

LEGAL ASPECTS OF MARKETING IN INDIA



V. V. SOPLE

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V. V. SOPLE

**B.E. (Mech.), M.B.A., Ph.D
Professor (Marketing and Logistics)
Institute for Technology and Management
Navi Mumbai**



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PREFACE

The environmental forces set the boundaries to the marketers in their decision making process. Hence, the impact of legal environment on the business needs to be studied by the students and practitioner of management. One of the most complicated and easily misunderstood issues in the marketing is the legal environment. The marketing manager, while formulating the marketing strategy or taking decision on day-to-day basis needs to have the preliminary knowledge about the legal implications of his decisions. He need not be a legal expert, but he should have enough knowledge about the laws of the land to avoid falling into the legal trap and face the consequences like imprisonment or penalty or deformation for himself and for the organization he is representing.

Institute for Technology and Management, Navi Mumbai, introduced this subject for first time in India in PGDBA/MBA curriculum for the PGDBA/MBA students specializing in marketing management. This is emerging subject and not only the MBA students but also the marketing practitioners should know about the Indian laws influencing marketing decisions. The book is the outcome of the efforts to prepare the teaching materials for our PGDBA students. Currently there is no book available on the subject. The legal aspects of marketing is taught in leading business schools abroad, but in few Indian B-schools the subject titled 'Legal Aspects of Business' is taught covering the Company formation, MRTP Act, Contract Acts, Labour Acts and other Corporate Laws to the MBA students opting for specialization in Finance and HR Management. Hence, exclusively for marketing students, this book is written to bridge the gap. This will be helpful as a reference book to the marketing practitioners also. The book covers the Indian Acts, which have implications on marketing strategy formulation and implementation with regards to 4 Ps of marketing mix i.e product, price, promotion and physical distribution. The book discusses the IPR Acts, TRIPS/WTO provisions, Contractual obligations and rights of seller and buyer (Contract Act, Sales of goods Act, Hire Purchase Act), Unfair, restrictive and anti-competitive practices as laid down in CPA, MRTP and Competition Act, consumer rights and protection laws and some ethical issues in marketing. The Competition Act, 2000, which recently replaced MRTP Act is also discussed in details. The chapters on legislation for pricing, advertising, channel management, logistics and packaging are incorporated in this book.

This book is designed to take the students through all aspects of marketing functions and the related legal issues. It will also help the marketing practitioner to understand the legal implications of there decisions before implementing the same.

Contact

To improve the usefulness of this book, I appreciate your valuable suggestions. You can reach me at email: vinodsople@rediffmail.com.

Dr. V. V. Sople

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I wish to thank numerous people for their contribution without whom this text would not existed.

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I would like to thank Mr. Guabert Pereira, Secretary General Advertising Standards Council of India, for granting the permission to incorporate a few cases on advertising complaints received by ASCI and the decisions given by CCC (Consumer Complaint Council) towards the complaints resolution.

Let me acknowledge the efforts of senior PGDBA students and the research assistant at Institute for Technology and Management, Navi Mumbai, who helped in preparing the cases (based on the court judgments) in the form required at business schools.

I cannot forget my spiritual guru. Shree Dada Maharaj Zurale, who in-fact inspired me to take up this book project. Without his blessings this book would not have been completed within short span of time.

And of course, there are no words for the gratitude and love I feel for my family members, who from time to time encouraged me to complete this book even at the cost of my time to be spent with them.

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Chapter 1



INTRODUCTION—MARKETING AND LAW

– Marketing Decisions Within the Legal Framework

- ◆ General Principles of Law
- ◆ Types and Levels of Law
- ◆ Laws and Marketing
- ◆ Marketing Process
- ◆ Transaction—A Legal Relationship
- ◆ Marketing Mix and Legal Obligations
- ◆ Marketing Strategies and Legal Framework
- ◆ Cases : Business Legislation

The present form of marketing, which is over the period of time emerged as a discipline, is evolution of an age-old exchange process. Today marketing has become a much more complex process than ever with the shifting of power from sellers to buyers, coupled with technological advancement, which has transformed the entire transaction process to take place without any time-place barrier. It has converged world market into a global village leading to wider choices to customers to pickup the products and services from anywhere at any time. In the free market economies of the countries across the world, the governments try to make the marketing exchange process simpler through the policies and legislation. However, to maintain the discipline in business operations, exercise control for healthy growth of industries and protect the customers from unscrupulous marketers, the governments continuously evolves the business legislation. Hence, it becomes necessary for the marketers to formulate the marketing strategies in 4Ps within the four boundaries of the law of the land, justifying the means to the goals attended.

