective protection against practices which could adversely affect their economic interests and the exercise of choice in the market place.

(iii). **Right to Choose**:- The right to choose means the right to be assured wherever possible, access to a variety of goods and services at competitive price. The Council as constituted under the Act has been charged with the responsibility of the organization of markets and market practices in such a way that all dealers are supplied with a variety of
goods for the benefit of the consumer and that the goods with a variety are being offered at competitive prices. This is based upon the belief that best way to improve quality and value for money is to give the citizen wider choice through the mechanism of free competition. It is only then the consumer will have access to variety and will be able to enjoy the benefit of competitive prices.

(iv). **Right to be heard**: The right to be heard also includes the right to be assured that the consumer interest will receive due consideration at appropriate forums. The council is also charged with the responsibility of assuring consumers that they would be heard as of right by the appropriate forums and the consumer will receive due attention and consideration from such forums. Thus it is the duty of the Council so to organize and compose the different forums under the Act so that an aggrieved consumer is heard as of right and receives due consideration at the hands of the appropriate redressal forums.

(v). **Right to seek Redressal**: The consumer has been given the right to seek redress against restrictive or unfair trade practices or unscrupulous exploitation. The consumer should have some means of redress when goods fail to live up to their promise or indeed cause injury.

(vi). **Right to Consumer Education**: For the proper functioning of the legal system it is necessary that knowledge of the availability of a legal remedy should be so widely disseminated that people as a whole become conscious of their rights. By increased information as to rights and remedies the consumer will be better empowered to pursue his remedies. The enforcement of this duty (to provide consumer education to masses) is primarily the task of the government and other authorities constituted for the purpose.
(B). Consumer Disputes Redressal Agencies\(^{(83)}\) :- To provide simple, speedy and inexpensive redressal of consumer grievances, the Act envisages a two-tier quasi-judicial machinery at the divisional and state level. It is noteworthy to mention here that consumer redressal agencies have been established in almost all the districts of neighboring States of our Country except in the State of J & K. In this way in the State\(^{(84)}\) there is establishment of Divisional Forum in each division and the appeals from the orders of the Divisional Forum goes to the State Commission and appeals from orders of State Commission lies to the J & K High Court. First here we will deal with the composition, terms and conditions etc. of the lowest level of redressal agencies – divisional forum.

(1). Composition of Divisional Forum\(^{(85)}\) :- Presently each Divisional Forum consists of a President and two members\(^{(86)}\). The President is required to be a person who is, or has been, or is qualified to be a district judge and other two members are required to be persons of ability, integrity and standing and have adequate knowledge or experience of dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs of administration one of whom to be preferably a lady. Regarding the appointment of members of the Divisional Forum the Amended Act\(^{(87)}\) provides that every appointment be made by the Govt. on the recommendation of a Selection Committee consisting of the following members –

\(^{83}\) Supra Note Section 7 .

\(^{84}\) Substituted --- of eminence in the filed of education, trade or commerce; similar provision under Central Act .

\(^{85}\) Id. Section (1-A) of Section 8

\(^{86}\) Supra Note 83 Section 8 .

\(^{87}\) Supra Note . 85
(2). **Tenure and Vacancy**\(^{(88)}\) :- The term of office of every member of the forum is five years or up to the age sixty five years whichever is earlier. However, both the Act and Rules provides that no member is eligible for re-appointment\(^{(89)}\). Every member is at liberty to resign his office in writing at any time by addressing the resignation to the Govt. This way vacancy may arise on account of resignation, death or by removal and any such vacancy so caused may be filled by appointment of a person possessing the qualifications as mentioned in Section 8 (1) of the State Act.

(3). **Salary, Honorarium and other allowances** :- Under Sub-section 3 of Section 8 where the President of the Divisional Forum is a sitting judge of the Sessions Court, he shall enjoy all the benefits which he should have enjoyed as a sitting judge of Session Court. Where he is not a sitting judge of such Court he shall receive a honorarium equivalent to the amount of salary as he was drawing at the time of his retirement minus the pension per month. ‘Prior to appointment, the President and the Members of the Divisional Forum shall have to give an undertaking to the effect that he does not and will not have any such financial or other interest as is likely to affect prejudicially his functions as such\(^{(90)}\).’ However the terms and conditions of service of the President and the Members or any member of the Divisional Forum shall not be varied to their disadvantage during their tenure of office.

\(^{(88)}\) Supra Note 79. Rule 7 (ii).

\(^{(89)}\) Similar provisions regarding the tenure etc. provided under the Central Act.

