Chapter III

UNFAIR TRADE PRACTICES -
A HISTORICAL RETROSPECT
Unfair trade practices are as old as the trade itself. However, the legal mechanism to curb these practices took its own time to settle. Although, the courts from the very beginning were quick to condemn the unfair or misleading conduct in dicta1, judicially imposed limitations and practical considerations of time and cost confined these remedies to narrow circumstances. The tenderness exhibited towards trade practices of doubtful probity was rooted in the history of markets and fairs in the medieval England, in which trust was neither given nor expected2.

In the medieval days, transactions of sale and even of barter between strangers were few and rare. When trading did take place, it was in markets and fairs where the goods were openly displayed. So it was presumed that the buyer relied on his own skill and judgment. Only a fool would rely on the word of stranger, he might never see again -- the idea of Caveat Emptor well reflected that practice3.

At common law unfair trade practices are subject to legal control through three types of remedies.

1. Civil suit by consumer. The remedy sought to be enforced through a civil suit was either Tortious or Contractual.

2. Civil Action By Competitors.

3. Criminal prosecution.

Civil Suit By Consumer: Tortious Remedy

Only towards the end of the eighteenth century did common law impose liability for dishonesty, the fons'et origo of deceit being *Pasley V. Freeman*. It assumed its modern shape after *Derry V. Peek*.

The following four elements have to be satisfied for successful action for deceit:

4. These remedies will not be discussed as they fall outside the scope of the present study.


7. (1789), 3 T.R. 51; 100 ER. 450.

8. Howard Allan Bartnick is of the view that the plaintiff in order to prevail in an action in deceit, has to show: (a) that the representations were made by the defendant; (b) that they were made knowingly and with design false; (c) that they were made for the purpose and intent to deceive and defraud; (d) that they did deceive and defraud; (e) that they related to an existing or past fact; (f) that the party to whom the false statements were made did not know that they were false (g) that he relied on their truth and suffered loss; See Howard Allan Bartnick; Consumer Protection in Georgia: The Fair Business Practices Act of 1975, Emory LJ vol 25 (1976) P 445. See also a comment on Maryland's Consumer Protection Act: A Private Cause of Action For unfair or Deceptive Trade Practices. Maryland. L. Rev. vol 38 (1979) at 733.
1. A false statement made, orally, in writing or by conduct of existing facts;  
2. made with the knowledge of its falsity or recklessly, not caring if it be true or false;  
3. with the intent that the plaintiff should act on it, &  
4. the plaintiff does act on it to his detriment.

A deceived buyer might bring an action for deceit against a seller who had falsely advertised a product but legal pitfalls and requirements of proof made this remedy illusory. It is not easy to prove scienter, a basic premise to fix responsibility. Secondly, to show that a reasonable consumer would have relied on like representation is often difficult to establish. Probably the most troublesome requirement is that the statement must be related to a past or existing fact and not an opinion stated by the seller. This requirement leaves a large grey area where the merchant who has made exaggerated claims about his

10. Promise and declaration of future purpose are not generally actionable. If however, the declaration of purpose can be constructed as a representation of a present state of mind, it will be treated as a statement of fact, Edgington v. Fitzmaurice (1885) 29 chn 459.  
11. Supra note 6.  
12. Langride V. Levy (1837); 150 ER. 863, 1458.  
13. The damage is the gist of the action. Smith V. Chedwick (1884) 9 APP Cas. 187. 196 per lord Black-buns; For judicial statement of the requirements see lord Maugham in Bradford Third Equitable Benefit Building Society V. Borders (1941) 2 All. ER. 205 at 211.  
14. See generally Bohlen; Misrepresentation As Deceit, Negligence or warranty, 42 Harv. L. Rev. 733 (1929).
product can maintain that his statement was mere "puff" and he should not therefore, be held liable. Although, some writers are of the opinion that it is reasonable to grant some latitude to the producer pro-claiming the merits of his own goods, there is a school of thought which believes that the category of fact and opinion in an action for deceit had an adverse effect on the information value of advertising.

Contractual Remedy

Three associated principles permeated the development of Law of contract. These are (a) Caveat Emptor (b) Sanctity of contract (c) Privity of contract. These Principles are discussed here under.

a) Caveat Emptor:

Caveat Emptor has its origin in the Middle ages and was dominant feature of the sale of horses in market overt. Since all sales used to take place in the open market where seller and buyer were face to face, it was presumed that since buyer is the

15. Puffing can be defined as a representation by the seller which are merely opinions or commendations of the quality of goods or affirmation of their value see Ga. Code. Ann 109 A-2-313 (2) (1973).


