Chapter VIII

CONCLUSIONS
&
SUGGESTIONS
The needs of the pastoral society of the past were few and simple. The rapid growth of the economic development coupled with the amazing progress of the science and technology changed the wants and needs of the society. The change of market structure and the stiff competition of the producers, forced them to devise means and methods to place the consumer in a mood to buy. Studies are being conducted to elicit the consumer preferences and trained business executives are given the job of sale of goods or services. The complex manufacturing process forced consumers to rely more and more on the information disseminated by the producers. This gave much scope to the unscrupulous traders to exploit the ignorance of the consumer. In order to harvest it to the maximum, sales promotion schemes are adopted which are false, or misleading. These promotional schemes not only lure potential customers away from truthful producers and injuries individual consumers by inducing transactions premised on inaccurate information; it also misallocates economic resources by leading customers to purchase products that do not match their wants. Such practices are injurious to competing producers also as the money taken by the unscrupulous producer is the money taken from the honest businessman. Thus there is a clear public interest in controlling these unfair business practices.

The unfair trade practices incorporated in the MRTP and CP Acts are basically those commercial advertisements which are false, misleading or unfair. These advertisements raise many
issues for researcher to ponder. The MRTP Commission, CDRA's have been armed with the powers to control these unfair business practices. These powers are inadequate. The Regulatory agencies have also failed to evolve a plausible jurisprudence. So for proper understanding of these issues and the suggestions thereof, the thesis has been divided into following chapters.

Chapter I is introductory in nature in which a brief account of the issues which have not been hither to addressed or have not been satisfactorily answered, have been projected. The research methodology along with the objectives set for the present research have been elucidated. The research design to accomplish these objectives has been given.

Chapter II dwells on the historical development of the law relating to unfair business practices. Initially the remedies available to consumers were of three types.

(1) Civil suit by consumers. The remedy sought to be enforced through civil suit was either tortious or contractual (2) Civil suit by competitor (3) Criminal prosecution.

The remedy under law of torts was almost illusory because of the requirements of proof. It has to be proved that the reasonable consumer would have been deceived by such advertisement. Only intentional misrepresentation was actionable and representation should have been relating to past or existing fact and not an opinion of the seller.

The contractual remedy has remained under the dominance of the three common law principles namely, Caveat Emptor, sanctity
of contract and privity of contract. Caveat Emptor suited to the conditions when goods were simple. The seller and buyer were face to face, Apotheosis of the promise was possible before the advent of the Standard Form Contracts and privity of contract bears some significance in cases of commercial sales and not in consumer sales. The twentieth century developments have proved that these catch phrases of the past have outlived their utility. The market structure of the past has undergone a sea change which the propounders of these doctrines might not have envisaged. Although the courts have evolved principles to mitigate the rigour of these doctrines, there was need to provide new legal frame work to guard consumer interest. This was met by passing the MRTP and CP Acts.

Chapter III covers the first part of the definition of unfair trade practice. It says that unfair method, unfair or deceptive acts should not be adopted for promoting sale, supply or use of goods or services.

However, it is not made clear as to whether goods involve only existing goods or also future goods. It has been suggested that the future goods should also be brought within the confines of the definition. Otherwise practical difficult will ensue. Firstly, where for example a company whose goods are still in the manufacturing stage falsely advertises that the goods are of particular quality and discontinues the advertisement when goods are actually thrown open in the market. Then a consumer who purchases goods in pursuance of the advertisement will get no compensation for any loss or injury as the goods were not in
existence at the time when advertisement was made. Secondly, if the view that the goods must be in existence at the time when representation was made is upheld then the same test should be applied to service also. Since services, unlike goods have no permanent existence and may be regarded as being inchoate until they are actually supplied, it will be difficulty to bring a representation within the definition for example the quality of services which have not at the time the representation is made, actually been supplied.