1.1 GENERAL PRINCIPLES OF LAW

For regulating the conduct of human beings and human actions in dealing with each other in the society, the set of rules are required. However, for achieving the uniformity and security in the application of these rules in the administration of justice, there needs an agency to enforce the same. The government is the agency, which gives recognition to the rules and takes the responsibility to enforce it. These rules, which are enforceable, are termed as 'Law.' As defined

by Austin “A law is a rule of conduct imposed and enforced by the Sovereign.” The thinker Salmand defines law as “the body of principles recognized and applied by the State in the administration of justice.” The law regulates relations of individuals with others and with the Government. With the law and its enforcement agency, the welfare of the society and its people is possible. However, enactment of law cannot be done in isolation. The law and the legal system of the nation are inseparable from the country’s history, culture and its customs.

The law is an enforceable set of rules and regulation that governs the conduct of an individual, group of people or an organization in the society in terms of their relationship with each other and the society as a whole. The legal system in the country provides certain rights, protection and freedom to the individuals and group of people or organizations. It specifies the boundaries for conduct and in the event of violation of these boundaries the penalties in terms of fines or imprisonment are imposed on the defaulters. The laws across the nations in the world are commonly having the following broad features:

- Provides direction to the conduct of the individuals and organizations
- Preserves the social order by imposing penalties in the event of violation of the law.
- Evolves a common set of enforceable rule for all sections and segments of the society.
- Provides rights and freedom to individual and organizations in dealing with each other, within the legal boundaries.
- Provides guidelines to individuals and organizations to facilitate the economic, political and social exchange process.

The law is dynamic, which changes over the period of time with social, economic and political changes in the country. There may be differences in different societies regarding nature of law and its implementation because of the differences in the value, beliefs and cultural background of the society. However, it was rightly said by US Supreme Court judge “law embodies the story of nation’s development through many centuries”.

1.2 TYPES AND LEVELS OF LAW

The different countries across the world follow the different types of laws, which can be broadly categories into the following:

- **Common Law.** The legal system is based on the precedence and the past experience to apply the law. The principles in written or in unwritten forms are used by the courts. The principles are interpreted based on the situation. The USA and Anglo-American countries follow this type of system.
- **Civil Law.** It is more comprehensive and codified form of legal system covering every possible contingency. The courts have major role of applying the law. This type of system is followed in European as well Far East countries. India follows Civil Law System.
- **Religious Law.** This is based on the texts, tenets and precedence depicted in religious books. The rules for all aspects of life are covered in the religious codes. Many Islamic countries follow this system.

The Indian laws can be broadly categorized into the following heads:

- | | | |
|------------------------------------|--------------------------|------------------|
| * Business and Corporate | * Banking and Insurance | * Consumer |
| * Criminal | * Environments | * Labour |
| * Tax laws | * Family and Inheritance | * Property |
| * Public utilities | * National security | * Constitutional |
| * National Heritage and Importance | | |
| * Procedural and Administration | | |

In India civil law system, which is a legacy of British Rule is followed. The government enforces these laws through three levels such as Central, State and Local level.

The most of the Indian States, in addition to Central Laws, have their own laws to protect consumer and industry. These laws are dealing with food, manufactured goods, financial sectors, cargo transportation and distribution and affect the firm's marketing mix.

The local laws are enforced through the municipal corporations or the district authority, which controls the activities of industries in the region. These include entry taxes, registration of establishment, issuing licenses, pollution control, social cleanliness and public health and zoning etc.