17. See E. Rogers; Goodwill, Trade Marks and Unfair Trading 98(1914).

best judge of his own interest, so if he makes a wrong selection by his own choice, he cannot complain later-on against the seller. As the Judge in Fifteenth century case said: if a man sells me a horse and warrants that it has two eyes, and it has not, I shall not have an action. I can know this for myself from the beginning. This legal position remained unchanged till seventeenth century. Then the express warranty was given effect and buyer was given remedy when goods did not conform to the warranty. J. Fitzherbert a seventeenth century judge observed:

If a man sells unto another man a horse, and warrant him to be sound and good, if the horse be lame or diseased, that he cannot work, he shall have an action against him... But note: it behoveth that he warrant the horse, without such warranty, it is at the other peril and his eyes ought to be his judge in that case.

In the last quarter of seventeenth century, courts did not insist on the express promise or warranty on the part of seller. In Cross v. Gardner the buyer bought two oxen, the seller represented that they were his own but in fact belonged to another and were taken from the buyer. Chief Justice John Holt said that since no amount of examination of the oxen here would reveal their true owner and credit given on the affirmation makes the action lie. Thus there was an implied warranty that the seller at

20. Id at 19.
21. (1688), Carth 90.
the time of sale had right to sell\textsuperscript{22}. Hundred years later, Justice Buller in \textit{Pasley V. Freeman} \textsuperscript{23} interpreted the observation of John Holt in \textit{Cross V. Gardner}\textsuperscript{24} to mean that there is no distinction between warranty and affirmation and real test lies in the intention of the parties\textsuperscript{25}.

The beginning of the nineteenth century marked a complete shift from the original insistence of the courts on words of the promise. Now courts began to infer the promise from mere fact of sale. Even though nothing was said. Thus in \textit{Gardiner V. Gray}\textsuperscript{26}, the buyer had agreed to purchase twelve bags of waste silk which turned out to be unmerchantable, Lord Ellen Borough held that when there is no opportunity to inspect a commodity, the maxim Caveat Emptor cannot apply. The goods must be saleable under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on dunghill.

Few years later in \textit{Jones V. Bright}\textsuperscript{27}, the plaintiff bought from a manufacturer some copper for a stated purpose of sheathing a ship. it lasted only for 4 months instead of normal 4 years. CJ Sir William Best in his new found vigour observed:

\begin{quote}
22. Emphasis added.
24. Supra note 21.
25. Modern reflection of this type of distinction can be found in \textit{Oscar Chess Ltd v. Williams} (1957) IWLR 370.
26. (1815) 4 Camp 144.
27. (1829) 5 Bing 533.
\end{quote}
I wish to put the case on the broad principle, if a man sells an article, he thereby warrants that it is merchantable; that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants that it is fit for that purpose. If that turns out not fit, the buyer will have remedy.  

Last quarter of the 19th century saw in England, the enactment of the Sale of Goods Act, 1893. This Act represented an important step in the abandonment of the original common law rule of caveat Emptor. The Judicial pronouncements in Cross V. Gardner, Pasley V. Freeman, Cardiner V. Gray and Jones V. Bright found legislative recognition in Sections 13, 14(2) and 14(3) along with the Caveat Emptor. Thus this was the precursor of the shift from Caveat Emptor to Caveat Venditor. However, there was no provision in the Act to prevent the seller from contracting out his liabilities. To plug this loophole, Supply of Goods Implied Terms Act, 1973 was passed on the recommendations of the Law Commission Report, First Report on Exemption Clauses in contracts (1969) law Com. No. 24 (1968-69) HC 403.Paras:4.1-6.24 at 517.
of Law Commission\textsuperscript{36}, which restricted the seller from contracting out the implied terms. In 1979 a consolidated Sale of Goods Act was passed in which the amendments made by the 1973 Act, were incorporated. The Sale of Goods Act, 1979 has caused hardships to the seller as the buyer is given right to reject the goods even on trivial grounds. In order to maintain the balance, English law commission after issuing a working paper in 1983\textsuperscript{37} published final report, Sale and Supply of Goods in 1987\textsuperscript{38}, which recommended certain changes in the Sale of Goods Act, 1979. These changes have been accepted by the Government in principle. However, these changes will not affect the consumer transactions\textsuperscript{39}.