\(^{(90)}\) Supra Note. 88 Rule 7 (i).
(4). **Jurisdiction of the Divisional Forum**[^91^]: Jurisdiction means the extent of the authority to administer justice not only with reference to the subject – matter of suit but also to the territorial and pecuniary limits. It is a fundamental rule that a judgment of Court without jurisdiction is a nullity ... Under this Act while filing a complaint care is to be taken whether the Forum before which a complaint is to be lodged is having jurisdiction to entertain such complaint. For example a complaint against any service free of charge or against a contract of personal service is outside the jurisdiction of the consumer forum[^92^].

a). **Pecuniary Jurisdiction**[^93^]: Sub-section 1 of Section 9 deals with the pecuniary jurisdiction. Originally it provided that the divisional forum has the jurisdiction to entertain complaints where the value of the goods or services and the compensation it claimed does not exceed rupees fifty thousand then Amendment Act 1997, substituted for the words ‘rupees fifty thousand’ the words ‘value not exceeding rupees five lakh.’ Now again by virtue of recent Amendment Act, 2002 Section 9 stands amended and for the words ‘rupees five lacs’ the words ‘rupees ten lacs’ have been substituted. So the complaint involving claims exceeding rupees ten lacs will lie to the other consumer forum that is the State Commission. It is pertinent to mention here that the pecuniary jurisdiction depends upon the amount of relief claimed and not upon the value of the subject matter nor upon the relief allowed by the forum.

b). **Territorial Jurisdiction**[^94^]: Sub-section 2 of Section 9 deals with territorial jurisdiction of the divisional forum. It provides that a complaint shall be instituted in a divisional forum within the local limits.

[^91^]: Supra Note 86 Section 9 (1)
[^92^]: Supra Note 82 P. 213.
[^93^]: Ibid.
[^94^]: Id. P. 214.
of whose jurisdiction –

i. the opposite party or each of the parties at the time of institution of the complaint actually and voluntarily resides or carries on business directly or through a branch office\(^{95}\) or personally works for gain; or

ii. any of the opposite parties, where there are more than one at the time of the institution of the complaint actually and voluntarily resides or carries on business directly or through a branch office\(^{96}\) or personally works for gain provided that in such case either the permission of the Divisional Forum is given or the opposite parties who do not reside, or carry on business or have a branch office, or personally works for gain, as the case may be, acquiesce in such institution; or

iii. the cause of action, wholly or in part, arises.

Now let us have a bit of discussion about the various expressions as used in Sub-section 2 of Section 9 of the Act.

(i). **Actually and Voluntarily Resides**\(^{97}\): The words ‘actually and voluntarily resides’ are relevant at the time of the institution of the complaint. The residence gives the jurisdiction to institute a complaint under the Act. The term ‘resides’ indicates the place where a person normally lives. Further, it refers to the natural person and not to legal entities and Govt. A complaint under the Act can be laid against the Govt. wherever the cause of action arose in whole or in part. This principle applies also to registered companies and corporations.

(ii). **Carries on Business**\(^{98}\): The expression ‘carries on business’
is intended to relate to business in which a man may a contract and is liable to be used by persons having business transaction with him. The ‘business’ term is restricted to commercial business. To constitute ‘carrying on business’ at a certain place, the essential part of the business must take place in that place. A person may carry on business at a place where he has no office or regular establishment. The business need not be carried on personally. The phrase ‘carries on business’ is used as distinct from the phrase ‘personally works for gain’. It does not involve actual presence or personal effort and a man may carry on business in a place through an agent or a manager or a servant but he must have an interest and some control upon the existence of the business.

(iii). **Through a Branch Office**\(^{(99)}\)- Earlier consumer was to file complaint at the place where opposite party was carrying business but now by virtue of Amendment Act 1997 it enables the consumers etc. to file their complaints U/S 9 (2) even at the place where a branch office of the opposite party is functioning.

(iv). **Personally Works for gain**\(^{(100)}\)- The words ‘personally works for gain’ indicate that a person may be living outside the limits of jurisdiction but comes there to work for gain. For example, a pleader who lives outside the jurisdiction of High Court where he practices. It is necessary that ‘works for gain’ must be carried on personally. The word ‘works’ implies mental or physical effort. A complaint, thus may be instituted within limits of whose jurisdiction the opposite party at the time of the institution of the complaint, personally works for gain.

(v). **Permission of the Forum or Acquiescence**\(^{(101)}\)- Where there are more than one opposite parties, a complaint may be

99. Inserted Supra Note .85 .
100. Supra Note . 82 P. 216
101. Ibid.
instituted within the local limits of whose jurisdiction any of the opposite parties actually and voluntarily resides, or carries on business or personally works for gain. However, in such a case, the permission of the forum concerned is required. The permission may be granted even after the institution of the complaint and even at the stage of appeal. Where the permission is not granted, the complaint cannot be proceeded with unless the opposite parties who do not reside, or carries on business, or personally works for gain, acquiesce. Thus, where some of the opposite parties are within and others outside jurisdiction, either the permission of the concerned forum, or acquiescence of those who are outside the jurisdiction is required.

(vi). **Cause of Action**\(^{102}\)- The expression ‘cause of action’ means every fact which is necessary to be proved to entitle the complainant to relief. It is, in other words, a bundle of essential facts which it is necessary for the complainant to prove before he can succeed in the case. It refers entirely to the grounds set forth in the complaint as the cause of action. The cause of action must be antecedent to the institution of the complaint.

