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W.P. No. 2015-08-04

August 2015

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Abstract

Liberalisation and globalisation of the India economy, inaugurated in 1990, ushered in a qualitatively different economy. In these decades, there has been expansion of goods and services; diversification in the means of reaching the consumer; proliferation of trade practices; coming in of e-commerce; vigorous sales promotion; and aggressive advertising. The persona of a consumer has undergone a transformation. The legislative regime for protection of consumer needs reform. The government has suggested changes in the Consumer Protection Act, 1986. Taking this as the context, the article reviews the proposed amendments and identifies further areas for amendment. The article has identified four overarching aspects of consumer rights for review, unfair terms in contracts; unfair trade practices; commerce through online platforms; and definition of consumer.

Consumer Rights in the New Economy: Amending the Consumer Protection Act, 1986

Liberalisation and globalisation of the India economy, inaugurated in 1990, ushered in a qualitatively different economy. In these decades, there has been expansion of goods and services; diversification in the means of reaching the consumer; proliferation of trade practices; coming in of e-commerce; vigorous sales promotion; and aggressive advertising. The persona of a consumer has undergone a transformation. But this is only the surface. A consumer is only the last link in a business chain. The transformation has been in the entire business chain. This requires reform in our business laws for an effective protection of the consumer and a healthy and fair competition among the businesses.

Our business laws are drawn from the British common law. The foundational planks of business law are the Indian Contract Act, 1872 and the Sale of Goods Act, 1930. While the United Kingdom has reformed its laws by enactments, we have had no reforms. In 1986, the Consumer Protection Act, 1986 (CPA), a legislation exclusively committed to creating rights for the consumers, was enacted. However, the CPA merely enforces the rights and obligations created by a contract. With a few exceptions, it does not create new rights. Another reform was introduction of provisions on unfair trade practices in the Monopolies and Restrictive Trade Practices Act, 1969. There has been a step backwards. These provisions are gone with the replacement of the Act with the Competition Act, 2001. The Government of India has proposed amendments in the Consumer Protection Act, 1986. As the consumer is only the last chain of business relations, the changes will not merely create new rights for the consumer but affect all business relationships. The proposed changes are to be seen as a reform initiative. Such changes happen once in 30 years. These need to be strengthened through analysis, discussion and dissemination.

In this article, we will review the main proposed amendments and identify further areas for amendment. The CPA is a very broad Act. It deals with micro aspects, such as holding of lotteries for sales promotion, as well as overarching principles and rights of the consumers, for example, unfair trade practices. We have identified three overarching aspects of consumer rights for review, unfair terms in contracts; unfair trade practices; commerce through online platforms; and definition of consumer.

As a broad introduction, the CPA creates a three tiered quasi-judicial body for the redressal of the rights of consumers. The bodies are at the district, state and national level. A consumer can approach a consumer forum for a defect in goods purchased; deficiency in service availed; and unfair or restrictive trade practices indulged in by a trader. The consumer forums can give an appropriate remedy to a consumer ranging from remedying the defect in goods or deficiency in service to terminating the contract and refunding the price. In relation to an unfair trade practice, a forum can order the trader to discontinue the practice. The CPA creates an inexpensive and expeditious mechanism for a consumer to seek remedy. In the absence of it, a consumer will need to go to an ordinary court to seek remedy against the seller or the service provider. Significantly, only a consumer can go to a consumer forum.

Unfair Contract Terms

Under the CPA, a consumer has a right against defective goods. Goods supplied by the seller are defective if these are not in conformity with the contract or violate any law. Similarly, a consumer has a right against deficient service if the service provided does not comply with the terms of the contract or is in violation of any law. Thus, the rights of the consumer in relation to defect in goods or deficiency in service are subject to the contract the consumer has entered in. In most contracts, a consumer enters in a contract with the seller or service provider on a standard form contract. As the seller or the service provider sets the terms of the contract, he invariably exempts himself from the liability under the contract, casts rights in his own favour and limits the rights of the customer. Are such contract terms valid? This has been a question of general interest in all jurisdictions. As our contract law is drawn from the British common law, a review of the law as it has developed in the UK would be instructive.

Contracts, by their very definition, are voluntarily formed. The courts took the position that it was for the contracting parties to set the terms of the contracts. If the courts were to interfere, it would erode the freedom of contract of the parties and violate the voluntary nature of contracts. Thus, the role of the court was only in interpreting the terms of the contract. As corporations developed, they employed standard term contracts. The power between the contracting parties became asymmetric. The standard term contracts exempted the liability of the corporations and limited the rights of the customers. The courts were in a dilemma. They could not interfere in the contract but could not also be spectators to injustice being inflicted on the customers. In the 1970, Lord Diplock thus expressed his anguish on standard term contracts:¹

This [standard form of contract] is of comparatively modern origin. It is the result of the concentration of particular kinds of business in comparatively few hands. The terms... have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it".

Lord Denning added to the observations of Lord Diplock:²

I would only add that in this case — as in many others — the weaker party is not even told: 'Take it or leave it.' He is simply presented with a form to sign, and told: 'Sign here'; and so he does. Then later on, when the goods are lost or damaged, the form is produced, and the stronger party says: 'You have no claim. Look at the conditions on the form. You signed it and are bound by those conditions.'