\textbf{Freedom and Sanctity of Contract:}

Early development of law of contract was greatly influenced by the then prevailing moral values and business norms. Although, English Law of Contract has taken its roots in the Middle Ages, most of the general principles were developed and elaborated in the eighteenth and nineteenth century, the days of natural law. To the Judges of eighteenth century, theories of natural law

\textsuperscript{36} No such Act has been passed in India.

\textsuperscript{37} Working paper No. 85, Sale and Supply of Goods.

\textsuperscript{38} Law Com. No. 160 Cm 137 (1987).

\textsuperscript{39} Broadly, the proposals inter alia are that no change is to be made in consumer sales, but in non consumer sales the buyer will no longer have the right to reject the goods in case there is a breach of the statutory requirements as to quality where the breach is so slight that it would be unreasonable to reject the goods (section 15 A).
meant that men had an inalienable right to make their own contracts for themselves and to the Judges of the nineteenth century similarly meant that the law should interfere with the people as little as possible\(^40\). The theme of this dogma is well reflected in often quoted passage of Sir George Jessel\(^41\) that if there is anything more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of Justice. Thus the main thrust was given to promise\(^42\) which once made was held sacred and was enforced. The notion was that the oxen are tied by their horns\(^43\) and men by their promises. Judges task was relegated to that of an umpire who was called on only when some thing went wrong. Thus the shibboleths freedom of contract and sanctity of contract became the foundation on which the whole Law of contract was built. This

\(^{40}\) P.S. Atiyah; An Introduction to the Law of Contract, 2nd ed. 1977 at 5.

\(^{41}\) Printing and Numerical Registering Co V. Sampson (1875) L R 19 Eq P.465; Similar views were expressed by Henrey Sidgwick in his Elements of politics; suppose contracts freely made and effectively sanctioned and the most elaborate social organisation becomes possible at least in a society of such human beings as the individualistic theory contemplates gifted with mature reason and governed by enlightened self interest, cited in Kessler and Gilmore contracts, Cases and Materials 2nd ed. 1970 at 4.

\(^{42}\) For detailed account of promise as the basis of contract see Randy E Barnett, A Consent Theory of Contract, Col. L. Rev vol 86 Jan 1986.

unlimited freedom of contract and its sanctity proved divorced from the reality in nineteenth century hence. The emergence of standard form contracts\textsuperscript{44}, giving the consumer an option either to take it or leave it\textsuperscript{45} with no scope to negotiate, exposed the limitations of freedom of contract theory.

As the nineteenth century waned, the very freedom of contract with its corollary, the freedom to compete, was merging into the freedom to combine; and in the last resort competition and combination were incompitable. Individualism was yielding to monopoly, where strange things might well be done in the name of liberty. The background of Law, social, political and economic has changed. Laissez fair as an ideal has been supplanted by social security and social security suggests status rather than contract\textsuperscript{46}.

Horizons of change in socio-legal outlook came to witness. Law is no longer treated as a police\textsuperscript{47} but a positive instrument for the achievement of well being of the people through Justice. The moral principle that one should abide by one's agreements and

\begin{itemize}
\item \textsuperscript{44} In France standard form contracts are known as contracts of adhesion, see Amos & Walton, Introduction to French Law (2nd ed 1963) at 152. Linhoff calls them compulsory contracts, see scope of Compulsory Contracts Proper, (1943) 43 Col L. R. 586.
\item \textsuperscript{45} Per lord Diplock, Schroder Music publishing co ltd v. Macanly (1974) 3 All. ER 616 at 624.
\item \textsuperscript{46} Cheshire, Fifoot and Furmstoms, Law of contract (12th ed) at 19.
\item \textsuperscript{47} Holland, T E, The Elements of Jurisprudence (13th ed 1924).
\end{itemize}
fulfil one's promises is being increasingly met by another moral principle namely, that one should not take advantages of an unfair contract which one has persuaded another party to make under economic and social pressures\textsuperscript{48}.

Without overtly replacing the shibboleth of freedom of contract, the twentieth century witnessed increased intervention of both, judiciary \textsuperscript{49} and legislature \textsuperscript{50} on behalf of the consumer.

**Privity of contract:**

The doctrine of privity of contract means that a contract cannot as a general rule, confer rights or impose obligations arising under it on any person except the parties to it\textsuperscript{51}. The origin of the doctrine is shrouded with uncertainties\textsuperscript{52}.