It is to be submitted here that this Section does not take into consideration the residence of the complainant (the consumer) for whose benefit the Act is meant to give jurisdiction to file the dispute to file the complaint. The very object of the Act is consumer protection but a consumer who is the aggrieved person, who resides at a particular place, but has suffered by act/acts of the person done outside the jurisdiction of the DF where he resides cannot file a case within the jurisdiction where he resides. As the protection Act Section 9 stands he is required to file the dispute going to the place where the opposite party resides or has his

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\(^{102}\) Id. P.217.
office or branch. A consumer may not have that tenacity to go such place outside his district/division or residence to agitate his grievance. So immediate necessity in the interest of the consumers and for the easy reach to the redressal forum Section 9 be amended by including a sub-clause d as follows –

Section 9 (d) – ‘where the consumer resides’

(5). **Manner in which Complaint is to be made**

The complaint made to the Divisional Forum under Section 10 in a relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a Divisional Forum by –

i. consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;

ii. any recognized consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;

iii. one or more consumers where there are numerous consumers having the same interest, with the permission of the Divisional Forum on behalf of or for the benefit of all consumers so interested;

iv. the Govt.

The Proviso appended with the Section provides that in relation to district of Leh, Kargil, Poonch and Rajouri a complaint under this section may be filed with the concerned Deputy Commissioner, who shall

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104. Supra Note 98. Section 10.
forward such complaints to the Consumer Forum having jurisdiction to entertain such complaint. However, it is to be submitted here briefly that this manner of filing complaints by the consumers of above mentioned places is causing inconvenience to file complaints before the competent consumer forum by sending their complaints through Deputy Commissioner's(105).

(6). Procedure on Receipt of Complaint (106):- The complaint made to the Divisional Forum is analogous in its nature to a plaint filed before a Civil Court but under this Act Section 11 provides the procedure which is to be followed on receipt of complaint by the Divisional Forum.

It provides where a complaint does not require analysis or testing of the goods, it should be decided as far as possible within a period of 90 days from the date of the notice received by the opposite party and within 150 days if it requires analysis or testing of the goods.

The procedure to be followed on receipt of complaint may be classified into two parts –

i. the complaint relating to service, or goods which do not require any analysis or test; or

ii. the complaint relating to goods which require analysis or test.

Now it is proper to have a brief discussion about the above two points here one by one.

a). When Analysis or Test is not required (107):- The Divisional Forum shall on receipt of complaint relating to any service or goods which do not require analysis or test refer a copy of the complaint to the opposite party directing him to give his version of the case with in a period of 30

105. Id. Section 10 Provision appended.

106. Id. Section 11; seen also Section 8 of Amendment Act, 1997.

107. Supra Note 100 P. 242.
days. The period of 30 days cannot be curtailed. Where the notice did not provide 30 days time to the opposite party to file its reply, it will be a violation of Section 11 (1) (a) and any order passed by Divisional Forum in the absence of opposite party is liable to be set aside. However, the period may be extended up to 15 days by the forum. Thus, in no case the opposite party be allowed to give his version after the expiry of 45 days. Where the opposite party admits the allegation made by the complainant, the forum has to decide the complaint on the basis of the merit of the case and documents provided present before it. But, where the opposite party denies or disputes the allegation contained in the compliant, or omits or fails to take any action to represent his case within the above stipulated time, the forum is bound to proceed and to settle the consumer dispute on the basis of the evidence draw to its notice by the respective parties. In such a situation it is obligatory on the parties or their agents to appear before the forum on the date of hearing or any other date on which hearing could be adjourned. Where the complainant or his agent fails to appear on such dates, the forum may in its discretion either dismiss the complaint for default or decide it on merit. Where the opposite party or its agent fails to appear on the date of hearing, the forum may decide the complaint ex-party.

b). **When Analysis or Test is Required**

Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the forum should obtain a sample of the goods from the complainant and if necessary, it may obtain more than one sample. On receiving the sample, the forum should seal and authenticate it in the manner prescribed by the Rules made by the State.

108. Ibid; A reading of Section 11 shows that the goods are to be referred to a laboratory only if the alleged defects cannot be determined without analysis or test of the goods. Where the defect can be seen by naked eyes there is no need to send it for laboratory.
Govt. and fix a label on the container carrying the following information:

i. name and address of the appropriate laboratory to which the sample will be sent for analysis and test;

ii. name and address of the DF;

iii. case number;

iv. name and description of the goods/articles kept in the sealed container;

v. seal of the DF.

The sample sealed and authenticated in the above manner should be sent to the appropriate laboratory for analysis or test, with a view to find out whether such goods suffer from any defect. Samples of goods for test or analysis shall be sent by the DF by registered post in a sealed packet, enclosed together with a memorandum in Form -1 in an outer cover addressed to the laboratory. The packet as well as the outer cover shall be marked with a distinguishing number. On receipt of the packet it shall be opened by an officer authorized in writing in that behalf and shall record the condition of the seal on the packet and then the laboratory is required to submit its report to the forum within a period of 45 days of the receipt of the sample or within such extended time as may be granted by the forum.