The British courts responded by using the principles of contract law itself to fashion remedies. The courts reasoned that every contract has a fundamental purpose. If the performance of the fundamental features themselves were exempted, the contract would become meaningless. It could never have been the

¹ *Schroeder Music Publishing Co Ltd. v. Macaulay*, (1974) 1 All ER 174.

² *Levison v. Patent Steam Carpet Cleaning Co. Ltd.*, (1977) 3 All ER 498.

intention of the parties and therefore, such terms should not be given effect to. This came to be called the doctrine of fundamental breach.³ The standard contract terms exempted or limited the liability of the corporation. The courts reasoned that an exemption or limitation clause should not be given effect to if it was unreasonable.⁴ The judicial initiatives were spirited but inadequate. The legislature had to step in. The British Parliament enacted the Unfair Contract Terms Act, 1977 addressing the problems of unfairness faced by the consumers. After the enactment, the courts themselves recognised that they had 'contorted' the principles of contract law to fashion remedies for the customers. Lord Denning, a prominent architect of the initiative, in a later judgment *George Mitchell (Chesterhall) Limited v. Finney Lock Seedy Limited*, commented on the initiatives of the court in interpreting the exemption clauses:⁵

Faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it. They still had before them the idol, 'freedom of contract'. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called 'the true construction of the contract'. They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction.

Lord Denning, later in the judgement, expressed that the Unfair Contract Terms Act, 1977 had addressed the problem of the weaker party, and therefore, 'we should no longer have to go through all kinds of gymnastic contortions to get round them.'

The learning is that legislative initiatives would be needed to address the problems of unfair contract terms. In relation to consumers, the proposed amendment to the CPA provides on unfair terms. Before exploring it, however, let us complete the development of the law in the UK. The Unfair Contract Terms Act, 1977 was followed by the Unfair Terms in Consumer Contracts Regulations, 1999. The regulation was to give effect to the European Union Directive. The two laws put together provide for the consumer protection against unfair terms. As a part of law reforms, there are moves and initiatives to harmonise the two in a single code.⁶ While the two laws cover overlapping grounds, the regulation is simply worded. The operating principle of the regulation is that for a standard form contract, that is, a contract where the consumer has not negotiated the terms, a term is an unfair term if it 'causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' Understandably, as the regulation provides, the unfairness of a contractual term will need to be assessed by taking into account the nature of the contract, including the nature of the goods and services and other circumstances when the contract was made. The Regulation in a schedule gives an indicative

³ The founding judgement for the principle is: *Levison and another v. Patent Steam Carpet Cleaning Co. Ltd.*, (1977) 3 All ER 498.

⁴ The founding case on this is: *Photo Production Ltd. v. Securicor Transport Ltd.*, (1978) 3 All ER 146.

⁵ *George Mitchell (Chesterhall) Limited v. Finney Lock Seedy Limited*, (1983) 1 All ER 108.

⁶ See the Report of Law Commission and the Scottish Law Commission Report on 'Unfair Terms in Contracts', 2005.

and non-exhaustive list of terms which can be regarded as unfair terms. This then can be the principle for providing on an unfair term contract.

We can now review the proposed changes in the CPA on unfair contract terms. A consumer can challenge before a consumer forum that the contract terms are unfair. If the forum finds the terms to be unfair, these will not be binding on the parties. The definition of 'unfair contract', however, is 'a contract which contains any one or more of the following types of clauses'. It then lists five types of clauses. The problem with the existing definition is the unfair terms are limited to the five listed terms and these are not comprehensive, covering every kind of unfair contract term. The definition of unfair contract should be inclusive. It should state the principle as to what constitutes an unfair contract. Following the principle, an illustrative listing could be given. The definition of 'unfair contract' could read as follows:

An 'unfair contract' is a contract which has a term or terms which cause a significant imbalance in the rights and obligations of the parties to the detriment of the consumer. This will include, the following types of terms:

Following this, the illustrative clauses can be listed. The five clauses as in the draft amendment bill are on the following five themes:

1. Excessive security deposit charged by the seller or service provider.
2. A penalty on the customer disproportionate to the loss caused to the seller or service provider.
3. Refusal to accept early payment, even with penalty for early payment.
4. Power to terminate the contract unilaterally without any reasonable cause.
5. Unilateral power to assign contract to a third party.

The five listed themes are drawn from specific type of contracts. To make it comprehensive, we will draw from the schedule of the Unfair Terms in Consumer Contracts Regulations, 1999. The listing could include the following:

1. Inappropriately excluding or limiting the liability of the seller or service provider for its non-performance.
2. Making an agreement binding on the consumer while the seller or service provider is free to perform or not perform the contract.
3. Providing for the seller or supplier to receive damages in the case of a breach of the contract by the consumer without providing for a similar compensation to the customer for a breach of the contract by the seller or service provider.
4. Authorising the seller or supplier to dissolve the contract in his discretion without giving the same right to the customer.
5. Giving the right to automatically extend a contract of fixed duration when the customer does not indicate otherwise when the deadline fixed for the consumer

to express his desire not to extend the contract is unreasonably early.

6. Enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.
7. Providing for the price of goods to be determined at the time of delivery without giving the consumer the corresponding right to cancel the contract if the final price is too high.
8. Providing for a seller of goods or supplier of services to increase their price without giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
9. Giving the seller or the service provider the right to determine whether the goods are in conformity with the contract.
10. Giving the seller or the service provider the exclusive right to interpret any term of the contract.
11. Limiting the obligations taken by the agent of the seller or service provider.
12. Obliging the consumer to fulfil all his obligations where the seller or service provider does not perform his.
13. Giving the seller or service provider the right of transferring his rights and obligations under the contract with the customer's consent, where this may serve to reduce the guarantees for the consumer.

This will make the definition of unfair contract inclusive.

Unfair Trade Practices

At present, the law against unfair trade practices is almost non-existent. Let us explore how it has come to this. By the 1980s, there was proliferation of advertising and with it, of false advertising. Towards regulating it, in 1984, the Parliament inserted a chapter on unfair trade practices in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP). Under the MRTP Act, any person or trader could approach the MRTP Commission against an unfair trade practice. The MRTP Commission could give a cease and desist order, directing the party to discontinue the unfair trade practice. In addition, if a trader suffered a loss due to an advertisement, and this happened in the cases of comparative advertising, the trader could claim losses.

The CPA copied the chapter on unfair trade practices from the MRTP Act. Thus, two platforms emerged for a remedy against unfair trade practices. In the new century, following the changes worldwide, the need was felt for a more comprehensive law against monopolies and anti-competition business activities. The Central Government appointed a committee to study the subject and draft a new law. Following the recommendations of the committee, the Competition Act, 2002 was enacted and the MRTP Act, 1969 repealed. The Competition Act, 2002 is a comprehensive law against monopolies and deals with all aspects of

competition in the economy. The committee did not include unfair trade practices in the Competition Act, 2002 as they did not want to dilute the thrust of the Act from anti-competition activities. It was reasoned that the provisions on unfair trade practices under the CPA would be adequate mechanism for redressal of grievances on unfair trade practices. As we will see, the CPA could never have given adequate protection against unfair trade practices.

Under the CPA, however, only a consumer, state government, central government or a registered consumer association can approach a consumer forum. Thus, a company cannot come before a consumer forum complaining of unfair trade practices being indulged in by its rivals. A natural person can become a consumer only on entering in a contract for buying goods or availing a service. Thus, a person cannot go before a consumer forum merely on coming across a false advertisement or a trader indulging in an unfair trade practice. He first must contract with the party. The remedy can only be against the party the consumer has contracted with. In most cases, however, a manufacturer advertises its products but a consumer contracts with a retailer and not the manufacturer. Thus, effectively a person, who comes across an unfair trade practice, has no remedy. The only remedy for anyone is to complain to the Central or State Government. The governments are loaded with numerous functions to concertededly pursue cases of unfair trade practices. Thus, practically and effectively, only the consumer associations have been able to bring cases of unfair trade practice before the consumer forums. Their effort in this direction, as it understandable, is to take up cases which are exemplary.⁷

The draft amendment bill is proposing to create a Consumer Protection Authority. While the Authority has several functions to protect consumer interests, it seems to fill the above gap in relation to unfair trade practices. The Authority is to be headed by a Commissioner, with five deputy Commissioners. The authority will be based in Delhi. One of the commissioners will be solely responsible for a bureau on unfair trade practices including false advertising. The other bureaus, each headed by a Deputy Commissioner are, safety in goods and services; quality standards; unfair contract terms; and enforcement of consumer protection laws. Thus, the Authority has numerous executive functions. Further, the Authority will have regional offices.

Under the proposed Section 12(3), the Authority can inquire into any unfair trade practice or false or misleading advertisement on its own knowledge or has come before it for inquiry. After inquiry, it has the powers to take remedial and punitive measures by making order to the party indulging in unfair trade practices. The Authority can order discontinuation of the trade practice or modification of the trade practice. It can also order the party to make corrective advertising. If a party 'repeatedly' indulges in an unfair trade practice, the Authority can also impose a fine. Thus, a mechanism has been created for any person to report to the Authority that a business entity is indulging in an unfair trade practice. The person reporting to the Authority need not be a consumer. It can be any person, including a business organisation.

⁷ An example is the case against idea and start ????

Some of the provisions under the chapter on Authority, however, are not consistent. Section 12 is on functions and powers of the Authority. Section 12(1) provides as to how the Authority will come to inquire on a matter. It is general to all aspects of the functioning of the Authority, including unfair trade practices. It reads:

Section 12 (1) Functions of the Authority: a) Inquire suo-motu or on a complaint or a direction from the Government or the Parliament or the judiciary, violations of consumer rights enumerated in the Consumer Protection Act.