The application of the MRTP and CP Acts to shares and debentures has remained still unresolved. The present interpretation of the Unfair Trade Practice, Trade and Trade Practice makes it necessary that the company must trade in shares and mere issue of shares to public for raising capital cannot be called as a trade practice. This view is taken inspite of the fact that the MRTP (Amendment) Act, 1991 amended the definition of goods so as to cover shares before allotment also. This interpretation has left the purchaser of shares and debentures outside the protection of the CP Act and MRTP Act unless the definitions of trade and trade practice are also amended. Even this will not bring shares and debentures within the purview of the CP Act for the reason, goods are defined in the CP Act with reference to the sale of Goods Act and shares before allotment have not been expressly covered like the MRTP Act and also shares after allotment cannot make the purchaser, the consumer, as the shares are meant for commercial purpose or for resale. so it is suggested that the shares and
debentures be treated as service falling within the term "financial..." as expressly mentioned in the definition.

The scope of the expressions, "unfair method, unfair or deceptive acts", used in the definition have not been outlined. Initially in America the term unfair was said to cover a practice which is unlawful, offend public policy as laid down in statutes, the common law or otherwise or which is immoral, unethical, oppressive or unscrupulous or which causes substantial injury to consumers or competitors. It has been argued that these criteria are vague and the terms used are devoid of precise meaning. Although in America new doctrine of unfairness suggests that the substantial injury to the consumer and violation of public policy are two tests required to determine whether a trade practice is unfair, still these test cannot guard properly consumer interest in India as the substantial injury element in America excludes an injury which consumers themselves could not have reasonably avoided. This test will cover only those situations where consumer was coerced to purchase and element of public policy is still there. Therefore following definition has been suggested for unfair trade practice.

An unfair trade practice is a trade practice which causes substantial injury to consumers which is not outweighed by an offsetting consumer or competitive benefits that the practice produces.

Explanation: while determining as to whether injury to the consumer is substantial, regard shall be had to the value of the goods or services in question.

The term deceptive act has also not been explained. In America conflicting opinions have been expressed on this point.
One view is that it is an act or practice by which consumers if acting reasonably would likely to be misled to their detriment by a material representation. Another view is that an act which is capable of misleading to a substantial number of consumers with regard to material facts. These two views have been analyzed and it has been found that both of them are inadequate as consumer protection laws in India are recent in origin and level of consumer awareness is not so high as it is in America, so following definition of deceptive act has been suggested.

A deceptive trade practice is a trade practice which has a potential to mislead consumers of ordinary intelligence with regard to material facts.

Chapter IV titled Commercial Advertising - legal perspectives deals with issues like, constitutional protection, application of mens rea, standard of protection, defence of puffing, television commercials, comparative advertising and interpretation of advertisements.

After initial wavering it has come to be judicially recognized that the commercial ads enjoy constitutional protection. This is considered by the researcher a positive step as the profit motive alone should not be the determining factor for an advertisement to fall outside the freedom of speech. However, this does not mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of
information necessary for subserving public good from that which is false or deceptive.

The application of the mens rea to commercial advertisements has not received judicial notice. The words like, falsely, intentionally, knowingly have been used in the definition of unfair trade practice which connote mens rea. Then should mens rea be imported in the definition of unfair trade practice and only in its presence should trader be held liable to compensate for any loss or injury to consumers?

It has been suggested that the answer to this question should be in negative as the class of practices legislated in the Acts are not criminal in any real sense but are practices prohibited under penalty. The efficacy of the two Acts cannot be attributed by reading mens rea in the liability for compensation to the consumer who has suffered loss due to the false representation. The compensation is the only tangible remedy available under the two Acts to deter the unscrupulous trader.

The aim of the law controlling unfair trade practice is to protect the consumers, who include, credulous and gullible, reasonably intelligent and the average consumer. Then the question is whose intelligence be treated as a standard for determining as to whether an advertisement is false, deceptive or not? It has been argued that the Indian consumers are not only unorganised, ignorant, ill informed and ill advised, they are also ignorant of their rights. Consumers are not conscious of the surreptitious methods of the traders. Traders are fully in know of the plight of
the consumers. They therefore, harvest it to the maximum. So it will not serve any worth while purpose if "reasonable man's" standard is upheld, leaving vast majority of credulous, gullible and unthinking, unprotected. However, this common man's test cannot be regarded as a general standard applicable in all situations. The context in which an advertisement is addressed should also be taken into account. For example, where an advertisement for a specialised equipment is directed at an expert group, such as engineers, the standard will be different as against the advertisement addressed to general consuming public or directed to children.