\textsuperscript{48} Supra note 39 at 11.

\textsuperscript{49} Courts in order to mitigate the rigour of exemption clauses have evolved various rules eg. Contra proferentem rule, theory of fundamental breach, reasonableness of the exemption clauses. For an academic treatment on these rules see A.G. Guest, Fundamental Breach of Contract (1961) 77 LQR 98 at 99; Gower Exemption Clauses; Contractual and Tortious liability (1954) 17 MLR 155; Linhoff, The Scope of Compulsory Contracts Proper, (1943) 43 col LR 586.

\textsuperscript{50} Unfair Contract Terms Act, 1977 was passed in England. Now no party can by reference to any terms of the contract exclude or restrict liability for death or personal injury resulting from negligence. However no such Law has been passed in India. The Trade Description Act, 1968, makes it an offence to offer goods for sale in false or misleading language.


\textsuperscript{52} For a detailed discussion see Contracts for the Benefit of Third parties. 12 Int. Comp. L. Quar-318; Promise Without Consideration and Third party Beneficiary in American & English Law 15 Int. Comp. L. Quar 835.
It is often linked with consideration. But its dichotomy suggests that the rule will stand even in absence of the consideration. There may be several reasons for the reception of this common Law rule. One possible reason may be that it is unjust to allow a person to sue on a contract on which he could not be sued. Second possible reason is that if third parties could enforce contracts made for their benefit, the right of contracting parties to vary such contract would be unduly hampered.

The concept of privity bears some significance where the transactions are of commercial nature, i.e. When the buyers and sellers are merchants and they enter into the transaction with approximately equal strength. But it does not suit to consumer sales. It often happens in such sales that one member of the family purchases goods and whole family consumes it. The doctrine of privity will preclude the family members from


54. However, there are writers who consider privity of contract and privity of consideration as the two different ways of saying samething. See Smith & Thomas; A Case Book on Contract (8th ed) P 213; see also Salmond and Williams; The law of Contracts PP. 99-100.

55. Cheshire, Flfoot and Furmston in Law of contract (12 ed) at 78, opine,that it is true if the doctrine of consideration were abolished, the problem of privity would remain, as it still remains in other legal systems.

56. Tweddle V. Atkinson (1861) IB & S at 398.

57. Supra note 51 at 420.

enforcing any claim in the court of Law, as the rationale is that they have only availed or consumed but have not purchased them. From the consumer's point of view, the requirement of privity of contract appears to be very unfortunate. This doctrine came under scathing attack in *Lockett v. AM Charles*\(^5^9\) Ltd., when it was observed that it is really very strange that the plaintiff's right to sue a hotel keeper for having supplied poisonous food, should depend, in absence of negligence, on the fact whether she herself is paying for it or her host. In two celebrated cases, *Donoghue v. Stevenson*\(^6^0\) and *Grant v. Australian Knitting Mills*\(^6^1\) no remedy was available to the consumers for their injuries. In former case, plaintiff who was injured by the contaminated ginger beer was not himself a buyer but only consumer. But in latter case, although plaintiff was himself a buyer of underpants which caused dermitites, the seller had delivered the goods in the original form as received by him from the manufacturer, because the effectual remedy available was against the manufacturer in tort on the grounds of negligence and no remedy was available to the consumer/buyer because of the privity rule. Absence of negligence in addition to lack of privity may mean that no remedy at all is available to the injured consumer. This is what actually happened in *Bucklay v. Reserve*.\(^6^2\), when the plaintiff suffered

59. (1938) 3 all. ER. 170.
60. (1932) AC 562.
61. (1936) A C 85, 104.
illness caused by eating snail in the restaurant. The plaintiff's claim was dismissed because of the privity rule as he was the guest of the actual buyer who had paid for the dinner. As negligence was not alleged on the part of restaurant, the third party had no claim in tort either.