In the above provision, all the entities separated by 'or' are units in themselves. The meaning we give to the unit 'on a complaint' is a complaint can be made by any person on any violation of consumer rights. Thus, any person can report an incidence of an unfair trade practice for the Authority to initiate an inquiry. The role of the person is only to bring to the notice of the Authority an incidence of violation of a consumer right. The rest is for the Authority to follow and take action. The CPA defines the term 'complainant' as a consumer who comes before a forum for a remedy for a defect in goods or deficiency in service as a 'complainant'. The complainant in Section 12 is not this complainant. The word 'complaint' here is used in the general sense of bringing to notice of. Section 16, however, formalises the complaint making to the Authority. It provides:

16. Filing of Complaint and its Disposal.- (1) A consumer may file his complaint in writing or through email, as the case may be, either to the District Collector concerned, or to the Deputy Commissioner in the Regional Office concerned or to the Central Authority with an undertaking that he/she/it/ has made her complaint to only one of the aforesaid offices.

In this provision also, 'complaint' only means bringing a violation of a consumer right to the notice of the Authority. It is not a 'complaint' as defined in the Act. The intention is not to open the authority for consumers to come to seek redressal like any other consumer forum by filing a 'complaint'. In fact, the Authority itself is to take violations (other than unfair trade practices) before the consumer forums. To avoid this confusion, in the chapter on Authority, the term 'complaint' should be replaced by 'information', 'objection' or 'allegation'.

Further, section 16 states that a 'consumer may file'. Implication of this will be that only a natural person who has entered in a contract with a seller or service provider will be able to bring to the notice of the Authority a violation of the consumer rights. From the power and functions of the Authority, this does not seem to have been the intention. The intention instead is open up the channels of information for the Authority to take note of violations of consumer rights. Further, the Authority is not providing any individual remedy to the person making the objection. The only role of the person has is to bring a violation to the notice of the Authority. The person may do it as an interested party or without any interest in the matter. At the same time, the provision does not want to leave it to the discretion of the Authority to pursue an objection. Towards this, section 16 makes it obligatory for the Authority to follow objections by formalising receiving of objections. In the course of it, it ends up using the term 'consumer'. Thus, 'consumer' in Section should be changed to 'any person'.

The proposed Section 9 creates the Authority as an 'executive agency'. However, as we have noted above, it also has the powers to issue orders on unfair trade practices. These are judicial functions. The National Consumer Disputes Redressal Commission (NCDRC) has objected that the government is creating a 'parallel jurisdiction' by creating another body with judicial powers.⁸ But the Ministry has tried to dispel the apprehensions by explaining that 'ultimately class-action suits will be taken up by NCDRC'.⁹ The statement is correct. One of the functions of the Authority is to take up class action suits. These are to be taken up before the NCDRC. However, this is only a partial answer to the question on the nature of the Authority. The Authority certainly has adjudicating functions in relation to unfair trade practices. It is best to recognise it and strengthen the provisions to make it sustainable.

Despite the objection of the NCDRC, there is justification for the Authority taking up adjudication function. A specialised adjudicating body is needed for dealing with unfair trade practices. Since the CPA was enacted, there has been rapid proliferation in the means of communication, including the coming in of electronic communication. With the liberalisation of the economy, and competition coming in, businesses have aggressively advertised. Businesses have come to increase their advertising budgets significantly.¹⁰ Looking at the sheer volume of advertisements, a specialised body is needed for addressing the concerns of unfair trade practices. The Authority will get flooded with complaints of unfair trade practices. The Advertising Standards Council of India, which is a voluntary body, receives a large number of complaints each year. If the Authority were to take the disputes to the NCDRC, it will greatly increase the work load of NCDRC. The consumer forums are strained. Further, unfair trade practices, as a subject matter, need specialised attention. The Authority can come to specialise in unfair trade practices.

The proposed Section 19, which is titled 'Miscellaneous', requires the Authority to follow principles of natural justice in decision making. However, the details have been left for the rule making powers of the Central Government and regulations of the Authority. Once we recognise that the Authority is performing an adjudicatory function in relation to the vast field of unfair trade practices, it will be desirable, as it has been done for the consumer forums, to provide the procedure for adjudication in the Act itself. In this context, another problem which may arise, is on the qualifications of the Director/ Deputy Directors. The body performing adjudicatory functions should have the requisite legal qualifications. Within the CPA itself, all the consumer forums have at least one legally qualified person. The adjudicating body may have at least one member qualified in the field law. This problem arose in relation to the Competition Act, 2002, in relation to the

⁸ NCDRC opposing certain Consumer Protection Act amendments; says it may lead to "parallel jurisdiction", the Economic Times, May 29, 2015.

⁹ 'NCDRC opposing certain Consumer Protection Act amendments; says it may lead to "parallel jurisdiction', the Economic Times, May 29, 2015.

¹⁰ For example, Nestle's budget for Advertising and Sales Promotion for 2004 was Rs 121.26 crore. This increased to about Rs 450 in 2014. See news report at: <http://www.indiantelevision.com/mam/marketing/barc-india-to-install-30-of-total-barometers-in-rural-india-140917>

rules for appointment of the Chairman of the Commission.¹¹ As a result, the enforcement of the Act had to be put in abeyance for several years.