1.3 LAWS AND MARKETING

The laws and regulations of the land affect the marketing activities many ways. In the society to satisfy the needs, wants and demands of the individuals the business transactions are taking place and which involves activities such as manufacturing, storage, sales, distribution and finance. To regulate these activities in industry, trade and commerce in the State, the set of laws are required. These laws are called as 'Business Laws.' It includes laws relating to sale of goods, business contracts, company formation, unfair and restrictive trade practices, negotiable instruments, manufacturing, promotion and distribution etc. The business laws protect consumers, protect the businesses from each other and simultaneously protect the interest of the society.

Even the free market economies like USA has the regulations to control the domestic and exports sales activities of the marketers in the interest of the consumes, society, industry and the country at large. The country may have laws for restricting the certain class of goods leaving or entering the national boundary. For example in India exporting the live animal species is barred. Similarly, it is legally binding to print statutory warning of 'Smoking is injurious to health' on packages of all the tobacco products leaving the factory. The Indian law absolutely prohibits selling nuclear arms and narcotic drugs in the market. For the imported goods, the countries across the world have passed the antidumping laws and restricted the imports through quota system. The political and economic system in the country is basically responsible for creating the legal environment in the country. The classic example is liberalization of Indian economy in 1991 resulted into closure of 'Licensed Raj' with lot of restrictions on the business activities in the country then. The end of the protectionist policies then resulted into free economy with market orientation as driving force, considering 'consumer as king' and competition as guiding force.

The legislation is enforced to maintain the competitive business environment. The certain restrictions on business are must to serve the following purpose:

- Protect the consumers
- Equal access to markets by all competitors
- Protect the interest of the society.

Protect the Consumers

The companies with mal-intentions use deceptive sales practices such as misrepresenting the product, misleading advertising, deceive in packaging, manufacture and supply unsafe products for human consumption and use, supply the material with diluted specifications as against the one promised etc. To curb such practices, regulations are enforced through the legislation. The business laws protect the consumer from getting cheated or deceived and provide maximum access to the market.

Equal Access to the Market by All Competitors

The free market economy allows the healthy competition amongst the manufacturers or marketers. The competition is the fundamental strength of market driven economy. In the market place some companies are stronger than other and can take more risk and compete in the better way than others. However, the smaller companies because of lack or paucity resources are unable to take more risk and cannot compete with the bigger and stronger players. This results into overpowering of smaller companies by the large firms to dominate the markets. The bigger companies may go in for restrictive trade practices like creating barriers for market entry to smaller firms and further resulting into market domination by them. Hence the business laws need to curb such unfair trade practices and prevent the smaller fish being swallowed by the bigger ones.

Protect the Interest of the Society

The products and process of the manufacturers may cause the damage to the society by way of damage to the ecology, product waste generated, health problems to consumers at large. These damages are associated with cost, which the society has to bear by way of taxation to compensate for the same. The business laws protect the interest of the society by way of laws for environmental protection, prohibiting dealing with certain class of products or preventing to carryout certain activities by the industry.

1.4 MARKETING PROCESS

Today the marketing has assumed much more importance in the business world, as the success or failure of an organization depends on the marketing activities of the company. The organization may produce the world class quality product, but without marketing i.e. taking the right product to right consumer at right place and at right time, the organization will not be able to generate the revenue to run the business. The market is basically an exchange process, which requires two parties i.e. buyer and seller. The marketing plays a critical role in carrying out the exchange process. Marketing identifies the needs of the buyers or customers

and does all those activities to fulfill the needs of the customer by way of creating and supplying of product and services desired by them.