Sending goods (defective) for examining and conducting test about their purity, quality etc. is a very important right conferred under Act. Any objection by the complainant regarding the correctness of the findings or methods of analysis or test adopted by the appropriated laboratory should be made in writing to the forum and the forum should give reasonable opportunity to the complainant as well as to the opposite party of being heard as to the objection made in relation thereto and take steps under rules of the Act.
(7). **Findings of the Divisional Forum**\(^{(109)}\):- If after the proceedings conducted under Section 11 the DF is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved it should issue an order to the opposite party directing him to do one or more of the things as enumerated in this section.

(8). **Remedies available to Consumer**\(^{(110)}\):- As above said under Section 12 of CP Act, 1987 DF on finding any defect in goods or deficiency in service has to issue direction to the opposite party are the remedies available to the consumers. Following are these remedies which are available to the consumer under this Act.

a). **Removal of Defects**\(^{(111)}\):- Where the goods complained against suffer from any of the defects pointed out by the appropriate laboratory the forum can issue an order to the opposite party to remove the defect from the goods in question. When the complainant alleges such a defect in the goods which cannot be determined by any analysis or test, the forum should decide the complaint on the basis of evidence brought to its notice by the respective parties and pass necessary order under the Act.

b). **Replacement of Goods**\(^{(112)}\):- Clause b of Section 12 provides that where the DF finds that the goods complained against suffer from any of the defects specified in the complaint, it may direct the opposite party to replace the goods with new goods of similar description which shall be free from any defect. It is not clear when the forum can order for the removal of defect under clause (a) of Section 12(1) or when it can ask for

\(109\). Supra Note. 104 Section 12.

\(110\). Id. [Clauses (a) to (d). Inserted (e) to (i)].

\(111\). Id. Clause (a).

\(112\). Id. Clause (b).
the replacement of goods under clause (b) of the same Section. It appears that it has been left to the discretion of the forum.

c). **Return of Price**[^113]: Under clause (c) of Section 12 (1) of the Act if the DF finds that the goods or services complained against suffer from any defect or deficiency specified in the complaint it may order to opposite party to return to the complainant the price, or the charges paid by the complainant. Obviously, the forum will pass such orders when the defect in the goods cannot be removed or the replacement of goods is not possible or even if possible it will not be a sufficient relief to the satisfaction of the complainant. Once it is proved that the goods were not of the standard quality but defective and required to be returned to the seller, the customer is entitled to return of full price.

d). **Compensation for Loss or Injury**[^114]: Under clause (d) of Section 14 (1) of the Act if the DF is satisfied that the goods or the service complained against suffer from any defect or deficiency specified in the complaint, it may order the opposite party directing him to pay such amount as may be awarded by it as compensation to the consumer from any loss or injury suffered by him due to the negligence of the opposite party.

e). **To Remove the Deficiencies**[^115]: Clause (e) of Amended Section 12 provides that where the DF finds that the services complained against suffer from any defect or deficiency, it may direct to the opposite party to remove the defect or deficiency in the services in question. This provision has been inserted by the Amendment Act 1997 on similar lines as provided by the Amended Section 14 of the Central Act.

[^113]: Id. Clause (c).
[^114]: Id. Clause (d).
[^115]: Id. Clause (e) Inserted
f). **Cease and Desist Order**\(^{(116)}\): Clause (f) in Section 12 (1) has been inserted by the Consumer Protection (Amendment) Act 1997. According to this provision, the DF may direct the opposite party to discontinue the unfair trade practice or the restrictive trade practice or not to repeat it. Thus, clause (f) of Section 12 (1) of the Act authorizes the DF to pass 'cease and desist' order. It means that the practice shall not be repeated in future.

g). **Not to Offer the Hazardous Goods for Sale**\(^{(117)}\): Under this provision, the DF may by order direct the opposite party not to offer the hazardous goods for sale. It is to be noted that the term 'hazardous goods' has not been defined in the Act. Therefore, it creates difficulty to the Consumer Forums. However, it appears that it would include those goods which are likely to endanger the life, health or property of public.

h). **To Withdraw Hazardous Goods**\(^{(118)}\): DF may also direct the opposite party to withdraw the hazardous goods from being offered for sale. Prior to the Amendment Act, 1997 there was no such power conferred upon the DF.

i). **To Provide for Adequate Costs to Parties**\(^{(119)}\): In addition to the above directions, DF may award the adequate costs to parties. This is an important provision which enables this forum to award costs to the parties.

(9). **Order by the Divisional Forum**\(^{(120)}\): Every order made by the DF U/S 12 (1) shall be signed by its President and the Member or members who conduct the proceedings. Where the proceeding is

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116. Id. Clause (f).
117. Id. Clause (g).
118. Id. Clause (h).
119. Id. Clause (i)
120. Id. Sub-section 2 of Section 12. (For details).
conducted by the President and one member and they differ on any point they shall state the point on which they differ and refer the same to the other member for hearing on such point and the opinion of the majority shall be order of the DF (No act or proceeding of the DF shall be hold invalid by reason of any vacancy of its President or Member or any defect in the constitution thereof)\(^{121}\).