The Competition Act, 2002 has a model of vesting executive and judicial functions in a body. It is robust and sustainable and could be followed. The Competition Act, 2002 creates the Competition Commission. The Commission has two wings, the executive wing and the adjudicatory wing. The adjudicatory wing is headed by the Director General of Investigation and Research (DG). The DG's office does the investigation and research on the incidences of anti-competition actions and takes the matter to the Competition Commission for adjudication. The Commission acting as an adjudicatory body, follows a judicial process, as provided in the Competition Act, 2002. There is adequate opportunity for the other party to be heard and represented at different stages of the proceedings. To strengthen the Consumer Protection Authority, the above features could be adopted from the Competition Act, 2002. There could be an office of the Director General of Investigation and Research (DG). The DG could investigate and research in the complaints of unfair trade practices. Alternately, as provided in the existing arrangement, the Bureau for unfair trade practices could do this executive function. The executive wing could then take it up to the Consumer Protection Authority, sitting as an adjudicatory body. The process for the Authority to make a decision and pass an order could be prescribed in the Act. This should give the other party a right to be heard and represented at different stages. Significantly, the Authority should have the power of making interim orders, in addition to the final order. This will make it possible for the Authority to stop an unfair trade practice while the matter is under adjudication.

E-commerce

E-commerce is new to the CPA. However, in e-commerce, a contract like any other is formed. The only difference is in the modality of communication by which a contract is formed. The parties being in different locations can make a difference to the jurisdiction of the courts. The CPA provides for the different locations where a consumer can make a complaint to a consumer forum. Most contracts provide for a place whose courts will have a jurisdiction over the contract. However, as the CPA recognises the rights of a consumer with reference to the contract, a contention may be raised that a consumer can take a dispute to only a consumer forum of the place settled in the contract. It is a settled principle that a contract cannot override the provisions of law. However, to make the provision complete, it can be added as a further clause that a dispute can be taken to a consumer forum of the place provided in the contract. Different places appearing in the alternative in the CPA will take away the doubt. Further, in the case of e-commerce, where the parties are located in different places, it may turn out to be a valuable jurisdiction.

In e-commerce, numerous problems arise due to the buyer and seller being at a distance. The buyer is not able to inspect or sample the goods or services. The buyer necessarily pays through a card. This brings in the problem of fraudulence in card payment. To effectively protect a consumer buying goods or services

¹¹ See *Brahm Dutt v. Union of India*, AIR 2005 SC 730.

through e-commerce would need a separate law, as other countries have.¹² The draft bill has made provisions on aspects falling within the scope of the CPA. In e-commerce, a seller may supply inferior or defective goods and not take back the goods and refund the price. In fact, this could happen even in a face-to-face contract. This situation is covered by the existing provisions. The trader is in breach of the contract and has provided defective goods or deficient service. The draft bill, however, brings in an additional provision. It gives the right to the consumer to cancel any contract within 30 days. The draft bill has added the following as an unfair trade practice:

(8) after selling such goods and rendering of such services, refuses to take back or withdraw the goods or withdraw or discontinue the service and refuses to refund the consideration thereof, if paid, within a period of thirty days after the receipt of goods or availing of services it is so requested by the consumer.

Thus, every consumer, whether he contracts through e-commerce or other means has a right to terminate the contract at will. He merely has to communicate his intention of terminating the contract. This is certainly justified in the case of e-commerce where the parties are at a distance and the customer gets to see or examine the goods only when these are delivered.¹³ In other contracts, technically, the customer does have the benefit of examining the goods. However, he may or may not do an adequate examination of the goods. Significantly, in most cases, once the goods are sold, the retailer insists that these are subject to only a warranty by the manufacturer than a return of the goods and termination of the contract. In a context where there is inadequate protection for the consumers, the provision is a valuable right for the consumer. A doubt may arise whether this right can be waived by a contrary term in the contract. It should be made clear that the right of the consumer to terminate the contract is absolute, irrespective of the terms of the contract. This can be done by adding the following line in the above provision: 'The right of the customer to terminate the contract within 30 days of receipt of goods or availing of service by making intimation cannot be excluded by stipulations to the contrary in the contract.'

Who is a consumer?

The amendment should take up revision of the definition of consumer. It seems like a technical thing but has far reaching consequences for the administration of the CPA. At the outset, CPA is not a well drafted law. Some manifestations of it are significant and others are relatively unimportant. The definition of 'consumer' is a significant one. It is a single sentence of 226 words, running into four paragraphs! The text is long, confusing and convoluted. Let us assess the substance and expression of the definition. The legislature was creating a quasi-

¹² European Union has come up with 'Directive on the Protection of Consumers in respect of distance contract' which the Union countries have given effect to. The UK first gave effect to it with the Consumer Protection (Distance Selling) Regulations 2002. This has been replaced with The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

¹³ The UK law has a similar provision and gives 14 days to cancel a contract. This has been replaced with The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

judicial forum for consumers to seek inexpensive and expeditious justice. However, to seek remedy from law, a person would need to be a bearer of rights. Some of the ways in which a person becomes a bearer of rights is by entering in a contract, family law or a law made by the legislature. In the field of consumer goods and services, a person becomes a bearer of rights by entering in a contract. For this reason, the CPA limits a consumer to be a person who has entered in a contract to buy goods or avail services. There are problems, however, in the CPA expressing this idea.