By virtue of defence of puffing a wide latitude is allowed to traders in extolling the qualities of the products they have to sell. So long an advertiser confines himself to general praise of his goods, he is safe, no matter how exaggerated his praise may be. The underlying argument in the defence of puffing is that no reasonable man shall believe such advertisement as true. But this defence cannot reconcile with the common man's test as advocated above. Furthermore, an advertiser will not resort to puffing unless he has a faith that the gullible consumers will be allured by his campaign. Thus it is suggested that the commercial puffery be made actionable.

The television commercials have given new dimension to the false and misleading advertisements. Sometimes it is not possible to advertise a product with its natural colour or with the composed substances for example true colours of coffee, and orange juice are lost in transmission on a television screen and
artificial substance must be substituted to obtain a natural 
look. This involves the problem of interpretation of television 
commercials. One possible interpretation is to treat demonstra-
tion merely a dramatization of the express claim made in the 
advertisement. Thus the demonstration is unconnected with the 
express claim and so long express claim is true, the advertise-
ment will not be treated as deceptive even though the demonstra-
tion was accomplished by trickery. Second approach is to treat 
television demonstration as a warranty without taking into ac-
count the express claim, Thus the demonstration obtained by 
employing trickery will be considered as deceptive but it is not 
necessary that the demonstration should prove the express claim 
made in the advertisement. The third approach is the combination 
of the first two, i.e to interpret a television demonstration 
both a warranty that the result could be duplicated without 
trickery and a proof of the express claim made in the advertise-
ment. A demonstration which failed either of these tests would be 
considered deceptive and would not be permitted. It is suggested 
that the demonstration as well as the express claim made should 
be correct. In other words an advertisement should be accurate at 
both ends of the TV camera.

To determine whether a particular comparative advertisement 
is false or misleading is not free from difficulty. For the 
reason (a) there is no clear line between "comparative and non 
comparative" (b) a considerable amount of puffery has tradition-
ally been allowed in advertising, the same is true in case of 
comparative advertising. The limits of permissible puffery are
from being clear. It will not be out of place to mention here that it has been suggested above that the commercial puffery be held actionable which should include puffs employed for comparative advertising also.

In India there is no clear cut policy regarding the insignificant comparisons or where a trader describes accurately competitors goods but exaggerated the merits of his own goods. Besides the quality comparisons, there is no legislative or judicial policy regarding the price comparisons. It has been suggested that the insignificant comparisons should be declared as misleading. Otherwise an advertiser will focus more on insignificant comparisons and will derive benefit out of all proportions and what is insignificant will vary from case to case. Where an advertiser after truthfully stating the merits of the competing product, falsely embellishes his own, it is suggested that it should be treated as unfair trade practice. Since an advertiser misrepresents his own goods, such misrepresentation will be no less unfair by mere fact that the advertiser fairly states the quality of its competitors goods. Following are the suggestions which should be incorporated in the MRTP and CP Acts for regulating comparative advertisements.

1. The aspects of the advertisers product which are being compared with the competitors product should be made clear.

2. The comparisons should be factual, accurate and capable of substantiation.

3. There is no likelihood of the consumer being misled as a result of comparison, whether about the product advertised or that with which it is compared.
4. The advertisement should not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implications.

5. The subject matter is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

The commercial advertisements are either informative or pursuasive. The informative content of advertisement has raised many problems of interpretation. Several suggestions have been made for the interpretation of advertisements in the light of the Judicial decisions.

Chapter V discusses specific categories of false and misleading advertisements. Various sub clauses of the definition laying down different forms of false or misleading representations are not properly worded. Sub clauses (i), (ii), (iii) talk of representations which are false, Does it mean that if a representation is of the nature mentioned in these clauses which is not false but misleading, will be outside the purview of these clauses? Although it may be argued that (1) false representations encompasses misleading representations as well and (2) the words "unfair or deceptive acts used in the main body of the definition are wide enough to include misleading statements also, then what is the need of retaining the word misleading in sub-clauses (vi), (ix), and (x). It is therefore suggested that in order to remove any doubt, sub clause (1) be amended on the following lines.
The practice of making any statement, whether orally or in writing or by visible representations which is false or misleading that ---

The word "falsely" used in clauses (i), (ii), (iii) and the words "falsely or misleading" used in clauses (vi), (ix), (xi) should be dropped.