(10). **Procedure Regarding Meeting etc**\(^{122}\): The DF shall observe the procedure in regard to the transaction of its business as provided under rules. It provides that the meeting of the DF shall be presided over by the President in his absence the senior most member (in order of appointment) shall preside over the meeting. Each meeting of the DF shall be called by giving not less than 10 days notice in writing to every member. The notice shall specify the place, the day, hour and statement of business to be transacted there at.

(11). **Appeal to the State Commission**\(^{123}\): Section 13 of the Act provides that any person aggrieved by an order made by the DF may prefer an appeal against such order to the State Commission within a period of 30 days from the date of the order. Section 13 of the Act is to be reproduced here as follows:

*Section 13-Appeal:* Any person aggrieved by an order made by the Divisional Forum may prefer an appeal against such order to the State Commission within a period of 30 days from the date of the order in such form and manner as may be prescribed.

Provided that the State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

\(^{121}\) Supra Note .88 Sub-Rule (viii) of Rule 7.

\(^{122}\) Id. Rule 9.

\(^{123}\) Supra Note 119 Section 13 (For details) Supra Note . 108 P. 285-286.
The expression ‘person aggrieved’ does not mean a person who is disappointed or annoyed at decision. The term ‘aggrieved’ connotes some legal grievances, for example deprivation of something, an adverse effect on the title to something and so on. He must show that the order affects his own right or confers a right on a person to which he is not entitled or is not in accordance with law.

The proviso appended to the Section 13 as mentioned above provides that the State Commission may entertain an appeal even after the expiry of 30 days if it is satisfied that there was sufficient cause for not filing it within the period. The party has to show as to why he did not file an appeal on the last day of limitation prescribed. In other words it means that the party has to show sufficient cause for not filing the appeal on the last day but to explain the delay made thereafter day by day. The delay in filing an appeal should not have been for reasons which indicate the parties negligence in not taking necessary steps, which he could have or should have taken. What would be such ‘necessary steps’ will depend upon the circumstances of a particular case.

(12). **Procedure for Hearing Appeal**[^124]: In exercise of the powers conferred by Section 24 of the said Act the State Govt. has made consumer protection rules. These Rules provide that under Section 13 of Act memorandum shall be presented by the appellant or his agent to the State Commission in person or be sent by registered post addressed to the Commission[^125]. Every memorandum filed under Sub-rule (i) shall be in legible handwriting preferably typed and shall set forth concisely under distinct heads, the grounds of appeal without any argument narrative and such grounds shall be numbered consecutively[^126]. Rules further provide

[^124]: Supra Note. 122 Rule 10.
[^125]: Id. Sub-Rule 1.
[^126]: Id. Sub-Rule 2.
that each memorandum shall be accompanied by a certified copy of the order of the DF appealed against and such of the documents as may be required to support grounds of the memorandum\(^{(127)}\). When the appeal is presented after the expiry of the period of limitation as specified in the Act, the memorandum of appeal shall be accompanied by an application supported by an affidavit setting forth the facts on which the appellant relies to satisfy the State Commission that he has sufficient cause for not preferring the appeal with a period of limitation\(^{(128)}\).

The appellant shall submit six copies of the memorandum of appeal to the commission for official purpose\(^{(129)}\). On the date of hearing or on any other day to which hearing may be adjourned, it shall be obligatory for the parties or their agents to appear before the State Commission. If appellant or his agent fails to appear on such date, the SC may, on its discretion, either dismiss the appeal or decide ex-party on merits. If the respondent or his agent fails to appear on such date, the SC shall proceed ex-parti and shall decide the appeal on merits of the case\(^{(130)}\).

The appellant shall not except by leave of the SC argue or be heard in support of any objection not set forth in the memorandum but the SC while deciding an appeal may not confined to the grounds of objection set forth in the memorandum\(^{(131)}\). The SC on such terms as it may think fit and at any state adjourn the hearing of the appeal but not more than one adjournment shall ordinarily be given and the appeal should be decided as

127. Id. Sub-Rule (iii).
128. Id. Sub-Rule (iv).
129. Id. Sub-Rule (v).
130. Id. Sub-Rule (vi).
131. Id. Sub-Rule (vii).
far as possible within 90 days from the first date of hearing\(^{(132)}\). The order of the SC on appeal shall be signed and dated by the Members of the SC and shall be communicated to the parties free of charge\(^{(133)}\).

(C). **State Commission\(^{(134)}\):** The next higher forum in the hierarchy of CDRA’s in the State of J & K is the State Commission. In this State as in the rest of the country SC has been set-up which in the State is the higher separate consumer forum. Its decisions are binding on both Divisional Forums presently functioning state.

1). **Constitution of State Commission\(^{(135)}\):** The SC consists of a President and two or more members\(^{(136)}\). The President for this forum shall be a person who is or has been a judge of a High Court and other members shall be persons of ability, integrity and having adequate knowledge of law and experience in law and consumer affairs.