Like other fields, legal ideas have developed by taking the existing ideas as foundation and building on them. Over centuries, the idea of a contract came to develop. Contract law used terms like offer, acceptance, express, implied and consideration to express formation of a contract. We could call it the first generation law. As trade and commerce developed, specialised forms of contract, for example, sale of goods, came to develop. The law took contract law as the foundation and built on it. It used the term 'contract' as known and settled to express sale as a form of a contract. The same was done in expressing other special contracts, like, indemnity, guarantee, bailment and principle-agent relationship. We could call these the second generation law. Building on this foundation, the third generation of laws developed in the field of taxation and laws regulating contracts. These took terms like 'contract' and 'sale' to be foundational and built on them. This is the logical manner in which every field develops, by building on known and settled principles and phenomena. Thus, in expressing a law, the settled terms are to be used and built on. The CPA deviates from this settled style in defining a consumer. For analysing this, we would need to quote the definition in full. It reads:

(d) "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, or 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 of any services 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 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 but does not include a person who avails of such services for any commercial purposes;

Explanation.— For the purposes of this clause, “commercial purpose” does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;

The definition has two parallel paragraphs, one for goods and the second for services. Let us take the first paragraph for illustration. It defines a consumer to

be a person who '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 ...'. Let us contrast with the standard way in which it would have been written: 'any person who enters in an agreement for sale or sale'. Price is the consideration for a seller in a sale contract. The contracting parties are free to decide when and how the payment would be made. This can be advance payment, deferred payment or instalment payment. The payment may be required in advance, at the time of the delivery or later. The standard expression encompasses the entire gamut of practices. An elaboration is unnecessary and makes the text lengthy. The bigger problem is once the elaboration is done, the contestation between the parties becomes over each of the words used in text, or not used in the text. This expands the scope for unnecessary contestation. For example, in a case of an instalment payment, a seller can argue that the buyer is not a consumer as instalment payment has not been used in the definition.

The meaning of the term 'agreement for sale' and 'sale' is well settled. A sale contract is an agreement for sale of goods. It is for the contracting parties to decide on the time of transfer of ownership. According to the terms of the contract, the seller will transfer the ownership in goods. When the seller transfers the ownership in goods to the buyer, the agreement for sale becomes a sale. At times, the ownership transfer the very moment the parties enter in a sale contract. Thus, the expression 'agreement for sale' and 'sale' covers all sale contracts. The current definition uses the expression 'any person who buys any goods'. While the term 'buy' is used in everyday language, law has not developed or deployed it. There is no settled meaning for the term. When does the phenomenon of 'buy' happen, when the parties enter in an agreement or the ownership is transferred? The definition leaves these vital questions uncertain.

Thus, digressing from the logical and conventional style makes the text ambiguous and contentious. It could have been in the minds of the drafters that as the law is for the benefit of the consumers, it should be elaborate for lay persons to understand it. While well intentioned, this is not a productive line of reasoning. An Act, irrespective of the subject matter, takes effect through the same mechanism as any other act. In the case of a dispute, the text of the law would be subjected to judicial scrutiny. The courts would use the settled principles for interpreting the text. There is no reason to digress from the standard and settled style in expressing the law. The consumers can be informed of the law and their rights through other publications.

Exploring the definition further, the legislature does not want every person who enters in an 'agreement of sale' or 'sale' to benefit from the law. Its intention is to benefit only the person who finally consumes the goods. Thus, it leaves out a person who 'obtains' goods for 'resale'. The meaning of this is clear. A distributors, wholesalers, retailers or vendor cannot come before a consumer forum. In addition, the definition also leaves out the persons who obtain goods 'for any commercial purpose'.

The scope of the term 'for any commercial purpose' has been contested before the forums. In *Synco Textiles Private Limited v. Greaves Cotton and Company*

*Limited*¹⁴, it was contended that 'commercial purpose' should be distinguished from 'commercial organisation' and 'commercial activity'. To illustrate, a company buys a water cooler for its staff to drink water from. Undoubtedly, the objective of the company is commercial, to make profit. However, the water cooler has not been put to a 'commercial purpose'. It is only for the staff to drink water from. If a company buys raw material for manufacturing, it uses it for a 'commercial purpose'. Synco Textiles Private Limited had bought power generator sets for stand-by power supply. It contended that the power generator sets were a part of commercial activity. However, it was not put to 'commercial purpose' as the company was not selling power but manufacturing goods. The National Commission dismissed the contention by noting that the dictionary meaning of 'commercial' was large scale for making profit. The Commission did not recognise the company to be a consumer as it was engaged in a large scale commercial activity. The contention was not on the meaning of 'commercial' but 'commercial purpose'. Thus, the valid point did not get explored. The implication of the judgement was that a company, as a legal person, cannot qualify to be a consumer.