These traditional doctrines of common law namely, caveat emptor, freedom and sanctity of contract and privity rule were reflections of the then existing state of values and norms. Even today the spirit of these doctrines holds good. There are no two opinions about the fact that the promise once made must be fulfilled or where person has himself inspected the goods he should blame none but himself in case of any defect or Justice demands that only the parties to the contract must be entitled to or liable under the contract. However, the developments of twentieth century has proved that these catch phrases of 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. The modern paradigms of marketing have proved that these doctrines if implemented in letter and spirit, will prove harsh to consumers. The complex nature of the goods hardly provides any scope for an ordinary consumer to detect the defect while inspecting the goods. The aggressive advertising campaign has also added to the confusion of the consumers in making choice. Thus need to provide a new legal mechanism free from the

63. See for detailed analysis of undesirability of the doctrine of privity rule, Supra note 53.
doctrines which have outlived their utility to cope-up with the arsenal of unscrupulous traders bent to bilk the consumers was felt. As the Australian Attorney General puts it:

The marketing of goods and services is conducted on an organised basis and by trained executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. Thus consumer needs protection by Law\(^6^4\).

US Reflections:

The common law doctrines were venerated and received with full enthusiasm by American courts during their early stages of development of Law. In the eighteenth and nineteenth centuries the American courts strictly followed the doctrine of *caveat Emptor* which regulated the relationship between the buyer and seller in the market place. In an era of unbridled individualism, denial of freedom of contract either to the buyer or the seller, irrespective of the circumstances in which it was concluded would have been in-conceivable\(^6^5\). The rule of privity of contract laid down in *Winter-bottom V. Wright*\(^6^6\) by the British Courts in which the driver of a defective coach could not recover damages from the manufacturers on the ground of privity of contract, was meticulously followed by the American courts.

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64. Senator Murphy, the then Attorney General while introducing the Trade practices Bill of the common wealth of Australia in the Senate -- Quoted from John Goldring Consumer Protection and Trade practices Act,1974-5 6 Federal L Rev. at 288.


66. (1842) 10 M & M 109, 152 ER 402.
Present consumer movement of America is largely accredited to the farming community and honest businesses. The impetus behind the movement for the earliest legislation gathered strength during the 1870's and 1880's. The farmers could not fail to mark the contrast between the rapidly falling prices which they received for their produce and the relatively sticky prices of the goods which they needed to buy. The farmer lost both as buyer as well as seller. The price which the farmer received for the commodities he sold, seemed to him to have been fixed by those to whom he sold, so also he felt that the price of his supplies was fixed by those from whom he bought. The explanation was found in the trust or monopolies. Since the farmers were better endowed with the political influence so they influenced the congress and the result was the Sherman Act, 1889 which declared such trusts unlawful. Although the Sherman Act, 1889 to a great extent curbed the formation of trusts which distorted or hampered competition, nevertheless, experience showed that there were several monopolistic and restrictive trade practices to which the Act did not reach. In order to remove these infirmities, Clayton Act, 1914 was passed. This Act declared, price


68. Section 1 of the Act declares: Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal..., Section 2 says Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with the foreign nations, shall be deemed guilty of a misdemeanor...
discrimination,\textsuperscript{69} exclusive dealing\textsuperscript{70} and tying agreements\textsuperscript{71} acquisition of competing companies\textsuperscript{72} and interlocking directors,\textsuperscript{73} illegal. However there was no provision to deal with the unfair trade practices. For instance in \textit{American wash Board co. v. Saginaw Mfg co}\textsuperscript{74}, the manufacturers of Aluminum Wash board sought to enjoin the false representation that a competing Zinc board was made of aluminum, the Federal Court held that absent any evidence of "passing off", such a misrepresentation could not be restrained. Thus the defendant could not be restrained from deceiving the public by selling a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material. In \textit{Standard Oil Co v. United States}\textsuperscript{75}, the US Supreme Court confined the role of the Sherman Act by holding that only unreasonable contract in restraint of trade would be held unlawful under the Sherman Act. Within hours after this pronouncement, Senator, Frances G. Newlands proposed that congress should constitute an administrative tribunal similar to the Interstate Commerce Commission, over interstate transportation\textsuperscript{76}. Thus the Federal Trade Commission Act, 1914 was passed.

\textsuperscript{69} Section 2
\textsuperscript{70} Section 3
\textsuperscript{71} Section 7
\textsuperscript{72} Section 8
\textsuperscript{73} 103 F 281,50 LRA 609 (C.C.A.6th.1900)
\textsuperscript{74} 221 USI (1911).
\textsuperscript{75} Cong REC 1225 (1911).
\textsuperscript{76} 51 Cong REC. 11084 (1914) (Senator Newlands)
The original bill gave the commission a purely advisory role, but a specific provision to control unfair competition was subsequently inserted in section 5 of the Act and the agency was given the power to issue cease and desist orders, against violators. Since unfair competition at common law had been limited to the substitution of goods of one producer for those of another, section 5 was amended to declare unlawful "unfair methods of competition". Thus the framers apparently anticipated that the commission would move against abuses not yet contrived as well as those that occasioned the statute. One supporter of the legislation noted with prescience the merits of elasticity.