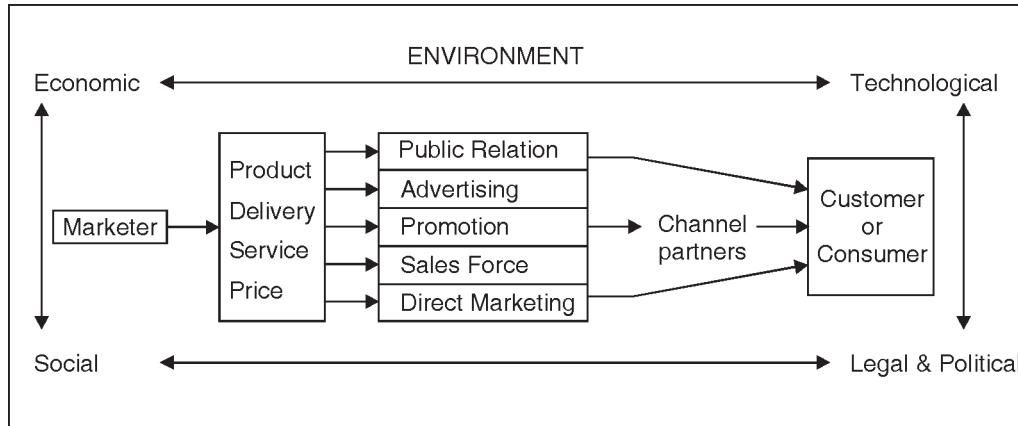


Figure 1.1. Marketing Process and Environment.

The management guru Peter Drucker writes on marketing, “Marketing is distinguishing and unique function of the business. A business is set apart from all other human organizations by the fact that it markets a product or service. Neither the church, nor army, nor school nor state does that. Any organization that fulfills marketing a product or services is a business. Any organization in which marketing is either absent or incidental is not a business and should never be run as if it were one.”

Philip Kotler defines marketing as “human activity directed at satisfying needs and wants through exchange process.” The marketing is associated with both tangible products and intangible products such as hotel, health, travel, logistics, financial, education, entertainment, amenities social services etc.

In today’s context the marketing has gained much more importance not only in profit-making organization, but also in the non-profit making organization. However, the basic objectives of the non-profit organizations remain as social responsibility. In the non-profit organization, when you try to persuade somebody to do something, which is for achieving some social objectives such as birth control to control population, save energy to conserve fuel, donations for relief funds or voluntary blood donation etc. Here the marketing plays a great role in promoting the cause for reaching the message to the target audience.

In the profit making organization, the marketing process involves two entities i.e. seller and buyer. The exchange process takes place between these two entities under certain contractual rights and obligation mutually agreed by both the parties. The contract may be oral or written. The variants in the contract may be quantity, price, place, taxes, after sales service, guarantee and warrantee depending on the nature of the product and the risk involved in the transaction. However, any process has to be carried out under certain environmental condition, which will ultimately decide and control the process parameters to get the desired goals. Similarly, the marketing process is carried out in the environment, which is some total of economic, technological, social, political and legal environment prevailing in the country.

Due to more and more countries across the world are adopting free economy model for the faster economic growth, the governments are evolving new set of legislation to control the businesses, protecting the gullible customer from unscrupulous marketers, and simultaneously ensuring healthy growth of the industry leading to the growth of national economy as a whole. Today the marketer cannot afford to ignore these laws and put the business at stake by attracting the heavy penalties, seizure or even closure of the business by the Government Authorities for violation of laws of the land.

1.5 TRANSACTION—A LEGAL RELATIONSHIP

Every marketing transaction involves two parties i.e. buyer and seller and the transaction between these two parties is a legal relationship. Right from the production to the consumption of product or services there are numerous stages involved, wherein the transfer of ownership title of the product takes place from manufacturer to wholesaler to stockiest to retailer and finally to consumer. The buying and selling process put the buyer and seller in contract, entails consideration of legal rights, obligations and available remedies for breach. In case the product is not performing as specified, there is breach of condition of 'performance guarantee.' In case the seller is not attending the faulty equipment within the warranty period, the supplier is at fault of 'deficiency in services' and can be sued in court of law for not fulfilling his obligation. The legal provisions are available for conflict resolution through arbitration, conciliation or mediation.

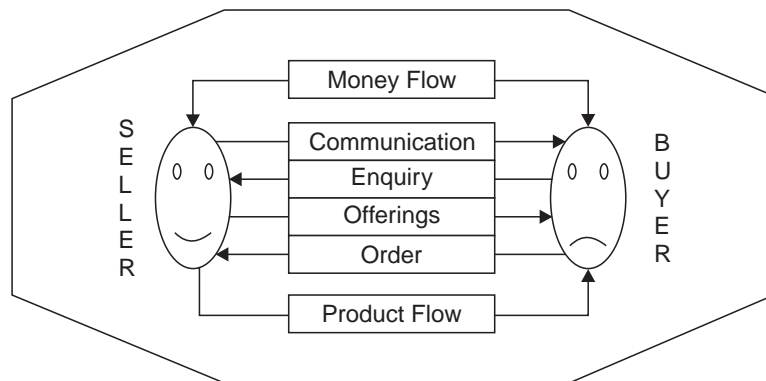


Figure 1.2. Sales Transaction Process.