Clause (i) says that it is "the practice of making any statement. The word "practice" means repeated action, habitual performance or succession of acts of similar kind. In otherwords it must be more than one act. If this interpretation is given to the word practice, then single act of representation will not constitute unfair trade practice. It is suggested that clause (i) be read with section (v) (ii) of the MRTP Act so that a single or isolated act of any person in relation to any trade is enough to stamp any trade practice as unfair provided of course other characteristics of unfair trade practice are found.

A thread bare discussion on clauses (i) to (x) has been made. The expressions not yet put to interpretation and those on which conflicting opinions have been expressed, have been discussed along with some alternatives.

Fictitious bargain offers have raised many legal issues either relating to interpretation or limitation of the provision dealing with the bargain offers. For instance, if the trader disparages his own goods and thereby induces the buyer to switch over other item available at higher price and more profitable to
the trader, he will not be covered under the present provision which will be violated only when the bargain offer is not so or is not available for a reasonable period or in reasonable quantities.

A question arises; are the labels on the goods as offers? There are two possible interpretations. One is not to use the term offer here in a technical sense and not to insist on the dichotomy of the offer and invitation to treat. This will bring all that in the ambit of the term advertisement which might otherwise be excluded if the offer is given a restricted meaning.

The other interpretation is to give offer narrow meaning in the sense as understood in the contract law. It is suggested that the former view should be preferred over the latter as it will widened the reach of the provision. Otherwise, the trader will escape from liability by contending that he never made an offer.

The provision requires that the intention of the trader not to sell advertised goods must be proved. This will give respondent an opportunity to escape from liability by contending that the non availability of goods was due to reasons beyond his control. It is therefore suggested that the provision be amended so as to dispense with the requirement of intention.

The provision dealing with the bargain offers has an Explanation attached which has two clauses. Clause (a) says that the bargain price means a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or
otherwise. This clause is ambiguous. It does not make clear as to whether the ordinary price is the price of the trader who has made a bargain offer, or any other trader. This Explanation will also not help where a retailer who owns two or more outlets may indicate in shop A that an article was previously sold at a higher price when it was so sold only at shop B. This problem will be added up if shop B is at a considerable distance away and possibly in an area where retail margins are normally higher than those in the area of shop A. Clause (a) of the Explanation is also silent about the time during which the ordinary price should be in vogue. Thus runs the danger of unscrupulous traders raising prices today, lowering them tomorrow and then claiming price reduction. Similarly advertisements like buy today for Rs 100 and not tomorrow for Rs 200 or buy now before price rise will not be covered by the explanation. It is therefore suggested that the Explanation attached to the provision dealing with the bargain offers be recast so as to cover above discussed situations.

It is suggested that there should be no fixed period for determining reasonableness of time during which a bargain offer should last, for the following reasons:

1. The period may vary from case to case depending upon the nature and size of the business, quantity at sale and nature of the market in which business is carried on;

2. No hard and fast rule can be laid down regarding the reasonableness of the period, what may be reasonable period for a particular item may not be reasonable for another;
3. If the rigid rule about the reasonableness of the period is upheld, then even the bonafide bargain offers will fall within the proscription. For example, where there was a bargain offer for a limited sale which did not last for a prescribed period, the traders will be hauled up for not providing the goods in accordance with the offer.

4. Where for example bargain offer relates to the sale of 10 radio sets or 20 refrigerators, the question of prescribing a period does not arise and the offer shall remain valid till the last set is disposed of.

The question as to whether the offering of gifts, prizes or conducting of contests, lotteries, game of a chance or skill are perse unfair, has been debated before the MRTP commission time and again. The commission expressed conflicting opinions and the issue is still unresolved. In order to maintain balance between the legitimate interest of the traders and the consumers, it has been suggested;

1. offering of gifts or prizes genuinely should not be prohibited
2. lotteries are against public policy and therefore should be prohibited
3. lotteries which do not directly or indirectly demand public subscription should be permitted
4. lotteries which run on the finance raised by the public subscription and which involve skill to a substantial degree are not in fact lotteries but game of skill, so it should not be proscribed.