Unfair competition, like fraud is a creature of protean shapes. It assumes one attitude to day and another tomorrow. As with fraud, so it will be with unfair competition. In fraud there is a constant race between rouge and the chancellor. In unfair competition there is going to be a constant race between the corporation and the commission.

The spirit of congress was not taken into account by the US Supreme Court while interpreting section 5 of the Act.

In its 1935 Annual Report, the commission recommended that section 5 be amended so as to specifically prohibit not only unfair methods of competition in commerce but also unfair and

77. 51 Cong. REC 11598 (1914) (Senator Thomas)

78. For instance, in FTC v. Gratz 253 US 421 (1920) The US Supreme Court held that the words Unfair methods of competition are not defined by the statute and their exact meaning is in dispute. It is for the courts and not for the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression.
deceptive acts and practices in commerce. Thus, Wheeler-Lea Amendments to FTC Act were made in 1938. These amendments extended jurisdiction of the commission to cover unfair or deceptive acts or practices in commerce regardless of whether such conduct injured competitors or consumers. Secondly, these amendments gave the commission power to have an effective control over false advertisements of goods, drugs, cosmetics and therapeutic devices. These amendments laid the foundation of modern consumer movement in America. In 1973 FTC Act was amended by the Trans-Alaska oil pipeline Act. Three important changes were made in the original Act. First, commission was empowered to seek injunctive relief in Federal Court for violation of any Law within its Jurisdiction. Second, commission was authorized to represent itself in Federal Court by its own attorneys if after ten days notice the court action desired by the commission was not taken by the justice Department. Third, increased maximum

79. 1935 FTC ANN. REP. 14; see also 1936 FTC ANN REP 16-17.
80. The Immediate provocation of passing of Wheeler-Lea amendments was the ruling of US Supreme Court in the landmark case of FTC V. Raladam Co, 283 Us 643 (1931). It was held that the commission lacked jurisdiction to proceed against false advertising without the proof that the advertisement adversely affected competitors even though it admittedly deceived the public.
81. According to Loyett these amendments marked the first real departure from the tradition of caveat Emptor in consumer contract administration. See Loyett; State Deceptive Trade practices Legislation 46 Tul. L. Rev. 724, 728 (1972).
81a. Section 408 (f).
82. Section 408 (d)
civil penalty for violation of commission's cease and desist orders from $5,000 to $10,000.\(^{83}\)

The Federal Trade commission was armed with more powers by the enactment of the Magnusm-Moss Warranty-Federal Trade Commission Improvement Act. This amendment popularly known as FTC Improvement Act has expanded jurisdictional reach of the commission to matters in or affecting commerce, confirms the commission's authority to promulgate trade regulation, rule defining Unfair or deceptive acts or practices, gives the commission an authority to represent itself in court proceedings and makes clear that the commission's investigating authority extends to persons, partnerships and corporations, instead of only corporation as in the past.\(^{84}\)

Commenting on the Federal Trade Commission's powers to protect consumers J Collier says, the consumer redressal provisions clearly mean money out of the pockets of corporate offenders and in many cases money into the pockets of consumers.\(^{85}\)

**Indian Perspective:**

As British were the past colonial masters of this whole subcontinent, the whole body of the commercial legislation was replica of English enactments, so there was every reason to

\(^{83}\) Section 408 (c)


\(^{85}\) Wall Street Journal, Jan 20. 1975 at 12 col. 2.
follow the cannons of interpretation evolved and developed by the English courts. It is only after independence, that our legislators while thinking independently began to feel the inadequacy of Laws protecting consumer's interest\textsuperscript{85a}.

With the adoption of Constitution in Nov. 1949, the aspirations of the people of India found an explicit expression in the preamble, fundamental rights and directive principles of state policy. The Constitution establishes a welfare state. We the people of India gave the Constitution unto ourselves to secure socio economic and political justice\textsuperscript{86}. This objective of economic justice is the generic philosophy of which the consumer protection is a constituent element. It is in this generic sense of "We the people" that the term consumer is visualised by the Constitution. A 20th century Constitution of an exploited and under developed country could not afford to espouse a \textit{laissez-faire policy}\textsuperscript{87}.