For the sales transaction to become a valid contract, The Contract Act 1872, lays down the following essential elements.

1. **Proposal and acceptance.** Quotation from seller and order from buyer for the product or services.
2. **Consideration.** It is a promise for promise in return. Buyer realizes product or service from supplier for price. Hence, 'Price' is the consideration here.
3. **Capacity of parties of contract.** The contracting parties should be of age of the majority (18 years) and should have a sound mind (not insane or lunatic).

4. **Free Consent.** Both the buyer and seller have agreed upon on some terms and condition with regard to product quality, features, price, quantity, usage and output and terms **of deliver and payments etc.**
5. **Documented.** Any sales contract should be documented in writing and registered. The enquiry, quotation, order, order acknowledgements in writing and duly signed by buyer and seller are the documents of the sales contract between buyer and seller.
6. **An agreement should not be void.** An agreement should be enforceable by law.

There may be agreement between the buyer and seller on the transaction, but this agreement cannot be called as contract unless it satisfies the above conditions. Hence all agreements are not contract but all contracts are agreement and are enforceable by law.

1.6 MARKETING MIX AND LEGAL OBLIGATIONS

The marketing functions cover all activities right from identifying the needs of the customer upto fulfillment of those needs with the desired products and services. The major marketing functions in the above process are product development, selling, storage, grading, packaging, distribution, pricing, advertising and sales promotion, after sales service, credit financing, and market research etc. For making your marketing offering attractive the marketing manager needs to make a comprehensive marketing plan. This plan is consisting of basic marketing inputs, which is called as marketing mix and comprising of:

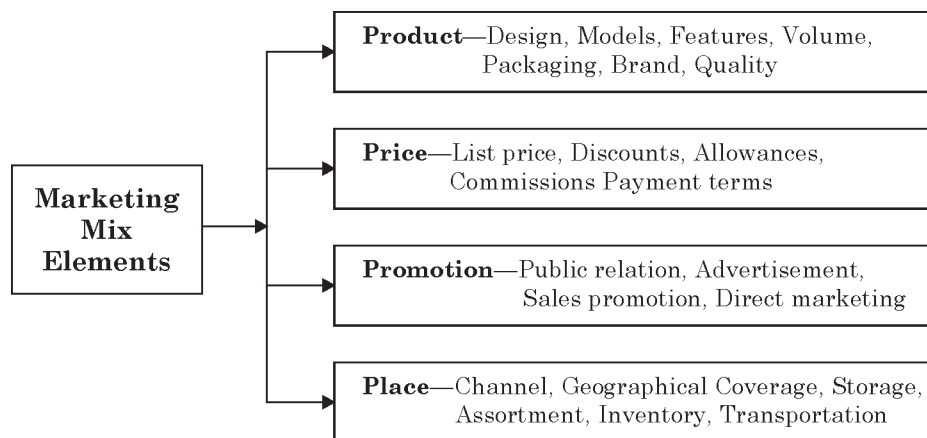


Figure 1.3. Marketing Mix.

The product may be in tangible or intangible form, which needs to satisfy the basic needs of the customer. The product has a price tag attached to it depending on its quality, utility, competitive positioning and affordability to the customer. The product should have the place for access or availability to be picked up by the consumer i.e. time and place utility to the consumer and it is done through the distribution channel and logistics. The communication about the product is done through advertising media or through some promotional programme.