2). **Appointment of President and Members\(^{(137)}\):** Under the Section 14 of the Act the appointment of the President of the State Commission shall be made by the State Govt.\(^{(138)}\) after consultation with the Chief Justice of the State High Court. However, consultation of the Chief Justice is necessary only if a sitting judge of the High Court is to be appointed as the President. It is to be submitted here that the State Act needs to be amended to the effect that for appointment of President of the SC consultation with the Chief Justice of the High Court be made.

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132. Id. Sub-Rule (viii).
133. Id. Sub-Rule (ix).
134. Supra Note 119. Section 14.
135. Supra Note. 106; Inserted two or more members who shall be persons of ability, integrity and having adequate knowledge in law and experience in law and consumer affairs.
136. Ibid.
137. Id. By virtue of proviso now every appointment made under this section is required to be made by the Govt. on the recommendation of the selection committee----
138. Ibid.
necessary even though the retired judge of the High Court is to be appointed as the President. This sort of Amendment will help in making fair appointments to the office of the President of the SC. Regarding the appointment of members of the SC the Amendment Act of 1997 now provides that State Govt. shall made every appointment on the recommendation of the Selection Committee consisting of the following, namely –

i. Chief Secretary … Chairman
ii. Secretary to Govt. Law Department … Member
iii. Secretary to Govt. Food & Supplies Department (Incharge consumer affairs) … Member

(3). Terms and Conditions⁽¹³⁹⁾: The State Govt. of J & K has laid down Rules regarding the terms and conditions of service of the President and members of the State Commission. These rules provide that President and the members of the SC are required to give an undertaking to the effect that he does not and will not have any financial or other interests as is likely to affect prejudicially his functions as such⁽¹⁴⁰⁾. The President and the Members can hold office for a period not exceeding five years or such period as may be specified by the Govt. in the notification⁽¹⁴¹⁾. However, any member may under his hand addressed to the Government resign his office at any time and he may be removed from his office in accordance with the provisions of Rule 13⁽¹⁴²⁾.

The terms and conditions of service of the President and the Members shall not be varied to their disadvantage during their tenure of office⁽¹⁴³⁾.

₁³⁹. Supra Note .133 Rule 12.
₁⁴₀. Id. Sub-Rule (i).
₁⁴¹. Id. Sub-Rule (ii).
₁⁴². Id. Sub-Rule (iii).
₁⁴³. Id. Sub-Rule (iv).
(4). **Salary, Honorarium and other Allowances**\(^{(144)}\)-

Where the President of the SC is a sitting judge of the High Court he shall enjoy all the benefits which he should have enjoyed as sitting judge of the Hon’ble High Court. Where the President is not a sitting judge of High Court he shall receive a honorarium equivalent to the amount of salary as he was drawing at the time of his retirement minus the pension per month. Other members, if sitting on whole time basis, shall receive a consolidated honorarium or Rs. 3000 per month or if sitting on part time basis a consolidated honorarium of Rs. 100 per day per sitting. The Instant Rule 11 further provides that the President and the members shall be entitled to traveling and daily allowances on official tours at the same rates as are admissible to class first officer of the Govt.

5). **Vacancies in the Office of State Commission**\(^{(145)}\)-

A vacancy in the office of the President or a Member may occur, after the expiry of the term, or by resignation, or removal. Any such vacancy caused by resignation or removal of the President or any other member of the SC under sub-rule 3 or otherwise shall be filled of by fresh appointment. Where any casual vacancy occurs in the office of the President of the SC, the senior most member as in case of Divisional Forum holding office (in order of appointment) for the time being shall discharge the functions of the President until a person appointed to fill such vacancy assumes the office of the President of the SC\(^{(146)}\). Sub-Rule viii of Rule 12 provides that when the President of the SC is unable to discharge the functions owing to absence illness or any other cause the senior most member (in order of appointment) shall discharge the

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\(^{(144)}\) Id. Rule 11.

\(^{(145)}\) Id. Sub-Rule (v) Rule 12.

\(^{(146)}\) Id. Sub-Rule (vi).
functions of the President until the day on which the President resumes the charge of his functions.

(6). **Jurisdiction of the State Commission**\(^{(147)}\): The State Commission has been vested with three types of jurisdiction – Original Jurisdiction, Appellate Jurisdiction and Revisional Jurisdiction.

a). **Original Jurisdiction**:\(\text{ This jurisdiction of SC can be read under three sub-headings namely, pecuniary jurisdiction, territorial jurisdiction and subject matter.}\\
\text{b). Pecuniary Jurisdiction}^{(148)}: \text{ Under Section 15 (a) of the Act the SC can entertain complaints where the value of the goods or services and compensation if any claimed exceeds rupees ten lacs but does not exceed rupees fifty lacs. It may be noted that prior to the Amendment Act, 2002 the pecuniary jurisdiction of the SC was five lacs but not exceeding rupees thirty lacs. It is also to be noted that originally prior to the above two Amendments originally pecuniary jurisdiction of the SC was above rupees fifty thousand but not exceeding rupees ten lacs.}\\
\text{It is appropriate to mention here that the pecuniary jurisdiction depends upon the amount of relief claimed including compensation and not upon the value of the subject matter, nor upon the relief granted up when the complainant before the forum under the Act claims two relief’s in the alternative the forum has to consider for the purpose of jurisdiction the value of the relief which is higher.}\\
\text{c). Territorial Jurisdiction}^{(149)}: \text{ There is no provision in the Act for determining the territorial jurisdiction of the SC. However, regarding territorial jurisdiction of the DF whether the provisions of Section 9 (2) can be made applicable to the SC - ? There is no express provision which could}
provide any guidance in this regard.