The provision controlling sale or supply of goods hazardous to life is ambiguously worded. It does not make clear as to whether manufacturer or seller is responsible to consumer in case loss or injury is caused to the consumer. It has been suggested
that the proper course is to see who is responsible for loss or who is in a position to control the danger.

This provision makes liability dependent on the negligence. The liability under the law of torts is strict and transborder laws also provide no fault liability in such cases. There is no reason not to adopt the same rule in such case also. The liability under this provision arises only when the goods do not comply with the standards prescribed by the competent authority. However, neither in the MRTP Act nor in CP Act, there is any authority designated to prescribe standards which the traders must follow. Under the Bureau of Indian Standards Act, 1986 licence or its renewal is made only when the manufacturer complies with the Bureau of Indian Standards Certification Mark. However, non compliance do not stamp the goods as perse hazardous nor is it compulsory that all the goods shall conform to the requirements of certification mark. It is suggested that in order to minimize the dangers which the hazardous goods are likely to pose, an independent body be constituted with the powers to prescribe standards. The standards be made compulsory and the MRTP and CP Acts be given powers to enforce these standards.

Chapter(v) covers powers of the MRTP commission vis-a-vis unfair trade practices. This chapter has been divided into six sub chapters which are (1) power to issue injunction (2) power to grant compensation (3) power to review orders (4) power to punish for contempt (5) power to pass cease and desist order and consent order (6) power to order corrective advertisement.
The provision dealing with the issue of injunction uses the expression "during an inquiry before the commission". On this issue, conflicting opinions were expressed by the High courts and the MRTP commission. One view is that the inquiry must be pending before an application for injunction is made. Another view is that the pending inquiry before the commission is not essential but prima facie existence of grounds for entertainment of the complaint will suffice. It is suggested that the proper interpretation of section 12 A would be, that the sooner the commission issues a notice of inquiry, either suo motu or on the application of the person, the inquiry is deemed to have started. It would not be wrong to stretch this theory a little more by stating that when a complaint is filed, the commission is seized of the matter, the inquiry starts.

It is not clear as to whether the MRTP commission can exercise powers of civil court under Civil Procedure Code for breach of an injunction order? It is suggested that the approach of the MRTP commission should be to arrogate power to punish for violation. However, it appears that the suitable follow up provisions to fully effectuate this power under sub section (2) of section 12-A have not been made and therefore in a given case how the commission would proceed to, say commit person to civil prison for infringement of the injunction order, remains ambiguous. Section 135 of the Code of Civil Procedure, 1908 read with sections 55, 57 and 59, suggest that the person to be arrested is to be brought to the court, Sub section (2) of section 12-A does not expressly provide that any reference to court in Order xxxix rule.
(2-A to 5) shall be construed as reference to commission. Thus sub section (2) be amended to remove this anomaly. At present injunction cannot be passed against those, aiding, abetting or conspiring the actual wrong doer. So one more clause be attached to section 12 (A) so as to encompass the above persons also. Whether the interim injunction order is appealable or not is yet to be resolved. However, examples are in galore where the High courts or the Supreme court was called in aid to stay the operation of the injunction order. It is therefore suggested that the injunction order be made appealable before the Supreme Court with a clause stating that an injunction order passed by the MRTP commission shall not be called in question in any High court.

The provision dealing with the compensation provides that in case loss or injury, compensation will be given to consumer. But the word consumer has not be defined in the MRTP Act. So it is not clear as to whether the term consumer includes user of the goods who is not the actual buyer. It is suggested that the definition of consumer as provided under section 2 (d) of the CP Act be incorporated in the MRTP Act also.

Section 36B does not accord locus standi to trader but like section 12-A, section 12 B, arms the trader with the power to file compensation application. Does it mean that before filing compensation application, it is not necessary that a prior inquiry be instituted. Section 12-B is silent on this point. The relevant words in sub-section (1) are "as a result of the monopolistic or restrictive or unfair trade practice...." These words do not show that inquiry is a condition precedent for filing
compensation application. Further more, clause (3) of section 12-B provides that the commission may, after an inquiry into the allegations made in the application filed under sub-section (1), make an order directing the owner of the undertaking or other person to make payment...." The words in this sub clause show that an independent inquiry is to be instituted under section 12-B. Thus it is not necessary that before filing an application for compensation, existence of any monopolistic, restrictive or unfair trade practice must have been established through inquiry. Through compensation application itself the allegation can be proved.