These four elements of marketing constitute a comprehensive offering to the customer to satisfy his needs. The fine-tuning to each of the above elements is given through its sub-mix as indicated in product mix figure. However, it is necessary that all these elements should be in harmony to achieve the desired marketing objectives. The degree of importance to each of these varies with the product, customer, marketing environment and the marketing strategy evolved. The planning of these elements and implementation of the marketing strategies needs to be done strictly within the framework of the legislation. The deceptive sales practices for short-term gains may put the seller in the legal trap. The seller has always to be very careful (not to involve in restrictive or unfair practices) in designing his offerings and implementing the marketing programmes to avoid legal trap and the penalties thereafter. Hence, as a good individual or corporate citizen of the country the seller has to discharge legal obligations during pre, post and during the transaction process. In addition he has to remain competitive not only for growth and survival also.

1.7 MARKETING STRATEGIES AND LEGAL FRAMEWORK

Every business organization is operating in the particular environment. The environmental forces exert the influence on the marketing operation of the organization. The organization has to formulate the strategies to counter these forces to remain competitive not only for growth alone but for the survival also. There are internal forces wherein the marketing decisions are within the control of the management. However, on the external forces the management has no control. These uncontrollable forces impose the restriction or limitation on decisions of the management. These forces are dynamic in nature and hence the organization needs to have environmental surveillance and scanning on the continuous basis. The marketing manager has to formulate strategies on the 4Ps of the marketing mix to maximize the profitability keeping in mind the restrictions or limitations imposed by the environment. To avoid the legal trap, the decisions of the manager should be always within the framework of the legislation and the means adopted by the marketing management to meet the corporate objective of sales and profits should be justified within the limits allowed by the law of the land.

The basic purpose of formulating the marketing strategy is to effectively allocate and co-ordinate marketing resources and activities to achieve the organization's business objective for the given product-market situation it is operating in. This is achieved through well-integrated programme of marketing mix - 4Ps, considering all restrictions and limitations imposed by the prevailing marketing environment. Before formulating the marketing strategy the marketing manager has to identify the threats to avoid risk. Apart from the competition the other major threat may be the government regulations. While achieving the business objectives of profits and customer satisfaction, the marketing manager needs to consider the legal restrictions before implementing the marketing programme based on the corporate strategy to avoid the legal trap.

In the economy like India, there is a government intervention in production and distribution of goods. The intervention is for following purposes:

- ◆ Prevention of concentration of economic power
- ◆ Proper utilization and mobilization of country's scarce resources

- ◆ Protect business form each others
- ◆ Protect the gullible consumers from unscrupulous marketers
- ◆ Achieving balanced economic growth.

In Indian Constitution, The Article 38 of covers 'The Directive Principles of State Policy', indicating that " The State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions and the national life", further Article 39 states, " The State shall, in particular, direct its policy towards securing the following:

- ◆ that the citizen, men, women and women, equally have the right to an adequate means of livelihood;
- ◆ that the ownership and control of the material resources of the community are so distributed as best to sub serve the common goods;
- ◆ that the operations of the economic system do not result in the concentration of wealth and means of production to common detriment."

After the liberalization of Indian economy in 1991, the Government has assumed a new role to assist and not regulate the business through the economic reforms to boost up the trade and commerce activities in the country to achieve the sustained economic growth. However, the Indian Government, simultaneously imposed certain restrictions on business to assure equal access to the markets to all competitors and protect the customers. As a result business related legislation has been focused on the following areas.

- **Consumer Protection.** The major area of legislation is unfair trade practices by the businesses to protect the gullible consumers from the unscrupulous marketers. The legislation will have checks on the false and fake advertisements, deceptive packaging and marketing of unsafe products etc.
- **Promoting Healthy Competition.** In the free market economy, the competition is the fundamental strength for achieving the growth. However, some firms in order to dominate the market may adopt the restrictive trade practices. The legislation is aimed to curb such business practices.
- **Environmental Protection.** The legislation is aimed at holding the business responsible for the social cost with the products they manufacture and the manufacturing processes they adopt.

Hence, the marketing professionals cannot ignore the business regulations in the country. As with any illegal activity, ignorance of law is not adequate defense and marketing managers cannot plead a lack of understanding of the prevailing legislation, if their organization becomes the target of government investigation on unfair and restrictive trade practices on product, price, advertising or distribution fronts. For gaining a competitive edge, the organization may adopt the aggressive marketing strategy, which the marketing manager has to see that it is not infringing the three areas-protecting businesses organizations from each other, protecting the consumer and protecting the social interest.