d). **Subject Matter** :- The provision of Section 15 (a) (i) of the Act restricts the jurisdiction of the SC to complaints in respect of goods and services only. The SC can exercise its original jurisdiction in respect of any defect in goods, deficiency in service, unfair trade or restrictive trade practice or charging of price in excess of the price fixed by or under any law or displayed on the goods or package containing such goods.

e). **Appellate Jurisdiction**\(^{(150)}\) :- Under Section 15 (a) (ii) of the Act, the SC shall have jurisdiction to entertain appeals against the order of any DF within the State. According to Section 15 of the Act, any person aggrieved by an order made by the DF may prefer an appeal against such order to the SC within the period of 30 days from the date of order. However the SC may entertain an appeal after the expiry the said period of 30 days if it is satisfied that there was sufficient cause for not filing it within the period.

f). **Revisional Jurisdiction**\(^{(151)}\) :- Under Clause (b) of Section 15 of the Act, the SC has jurisdiction to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any DF within the State of J & K where it appears to the SC that such DF has exercised jurisdiction not vested in it by law or has acted in exercise of its jurisdiction illegally or with material irregularity.

(7). **Procedure Applicable to State Commission**\(^{(152)}\) :- The procedure specified in Section 10, 11 and 12 and under the Rules made for the disposal of complaints by the DF are by virtue of the Section 16 applicable (with such modifications as may be necessary) to the disposal of disputes by the SC.

\(^{(150)}\) Id. Sub-Clause (i) of Section 15 Clause (a).

\(^{(151)}\) Id. Clause (b).

\(^{(152)}\) Id. Section 16.
(8). **Procedure Followed by State Commission**\(^{(153)}\): The Act does not provide any special procedure to be followed by the SC. Section 16 of the Act however simply provides that the provisions of Sections 10, 11, 12 and the Rules made thereunder for the disposal of complaints by the DF shall also be applicable to the SC. Section 10 provides the manner in which the complaint shall be made, Section 11 lays down the procedure and under Section 12 an order can be issued to the opposite party to do one or more of the things specified therein. All these provisions and the rules made thereunder, with suitable modifications are applicable to the SC. The J & K Consumer Protection Rules have laid down in rules the procedure to be followed by the Forum/Commission. Where a complaint does not require analysis or testing of the goods, it should be decided by the SC, as far as possible, within a period of 90 days from the date of notice received by the opposite party and within 150 days if it requires analysis or testing of the goods. Where the opposite party admits the allegation made by the complainant the SC shall decide the complaint on the basis of the merit of the case and the documents present before it. If during the proceedings conducted under Section 11 the SC fixes a date for hearing of parties, it should be obligatory on the complainant and opposite party or his authorized agent to appear before the SC on such date of hearing or any other date to which hearing could be adjourned. Where the complainant or his authorized agent fails to appear before the SC on such day, the SC may in its discretion, either dismiss the complaint for default or decide it on merits. Where the opposite party or its authorized agent fails to appear on the day of hearing the SC may decide the complaint ex-parte. The SC may, on such terms as it may think fit and at any stage, adjourn the hearing of the complaint but not more than one adjournment shall

\(^{(153)}\) Similar Provision is available under the Central Act on Consumer Protection.
ordinarily be given. Every proceeding shall be conducted by the President and at least one member thereof sitting together. However, where the member, for any reason, is unable to conduct the proceedings till it is completed the President and the other member shall conduct the proceeding de novo. Every order made by the SC shall be signed by its President and the member or members who conducted the proceeding. However, where the proceeding is conducted by the President and one member and they differ and refer the same to the other member for hearing on such point or points opinion of the majority shall be the order of SC. Orders of the SC shall be communicated to the parties free of charge.

(9). **Appeals**\(^{(154)}\): The original jurisdiction of the SC in terms of the monitory value of the dispute, namely a dispute between the value of rupees ten lacs to rupees fifty lacs. A person aggrieved of an order of the SC in respect of its either appellate or original jurisdiction can prefer an appeal to the High Court. Thirty days period from the order of the SC is allowed for carrying the matter before the High Court. A late appeal may also be entertained provided that the Commission is satisfied that there was as sufficient cause for not preferring an appeal within the prescribed period. However, the appellant is required to explain the delay beyond the prescribed period of limitation and further that he has acted diligently for the purpose of filing the appeal.