Art. 14 of the Constitution of India guarantees equality before law to all persons. Therefore, producers, sellers and consumers are all equal before law either for receiving reward or punishment. Further, Article 14 guarantees equal protection of

\textsuperscript{85a} The major legislations controlling anti consumer practices prior to independence were; The Indian Penal Code 1968, The Sale of Goods Act, 1930 and The Drugs and Cosmetics Act, 1940.

\textsuperscript{86} Preamble to the India Constitution.

\textsuperscript{87} V. P Bharatiya, Consumer Protection : So Much Done Much More To Be Done, Paper presented in a seminar on Consumer Protection through law conducted by the University of Jodhpur in 1989.
laws to all persons. Constitutionally, state is enjoined to pass laws, in order to give protection to consumers against the unscrupulous traders.

Art. 19(1)(g) guarantees a right to all citizens to carry on any occupation, trade or business and Art 301 guarantees freedom of Trade and Commerce. This right however, is subject to the restrictions contained in Art. 19(6) and Art. 304. It has been made clear that the freedom of trade or business does not include trade or business in immoral or criminal activities. So unfair trade practices are outside the constitutional protection.

The Economic Justice, equality of status and equal protection of laws, Freedom of trade, business and the reasonable restrictions on such freedoms are all directly or indirectly aimed at what we term in modern context, as consumer protection. To achieve this, state is directed to promote the welfare of the people by securing to them justice, social, economic and political to minimise the inequalities in income, status, facilities and opportunities, to secure to the citizens their right to an adequate means of livelihood to see that the ownership and control of the material resources of the community are so distributed as to subserve the common good, to ensure that the operation of the economic system does not result in the concentration of wealth and means of protection to the common detriment, to make

89. Art. 38.
available to both men and women equal pay for equal work, to protect human beings from exploitation on account of sex or tender age, to ensure that they are not forced by economic necessity to enter in a vocation unsuited to their age or strength. The state has to make effective provisions for securing right to work, public assistance in cases of unemployment, old age, sickness and disablement.

The state has also to endeavour to secure to the workers a living wage, a decent standard of life and full enjoyment of leisure, to provide free education for children. Promote with special care the educational and economic interests of the weaker sections and protect them from all forms of exploitation.

The state shall take into consideration the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and to introduce prohibition of the consumption of intoxicating drinks and of drugs injurious to health. For the raising of the nutritional standard and public health, the organisation of agriculture and animal husbandry on modern and scientific lines is also recommended to the state, as also the protection and

90. Art. 39.
91. Art. 41.
92. Art. 45.
93. Art. 46.
94. Art. 47.
95. Art. 48.
Improvement of the environment. Thus a constitutional duty is imposed on the state to protect consumers from the manipulative economics indulged in by the business tycoons and state is enjoined to formulate its policies in such a way as to ensure maximum possible benefits to the consumers.

After independence, many laws preventing unfair trade practices have been enacted by the Indian Parliament, their scope is however, limited. They deal separately with the various dimensions of the unfair trade practices. Since the present study is concerned with the unfair trade practices as covered under the Monopolies And Restrictive Trade Practices Act, 1969, and Consumer Protection Act, 1986 so the raison d'etre of the two enactments is outlined here.

Immediately after independence, big houses surreptitiously began to accumulate more and more wealth as there was no legal mechanism to control this. They tried to control market by

96. Art. 48 A.


98. Hereinafter referred to as MRTP Act.

99. Hereinafter referred to as CP Act.
employing monopolistic and restrictive trade practices. In order to ensure that the economic power does not remain in the hands of few individuals or groups of business houses, it was thought advisable to make a thorough enquiry to see the actual functioning of the market forces. Jawahar Lal Nehru, the then Prime Minister while moving draft of third plan in parliament remarked:

......An advance in our nations income and in our per capita income has taken place and I think it is desirable that we should enquire more deeply as to where this has gone.