There is no guidance in the MRTP Act and the Rules and Regulations framed thereunder regarding the principle for measuring damages. The MRTP commission expressed conflicting opinions on this point. Some Benches of the commission applied law of contract and some law of torts. It is suggested that the principles of law of torts be applied for the following reasons:

1). Under law of contract there is a well established rule that while quantifying the damages, the terms in the contract should be construed strictly where as under law of torts, courts award exemplary damages also, so as to deter the wrong doer from causing harm to the society.

2). Under the law of contract, courts do not generally award punitive damages. Since under the MRTP Act, perpetrator of wrong cannot be imprisoned, compensation can be used as a tool to prevent unscrupulous trader from resorting to unconscionable business
practice which is possible under law of torts and not under contract Act.

The MRTP (Amendment) Act, 1991 provides provision for class action suits. However the MRTP commission held that a voluntary registered consumer organisation cannot file suit in the representative capacity as it cannot be said to have the "same interest" as the class has. It is therefore suggested that an Explanation be provided either in the MRTP Regulations or MRTP Act that a recognised consumer association shall be deemed to have the same interest as the consumer on whose behalf the consumer association has filed the complaint. Another issue relating to class action suit is what constitutes "same interest". One view is that it implies common grievance and common interest arising out of the same transaction. Other view is that there must be common question of law and fact and common question must predominate the individual question. The consumer class action is based on Order/Rule 8 of the Civil Procedure Code. An Explanation was attached to this Order on the recommendations of the 54th Report of the Law Commission. It was made clear that the "same cause of action" is not necessary for representation suit. Thus it will be sufficient if it is shown that the members of the class are "similarly situated" or there exists "common question of law and fact".

The power of MRTP commission to amend or revoke its earlier order raises many problems of interpretation (1) Is this power unlimited or, is it subject to limitations? What is the extension of the commission's power? Does the expression " in the manner
in which it was made", imply that the commission by invoking this provision, can order fresh hearing?

It is the discretion of the commission whether to exercise power or not under this provision. However, the discretion cannot be arbitrary vague or fanciful. It must be guided by relevant considerations. Although there are no apparent limitations on this power, it cannot be construed so wide as to permit rehearing on the same material. It has to be kept in mind that basically this is a corrective or rectif icatory power, so it cannot be exercised to order fresh hearing. The expression "in the manner in which it was made cannot be construed as giving power to the commission to make fresh order in the same way as previous order was made i.e. by hearing parties and witnesses. But it merely indicates a procedure to be followed by the commission in amending or revoking an order.

The power to punish for contempt was incorporated in the MRTP Act in the year 1991. No case has been decided yet in which the MRTP commission has exercised this power. The approach of the courts has been to disallow contempt application where there is an effective alternative remedy for enforcing the decree. If this dictum is applied to the MRTP Act, a case for civil contempt will rarely be made as the punishment provided under section 12 of the Contempt of Courts Act is a maximum of 6 months simple imprisonment or a fine which may extend to two thousand rupees or both. Even an apology may sometimes suffice. On the other hand, the punishment under section 48-C of the MRTP Act for violation of the orders of the commission is a minimum of six months (for
otherwise reasons have to be recorded) which may extend to 3
years and fine which may extend to 10 lakh rupees. However, only
effectiveness which Contempt of Courts Act has, is the summary
nature of the proceedings. Whereas section 56 of the MRTP Act
empowers the courts to try offences and commission itself cannot
take cognizance.

Section 36-D(2) of the MRTP Act allows the commission not to
pass cease and desist order where respondent gives an undertaking
to remove the prejudicial effect of the trade practice. It is not
clear as to whether violation of such undertaking be called as
violation of section 36-D so as to bring erring respondent within
the clutches of section 48-C. Section 2 of the Contempt of Courts
Act, 1971 expressly provides that even wilful disobedience of the
undertaking given by the court is treated as civil contempt. So
section 2 of the Contempt of Courts Act will take care of the
grey area left by section 36-B(2) of the MRTP Act.