1.8 CASES: BUSINESS LEGISLATION

Case 1: Consumer Protection

Ban on Gutkha and Pan Masala in Maharashtra. Maharashtra government announced a total ban (effective July 23, 2002) on all Gutkha and Pan-masala products. The order prohibits production, sale and display of all Gutkha related products across the state. The move is aimed at deterring students and youth from falling prey to tobacco additives. Earlier the state had banned sale of Gutkha within 100 meters from schools. However it was not effective and as a result thought of a complete prohibition. The ban has been imposed under section 7(4) of Food and Drug Adulteration (Prevention) Act, 1954. The prohibition includes manufacturing of “Gutkha” and “Pan-masala” (with or without tobacco), its storage, advertisements and sale. The violations will invite stringent penalties.

Upholding the Maharashtra government's notification to ban manufacture and sale of Gutkha and tobacco additives, the Mumbai High Court dismissed a bunch of petitions, challenging the decision, filed by Gutkha manufacturers, who alleged that the Government notification infringed their fundamental right to carry on business activity. They said the notification was unconstitutional and alleged that it was issued at the instance of the cigarette lobby. The government justified the ban on manufacture and sale of Gutkha on the ground that its manufacturers had been repeatedly violating the prevention of food adulteration rules. The government said that prosecutions initiated in the past against Gutkha manufacturers for violation of rules did not have the desired deterrent effect. Food and Drugs Administration stated that the ingredients used to prepare Gutkha were not only far in excess of the prescribed standards but were also detrimental to health and report by a public analyst of a sample of ‘Gutkha’ showed presence of Magnesium Carbonate in violation of rules.

A partial ban on the sale of ‘Gutkha’ and similar products (within 100 meters of educational institutions) had been in existence since February 17, 2000. However, the partial ban was not a success and the government therefore decided to impose a total ban. (Eco Times 08/07/2002)

Case 2: Holding Business for Social Cost

Emission Norms for Motor Vehicles And Auto Fuel. The emission norms for the motor vehicles are specified in Rule 115 of Motor Vehicle Rules 1989. Emission regulation was introduced for petrol passenger cars in 1991 for the first time. For diesel passenger cars, it was introduced in 1992.

However, for different categories of vehicles the norms were first revised in 1990 and subsequently revised in 1992, 1996 and 2000. Euro-I norms have been brought in force w.e.f. April 01, 2000 for all categories of motor vehicles running on petrol or diesel. The Bharat Stage II which is equivalent to Euro II (applicable to vehicles upto 3500 kgs GVW) has been brought into force only in metros. Euro II norms are applicable in Bangalore, Hyderabad and Ahmedabad from 2004 and the entire country from April 1, 2005. Euro-III equivalent emission norms shall be introduced in Delhi, Mumbai, Chennai, Kolkatta, Bangalore, Hyderabad and Ahmedabad from April 1, 2004 and extended to other parts of the country from 2010. This will be binding to Auto manufacturers or their products to be sold in the Indian market.

As regards ‘Auto Fuel Policy’ THE UNION Cabinet approved the recommendations made by the Experts Committee on which entails implementation of Bharat Stage II (Euro-II) vehicle

emission norms in the country by April 1, 2005, a move that would involve an investment of Rs. 17,000 Crores by the oil industry to upgrade their technology to produce fuel conforming to the Euro II norms. (Source : Eco Time 08/01/2002)

Case 3: Protecting Businesses from Each Other's

Domain Name—Legal protection. The businesses are using trade and services marks as their domain names, to attract potential customers to their web sites and increase their market visibility, and ultimately their sales and profits. Domain names are also used in advertising, indicating the presence of a firm on the Internet.

Due to difference in the registration system of trademark and domain names they are increasingly come into conflict with trademarks. Trademarks are registered and administered by governmental authority on either national or regional basis. The domain names are administered by a non-governmental organization without any functional limitation. The domain names have global presence on the Internet. The territorial judiciary system for 'trademarks' cannot stretch for 'domain names' which are administer without any limitation of national boundaries.

Yahoo, Inc vs. Akash Arora, {1999 PTC (19) 201}, was the basis of the first Indian decision on Internet domain names passed by the Delhi High Court on February 19, 1999.