More than a decade later, the NCDRC has picked up the point in *Controls and Switchgear Company Limited v. Daimlerchrysler India Private Limited*.¹⁵ Controls and Switchgear Company Limited bought cars for the use of its directors. The cars turned out to be defective. The NCDRC recognised the company to be a consumer. The following passage from the judgement brings out the position taken by the NCDRC:

The first question which requires consideration is: Whether the cars were purchased for commercial purpose? In support of this contention the Opposite Parties submit that: (i) The Complainant Company claimed and is claiming depreciation on the cars; (ii) the Complainant Company has used the corporate resources for purchase of cars; (iii) Drivers are engaged by the Company and the Company spends for the fuel used; (iv) A Company is a distinct legal entity. It cannot be disputed that the cars enhance mobility and depreciation has direct bearing on the profits earned. (v) The cars are being used for commercial purpose; and, (vi) The Company is not a consumer in so far as the cars purchased by it.

In our view, there is no substance in the aforesaid contention, because: (i) Company is a legal entity and is entitled to file complaint; (ii) The cars are purchased for the use of the Directors and are not to be used for any activity directly connected with commercial purpose of earning profit. Cars are not used for hire but are for the personal use of the Directors. Hence, it cannot be said that the Complainant Company has purchased the cars for commercial purpose.

Thus, the NCDRC recognised the distinction between 'commercial purpose' and 'commercial activity'. Use of the cars by the directors was not a commercial activity. The line of thinking followed in the judgement is logical and consistent. A 'person', as it is understood in law and defined in the Act, includes legal person and 'commercial purpose' refers to the use to which the goods or services are put

¹⁴ Synco Textiles Private Ltd. v. Greaves Cotton and Company Limited, (NCDRC), 1991 CPJ 499.

¹⁵ Controls and Switchgear Company Limited v. Daimlerchrysler India Private Limited, 2007 Indlaw NCDRC 69.

to and not the nature of the person or objectives of the legal person. Thus, a company or a legal person can qualify to be a consumer. Is it the intention of the legislature to give the benefit of the CPA to companies and other legal bodies? The answer would be 'no'. The following is an evidence of it.

The definition of consumer has two parallel paragraphs, one on buying of goods and the second, on availing of service. The paragraph on buying of goods provides that if the goods are obtained for a 'commercial purpose', the person would qualify to be a consumer. Surprisingly, in the original enactment, the same delimitation was not there in the second paragraph on services. It was perhaps an oversight in drafting the law. Thus, companies could not approach a consumer forum for a defect in goods but widely used the provision to approach consumer forums for deficiency in services.¹⁶ In 2002, the CPA was amended to bring in the delimitation in the service part in the definition of consumer. The paragraphs on goods and services are now identical. It was stated that the consumer forums should not get crowded with the claims of companies and business organisations. Thus, to avoid confusion and contestation, it should be stated that only natural persons can be consumers. This can be done by making the opening part of the definition read: 'Consumer is a natural person who ...'. Defining a consumer as a 'natural person' or 'individual' has been adopted as an effective term for conveying legislative intent in other jurisdictions.¹⁷

We now come to a substantive benefit the CPA has created. Within the contract law, only the contracting parties have rights and obligations to each other. Others are third parties and do not have claims against the contracting parties. Thus, if A contracts a hospital H for treatment of B, in contract law, B has no rights and obligations in relation to the hospital as B is not a contracting party. This is ironic but can be explained. Contract law developed over the centuries to resolve the disputes among traders. It is only in the post-world war years that consumerism expanded and contract law came to be applied to consumer relationships. As a result, while a consumer will buy goods for his family, no one other than the person who entered in a contract will have rights and obligations with the seller.

The CPA has sorted this irony by recognising others also as consumers. Broadly speaking, anyone who uses goods or services through a consumer gratis is also a consumer. In substance, this is fine. However, as the second category of consumer is mentioned with the first, the paragraph has become long and confusing. The two can be separated. Further, it uses the following expression to identify the second category of consumer:

¹⁶ For example, *Bharati Knitting Company v. DHL Worldwide Express Courier*, AIR 1996 SC 2508.

¹⁷ Regulations in the UK have come to define a consumer as a natural person. The Unfair Terms in Consumer Contracts Regulations 1999 defines a consumer as: "consumer" means any natural person who, ...acting for purposes which are outside his trade, business or profession. The now repealed Consumer Protection (Distance Selling) Regulations 2000 defined a consumer as: a natural person who is acting for the purposes other than those of his trade, business or profession". While, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 defines a consumer as: "consumer" means an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession.

... 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, or under any system of deferred payment when such use is made with the approval of such person ...