Accordingly on October 13, 1960 an expert committee under the chairmanship of Prof. Mahalonabis was set up which submitted its report in 1964. This committee found that despite all countervailing measures taken, concentration of economic power in the private sector, is more than what could be justified on functional grounds. In pursuance of the recommendations of this committee, Government of India appointed in April, 1964, the Monopolies Inquiry Commission (MIC) which submitted its report on 31.12.1965. Monopolies Inquiry Commission suggested inter alia that an independent statutory body known as MRTP commission be established. In order to give effect to the recommendations of the MIC, MRTP Act, 1969 was passed and it came into force from

100. On 22.08.1960.


1st. June, 1970. This Act thus was primarily aimed at preventing concentration of economic power, monopolistic practices and restrictive trade practices. However, Unfair Trade Practices were not covered by the Act. With the passage of time, in the implementation of the MRTP Act, certain problems were encountered and several obscurities and lacunae where also noticed in the provisions of the Act. So Government appointed a high powered expert committee (popularly known as Sachar Committee)\textsuperscript{103} for reviewing the provisions of the Act. With reference to unfair trade practices, the Sachar Committee made following observation:

\textbf{Our MRTP Act at present contains no provision for protection of the consumers against false or misleading advertisement or other similar unfair trade practices. The Act at present is directed against restrictive or monopolistic trade practices. These provisions proceed on the assumption that if dealers, manufacturers or producers can be prevented from distorting competition, the consumers will get fair deal. But this is partly true. There is now greater recognition that consumers need to be protected, not only from the effect of restrictive practices but also from the practices which are resorted to by the trade and industry to mislead or dupe the customers}^{104}.

The Sachar Committee pointed out that unfortunately our Act is totally silent on this aspect. The result is that the consumer has no protection against false or deceptive advertisements. Any misrepresentation about the quality of a commodity or the potency of a drug or medicine can be projected without much risk. This has created a situation of a very safe heaven for the suppliers

\textsuperscript{103. Vide notification no 50 1981 dated 30-5-1981.}

\textsuperscript{104. Report of the High Powered Expert Committee on Companies and MRTP Acts (August 1978) at 262.}
and a position of frustration and uncertainty for the consumers. Therefore, it should be the function of any consumer legislation to meet this challenge specifically\textsuperscript{105}.

Keeping in view the recommendations of the Sachar Committee, Parliament amended the MRTP Act in 1984 and a new chapter on unfair trade practices was incorporated in the Act. The Committee proposed various unfair trade practices to be enumerated in the definition and with some exceptions, be punishable as an offence. Any person or undertaking indulging in any of them be liable to be prosecuted before the commission\textsuperscript{106}. However, this suggestion has not been accepted by the Parliament for the reason that these provisions are comparatively recent in origin and proper administrative machinery has to be geared up to track down the violations throughout the length and breadth of the vast country, they are regulated by issue of prohibitory orders and orders for payment of compensation for loss or damage suffered by the consumer and punishment by way of imprisonment enjoined upon only if those prohibitory orders are violated\textsuperscript{107}. A modified definition of Unfair Trade practice was incorporated in the MRTP (Amendment) Act, 1984\textsuperscript{108}. The definition had six parts. First part governed the rest five parts which covered, false and misleading advertisements, bargain offers, offering of Gifts, prizes and conducting

\textsuperscript{105} Id at 263

\textsuperscript{106} Id at 272

\textsuperscript{107} Lok Sabha Debates. MRTP (Amendment) Bill 1984 vol (48) May 7 at 412.

\textsuperscript{108} See Supra note 104 at 270.
of lotteries and contests, supply of goods hazardous to life and property and hoarding and destruction of goods.

The main part of the definition which governed the rest, was as under:

In this part, unless context otherwise requires, Unfair Trade practice means a trade practice which for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, adoptes one or more of the following practices and there by causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise ........

This original definition was rigid and applicable to only those practices which were enumerated in the definition itself. In order to provided flexible definition, will cover not only unfair trade practices which have been expressly mentioned but also those to be contrived, this definition was amended in the year 1991 and flexible definition was provided which is almost similar to the one provided in section 5 of the American Federal Trade Commission Act, 1914 as amended by the Wheeler lea Amendment Act, 1938.

For the better protection of the interests of consumers, the parliament passed the CP Act. The definition of the Unfair trade practice provided under the MRTP Act was bodily lifted and incorporated in the CP Act. However, the remedies available under the two Acts are different. Under the CP Act, remedies available are cheap. The procedure applicable is simple and free from technical Juggernauts and time is provided within which decisions should come. The remedies available under the two Acts are different. However, some common remedies are also provided. The CP Act
provides establishment of three tier quasi judicial bodies at District, State and National level. Where it is found necessary, more than one district forum can also be instituted. In the district forum a complaint of the value of 5 lakhs can be filed, more than five lakhs but less than 20 lakhs is the jurisdiction of the State Commission and more than that falls in the jurisdiction of the National Commission.