The courts have expressed conflicting opinions on the ques­
tion of justification for the contempt. One view is that the
truthfulness or factual correctness is no defence for contemptu­
ous act. Quite opposite of it is the other view. However, it is
suggested that the fair comment and good faith should be regarded
as a valid defence.

Section 36-D which gives power to the MRTP commission to
pass cease and desist order is not in consonance with section
36-B which gives inter alia power to the commission to file com­
plaint sue motu either upon its own knowledge or information.
Section 36-D provides that the "Commission may inquire into any unfair trade practice which may come before it for inquiry". This expression does not embrace within its import the suo motu inquiry which the commission is competent to institute by virtue of section 36-B. It is suggested that the words "come before it" should not be interpreted to mean that it would come before the Commission from other sources than its own knowledge and information. However, in order to avoid any possible controversy, it is suggested that the words which may come before it for inquiry be omitted from section 36-D.

An interesting question arises in respect of the unfair trade practice discontinued since the complaint is filed. In such cases the Commission has dropped proceeding once it is satisfied that the practice in question has been discontinued. It is submitted that this approach will provide an escape route for the trader. It is therefore, suggested that an explanation be attached to section 36-D making it mandatory for the Commission to launch fulfledged proceedings irrespective of the fact whether the prohibited practice is in force or has been discontinued. On reaching to the conclusion that the disputed practice although discontinued, was prejudicial to public interest, a desist order can be passed so that if it is repeated, the violator will be punished under section 48-C. If the approach as suggested, is not adopted then the Commission cannot punish the violator for repeating a prohibited practice as section 48-C makes punishable the Commission's orders and mere dropping of proceedings cannot by any stretch of imagination be called as an order.
A single trader or a class of traders cannot file a complaint. Naturally no cease and desist order can be passed even if the practice is injurious to competing trader or class of traders. Since under section 12-A injunction can be granted on the application of a trader or class of traders and under section 12-B compensation can be granted to a trader or class of traders, so there is a need for harmonious construction of sections 12-A, 12-B, 36-B and 36-D. This can be possible only by interpreting the words "Public interest" under section 36-D as to cover both, class of traders as well as a single trader. However, it is suggested that like consumer, trader may be accorded locus standi under section 36-B and Commission be empowered to pass cease and desist order, where a trade practice is prejudicial to competing trader. Since trader as compared to consumers are more alert and conscious of the tricks employed by their competing traders, so arming them with the power to file complaint will help in controlling unfair trade practices.

The issues surrounding consent order are; (1) Is consent order appealable where complainant or D G is not satisfied, (2) Is violation of consent order punishable under section 48-C. These twin issues can be resolved by answering to single question: Is consent order also an order under section 36-D. Conflicting opinions have been expressed on this point. It is submitted that the consent order be treated as an order and breach of it punishable under section 48-C. Otherwise consent order will provide a gate way of escape, for respondent who will give
readily an undertaking knowing fully well that the breach of it is not going to affect him in any way.

Chapter VI cover powers of the consumer forum which include power to remove defects or deficiencies, power to award compensation, power to enforce orders, power to pass interim orders and who can file complaint against whom and general observations relating to MRTP and CP Acts.

Section 14 of the CP Act provides powers which consumer fora can exercise. However, this section says that these powers can be exercised only when goods are found defective or any of the allegations contained in the complaint relating to services is proved. But a complaint can be filed not only against the defective goods but also against the unfair or restrictive trade practices, excessive price charging and goods hazardous to life. It is therefore, suggested that section 14 be recast to provide, "if after the proceedings conducted under section 13, the District forum is satisfied that any of the allegations contained in the complaint is proved".

At present consumer fora do no possess power to order return of excess price charged. Section 14 be amended in order to incorporate a clause which will run as follows:

To return the consumer, price charged in excess of the price fixed by or under the law for the time being in force or displayed on the goods or its package.
The powers of the consumer fora are restricted to section 14. It is suggested that a residuary clause be incorporated in section 14 which should run on the following lines:

To grant such reliefs as the District forum deems fit in the interest of justice.