There are two key concepts in this definition. One, the use of the goods is made with the approval of the first category of consumer. Second, the relationship between the first category of consumer and the person using it is non-contractual. There is no specific term to indicate a non-contractual relationship. When a person transfers ownership in goods to another, without any consideration, it is a gift. Gift is a recognised legal term. However, there is no term to indicate a hire of goods without any consideration or letting a person use a service without consideration. The best way of expressing a non-contractual relationship is to state that it is 'without any consideration'. It brings out that there is an agreement between the parties but the person is not paying for the goods or services. Thus, the first two paragraphs of the definition can be thus expressed:

(d) "consumer" means a natural person who—

(i) enters in an agreement for sale or sale of any goods but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) any person who uses goods with the approval of a consumer constituted under 2(d)(i) without any consideration; or

(ii) enters in a contract for availing a service but does not include a person who obtains such service for resale or for any commercial purpose; or

(iv) any person who avails a service or is a beneficiary of a service with the approval of a consumer constituted under 2(d)(iii) without any consideration.

In the original enactment of the CPA, a person who bought goods for a 'commercial purpose' was not included in the definition of a consumer. In an early case¹⁸, a person bought a car to ply it as a taxi. The consumer forums refused to recognize him as a consumer as the use of the car was for a commercial purpose. The consumer groups did not find this acceptable. In their view, as they argued, a widow who buys a sewing machine to make a living or a rickshaw puller would get left out from the benefit of the Act. The CPA was thus amended in 1990 to add the following explanation to the definition:

Explanation.— For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;

The effect of this addition came to be contested before the forums. The Supreme Court, in *Laxmi Engineering Works v. P. S. G. Industrial Institute*¹⁹ elaborated the scope of the explanation. It stated that to qualify under the explanation, a person

¹⁸ *Western India State Motors v. Sobhag Mal Meena*, NCDRC Nov 8, 1989.

¹⁹ *Laxmi Engineering Works v. P. S. G. Industrial Institute*, AIR 1995 SC 1428.

should be self-employed and using the goods or services himself and not through employees or hired labour. Following the amendment, the task of the forum has become elaborate and nuanced. It not only has to resolve the question whether the goods or services are being used for a commercial purpose but further, the nature of the commercial purpose the party is engaged in. In most cases, it is rarely in doubt that the goods are defective or the services deficient. The only way out for the seller or the service provider is to allege that the other party is not a 'consumer' as there is a nexus with 'commercial purpose'. This takes the forum in minute exploration of the nature of the engagement of the buyer or the party availing service. This side steps the main issue and consumes the time and resources of the forums. This should be minimized. One way of doing this is to delete the explanation. The implication of this will be that a person who has bought goods for a commercial purpose or availed a service for a commercial purpose will not be a consumer. He will need to go to an ordinary court. In this, a small group of people will not be able to avail the benefit of the CPA but it will expedite decision of cases.

The preferred option, however, is to go to the other end. Once we have limited the definition of consumer to natural persons, 'commercial purpose' can arise only in proprietary business. Proprietary businesses are small businesses. Within the small business, we need not distinguish whether the person is in very small business using the goods and services personally or bigger, using employees. We could give the benefit to all proprietary business. In this, no substantive right is being given to this group. It is only in this that instead of going to an ordinary court, the party can come before a consumer forum. This will not increase the load of the consumer forums significantly but take away the unnecessary discussion whether the party is a consumer or not. Giving effect to this, the definition of consumer would read as follows:

(d) "consumer" means a natural person who—

- (i) enters in an agreement for sale or sale of any goods but does not include a person who obtains such goods for resale; or
- (ii) any person who uses goods with the approval of a consumer constituted under 2(d)(i) without any consideration; or
- (ii) enters in a contract for availing a service but does not include a person who obtains such service for resale; or
- (iv) any person who avails a service or is a beneficiary of a service with the approval of a consumer constituted under 2(d)(iii) without any consideration.

To conclude the discussion, in this definition, a wholesaler or retailer will not be able to claim the benefit of the act. Save this, all other 'natural persons' will qualify to be consumers. While this definition expands the scope of the consumer, it has significant advantages. The only thing a person has to establish is that it is a natural person who has entered in a contract. This will be evident from the complaint itself and the documents evidencing a contract. With this simplified definition, a consumer can straight away move to the substantive point of establishing the defect in goods or deficiency in service.

The other significant right created by the draft bill for the consumers is product liability. This makes manufacturers, distributors, suppliers, retailers and others responsible for the injuries the products cause. Product liability has been known for some decades in the USA and Europe, falling under the field of law of torts. The judgements on injury by cigarette smoking and exposure to asbestos are the prominent faces of the field. The draft bill seems to have borrowed it from the law in the USA. As the field is new to us, it is best to borrow from another jurisdiction.

Conclusion

The proposed amendments to the CPA, while these apply only to consumers, are a lot more fundamental. Indian business and commercial law, due to our British connection, is founded on the British common law. This includes, among others, the Contract Act, 1872 and the Sale of Goods Act, 1930. However, the foundations have to be supplemented and built on to address issues which arise with changes in society. The UK has brought in several legislations and regulations to address rights and obligations arising under contracts. In our case, the reforms have been absent. The draft bill addresses the significant question of unfair contracts and provides for product liability. The creation of Consumer Protection Authority will provide an institutional basis for checking unfair trade practices. Giving the right to a consumer to terminate any contract within 30 days period is another very significant right.