(10). **Mode of Filing Appeal**\(^{(155)}\): The petition of appeal shall express clearly all the relevant facts leading up to the order appeared from and shall set forth in brief the objection to the order appealed from and the grounds relied on in support of the appeal. The petition shall also

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154. Ibid. Section 17.

155. More or less same procedure is to be followed here as in cases of appeal from Divisional Forum to State Commission.
state the date of the order appealed from as well as date on which it was received by the appellant. The petition of appeal must be accompanied by authenticated copy of the order appealed from and at least seven separate sets of the petition and the papers filed with it.

After the appeal is registered, it shall be put up for hearing ex-parte before the Court which may either dismiss it summarily or direct issue of notice to all necessary parties or may make such order as the circumstances of the case may require.

(11). **Finality of the Orders**\(^{(156)}\): The Act provides that where no appeal has been preferred the orders of a DF, or the SC may be enforced by a Divisional Forum or the State Commission and they are final. They will be enforced in the same way and in the same manner as order of these forums were decree or order made by a court in a suit pending there in and it shall be lawful for DF or the SC to send in the event of its inability to the Court within the local limits of whose jurisdiction the opposite party resides or carries on business or personally works for gain and therefore the court to which the order so sent shall execute the order as if it were a decree or order sent to it for execution.

(12). **Frivolous or Vexatious Complaints**\(^{(157)}\): The DF, the SC or the High Court may dismiss a complaint if the complaint is found to be frivolous or vexatious. The Act says that the Forum/Commission must record its reasons in writing for some dismissal. The Forum may also pass the order that the complainant shall pay to the opposite party such cost not exceeding ten thousand rupees as may be specified in the order. It means that now in addition to dismissal of the complaint which the forum declare frivolous or vexatious may award costs also to the

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156. Supra Note 154, Section 18.
157. Id. Section 20.
opposite party.

(13). **Penalties** \(^{(158)}\): The Act provides in Section 21 that where a trader or a person against whom a complaint is made or the complainant is supposed to comply with the order made by the DF and/or the SC or the High Court fails or omits to comply with the order the said forum may punish him with imprisonment for a term which shall not be less than one month but which may extend to three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or both.

PART -IV

In this part of the chapter some miscellaneous matters will be briefly mentioned.

(A). **Protection of Action Taken in Good Faith** \(^{(159)}\): The Scope of Section 22 is very wide and gives protection not only to members of the DF the SC or the High Court but also to any officer or person acting under the direction of the said forum for executing any order made by it or in respect of any thing which is done or intended to be done in good faith. The condition only is that the protection is available in respect of anything done or intended to be done in good faith under the provisions of the Act or any rule or order made there under. The immunity is available against any suit, prosecution or legal proceeding in a Court of Law.

(B). **Power to Remove Difficulties** \(^{(160)}\): The object of Section 23 is to empower the Govt. to make provisions to remove any difficulties which may arise in giving effect to the provisions of Act. Such powers however should not be inconsistent with the provisions of the CP Act for

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158. Id. Section 21.
159. Id. Section 22.
160. Id. Section 23.
removing the difficulties. The conditions for exercising these powers are enumerated as follows:

i. Some difficulty must have arisen in giving effect to the provisions of the CP Act.

ii. It must be necessary or expedient to remove the difficulty.

iii. The provisions made to remove the difficulty must not be inconsistent with the provisions of the Act.

iv. The order to remove the difficulty must be made before the expiry of a period of two years from the commencement of this Act.

v. The order must be published in the official gazette.

vi. Every order made under this Section should as soon as may be laid before the legislature.

(C). **Power of the State Govt. to make Rules**\(^{(161)}\) - Section 24 of the Act empowers the State Govt. to make Rules for carrying out the provisions of the Act. Under this Section State Govt. has issued Rules in the year 1988 which are in existence and are titled as Jammu and Kashmir Consumer Protection Rules, 1988. These rules are very useful and are explaining various provisions of the Act.

(D). **Laying of Rules**\(^{(162)}\) - Section 25 provides that every rule made by the State Govt. Under the Act should be the State Legislature. The provision is silent as to whether the state legislature has the power to make any modification or amendment of such rules. It seems that this power is implied and can be exercised by the state legislature.

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161. Id. Section 24.
162. Id. Section 25.
Observation:— After making a critical study of various provisions of the consumer protection Act in the light of Central Act on consumer protection and Jammu and Kashmir Rules, 1988 it appears that this benevolent legislation intends to provide speedy and inexpensive remedy to the aggrieved persons against unfair trade practices, unscrupulous exploitation and deficient services. If this is the aim and purpose of this Act there is no reason why this Act has not been implemented in the state as in rest of the country. Amendment Act, 1997 has provided for establishment of district consumer councils and another Amendment in the year 2002 provides for establishment of district level Courts but it appears that these two amendments have not been carried into effect and this attitude on the part of Govt. has created annoyance among the consumers. This social legislation which was intended to protect a large body of consumers from exploitation has remained ineffective. It is hoped a good sense will prevail on the Govt. to establish in actual practice district level Courts and also by way of Amendment these courts be empowered to pass interim orders also.