The compensation provision was interpreted in such a way as to create an impression that the compensation is the relief available for deficient service only. However, this is not correct. The compensation provision is general one and is available to consumer when he proves any of the allegations in complaint which occasions loss to him and that loss is caused due to the negligence of the opposite party.

The relief in terms of compensation is dependent on the negligence of the opposite party. In Industrially advanced countries the principle of strict liability has taken firm roots. Instead of fault of the trader, the fault of the product is demonstrated. It is therefore, suggested that the word negligence be dropped from clause (d) and when the complainant proves that a product is defective or service is deficient, and he suffered damage due to no fault of his, he should be entitled to compensation.

The power to enforce orders are laid down in sections 25 and 27. Section 25 provides that the orders may be enforced in the same manner as if it were a decree or an order made by a court in a pending suit but in case of the inability of the CDRAS to execute their order, it shall be lawful for them to send such orders
for execution to the court. Section 27 provides punishment for defaulter.

The question which has been debated before the consumer fora is, whether it is necessary that the decree holder must satisfy first section 25 and only then he can invoke section 27 or it entirely depends upon the decree holder whether to take help of section 25 or 27. Basically in sections 25 and 27 two independent remedies have been incorporated by the legislature for executing the orders of the forum. If the decree holder approaches the consumer forum under section 27, the forum will not be right to ask him to exhaust first section 25 and only then come under section 27. Sections 25 and 27 therefore give two optional remedies to the decree holder and it lies entirely in his discretion what option he is going to exercise.

Section 27 arms the consumer fora with power to inflict punishment or impose fine on the judgment debtor in case of his default. However, rules have not been framed for the exercise of this power by the consumer fora. It is necessary that an express provision be incorporated in section 27 for the said purpose.

The conflicting observations have been made on the question; whether orders passed by the District forum under sections 25 and 27 are appealable to state Commission? It is submitted that the orders passed under sections 25 and 27 are not appealable. Section 15 which gives right of appeal has to be read with section 14. Otherwise any order passed by the forum will be appealable.
However, if there is any miscarriage of justice, the judgment debtor can go to the superior forum for revision.

Consumer fora do not possess express powers to issue interim injunction. However, consumer fora have inherent powers to issue the same like that of civil court. In order to avoid any controversy it has been suggested to amend sections 14, 17 and 21 to provide express power to grant stay or interim relief by the District forum, State Commission and National Commission.

The above discussed powers have been given to consumer fora for protecting consumers. The definition of consumer provides that not only actual buyer is included but also the actual user. However, purchasers of goods for resale or for commercial purpose are excluded. There is no definition of the term commercial purpose but an Explanation was attached to the definition of consumer which provides that the goods purchased and used by the consumer for earning livelihood by self employment are not goods for commercial purpose. This explanation is not in accord with the definition of the consumer which gives locus standi to the user of the goods who may or may not be the actual buyer whereas the Explanation makes it essential that the purchaser and user must be one and the same person. It is also submitted that the explanation clarifies position in respect of those goods which have been purchased for earning livelihood by self employment. But for the rest, redressal agencies have to decide whether the goods purchased are for commercial purpose or not. To determine whether the goods purchased are meant for commercial purpose, following tests be applied.
1. the goods purchased are not for immediate final consumption;

2. there is a direct nexus between the purchase of goods and the profit or loss from their further disposal. Such direct nexus is absent when the goods or services are converted for producing other goods or services;

3. there is a nexus of form and kind between the goods purchased and the goods sold. The nexus is absent where goods undergo transformation and conversion.

Section 12 provides that a complaint can be filed by the consumer to whom goods have been sold or delivered or services provided and section 2(1)(b) says that the complaint can be filed by the consumer who by section 2(d) has been defined not the actual buyer but also actual user. Since the user of the goods or services with the permission of the actual buyer is treated as consumer, their inclusion in the definition will be meaningless unless they have a right to file complaint. It is therefore, suggested that section 12 be amended on the following lines:

A complaint.... by __

a) the consumer, or

b) any recognised consumer association, whether such consumer is the member of such association or not, or ___.

The consumer fora have not shown unanimity on the issue; who is responsible to the consumer - seller or manufacturer? It is submitted that since the privity rule is inapplicable to the CP Act, so better course is to fix liability on the person who is responsible for the defect.