The Indian party used the domain name '**Yahooindia.com**', against which 'Yahoo' filed a suit. The Delhi High court reviewing the case. restricted the Indian party to use the domain name similar to plaintiff's trademark 'Yahoo'. The court also restrained the party to copy any programme under '**Yahoo.com**'.

The Bombay High court in its decision of Rediff Communication Ltd vs. Cyberbooth said that domain is essential to protection as trademark. The internet domain names are of importance to the organization and can be valuable corporate assets. In the above case court restricted Cyberbooth to use '**Radiff.com**' as a domain name as it looks similar to plaintiff's existing domain name '**Rediff.com**' (AIR 2000 Bombay 27).

Case 4: Protecting Social Interest

Pollution is a civil wrong attracting exemplary damages. The Supreme Court held that pollution is a civil wrong committed against the community as a whole. As per Chapter VII of the Water (Prevention and Control of Pollution) Act, 1974, Section 15 of the Environment (Protection) Act, 1986 and Chapter VI of the Air (Prevention and Control of Pollution) Act, 1981, the Court could prosecute the person guilty of contravention of the above provisions, by imprisonment or fine or both. Hence the person or organization guilty of such action has to compensate for the damages to those who have suffered loss in addition to damages or compensation for restoration of environment and ecology. As per the Article 32, court can award damages in public interest litigation and a writ petition.

M/s Span Motel interfered with the natural flow of river water, thereby disturbing the environment and ecology of the area. The Supreme Court directed it to show cause why pollution fine in addition to compensation for restitution of environment and ecology should not be levied on it. M/s Span Motel contented that compensation could only be granted to victims whose fundamental rights were violated, victims of atrocious behaviour of public authorities or victims of an arbitrary action. It also contended that fine is a component of criminal

jurisprudence and the same cannot be utilized in civil proceedings. Further fine could be imposed only if provided by a statute and that too after a fair trial.

As against the above the Supreme Court has held that any disturbance of the basic environment elements namely air, water and soil, would be hazardous to life within the meaning of Article 21 of the Constitution. Any disturbance of these would make the victims of such pollution entitled to damages. The Court directed to M/s Span Motel to pay exemplary damages to the community, which suffered due to pollution.

[Source: 2000(5) SCALE 69]

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Chapter 2



MARKETING LAWS

– To Protect the Consumers, Businesses, and Society

- ♦ Legal System in India
- ♦ Indian Laws in Marketing—Overview

Marketing executives do not have to be legal experts, but they should know the legal implication of their decisions with respect to marketing mix while formulating the marketing strategies. The marketing laws are designed to regulate the deceptive and restrictive trade practices and concentration of economic power, which distort, eliminate or lessen the competition in the free market economy. The objectives of these laws are to protect consumers, companies from each other and the finally interest of the society.

2.1 LEGAL SYSTEM IN INDIA

India has one of the oldest legal systems in the world. India's commitment to law is created in the Constitution, which constituted India into a Sovereign Democratic Republic. It contains a federal system with Parliamentary form of Government in the Union and the States, an independent judiciary, guaranteed Fundamental Rights and Directive Principles of State Policy containing objectives, which though not enforceable in law are fundamental to the governance of the nation.

Source of Law

The source of law in India is the 'Indian Constitution', which, in turn, gives due recognition to statutes, case law and customary law consistent with its obligations. Legislatures of Parliament, State Legislatures and Union Territories enact the laws. There is also a vast body of laws known as subordinate legislation in the form of rules, regulations as well as by-laws made by Central and State Governments and local authorities like Municipal Corporations, Municipalities, Gram Panchayats and other local bodies. This subordinate legislation is made

under the authority conferred or delegated either by Parliament or State or Union Territory Legislature concerned. The decisions of the Supreme Court are binding on all Courts within the territory of India. As India is a land of diversities, local customs and conventions, which are not against statute, morality, etc. are to a limited extent also recognized and taken into account by Courts while administering justice in certain spheres.

Enactment of Laws

The Indian Parliament is competent to make laws on matters indicated in the Union List. State Legislatures are competent to make laws on matters enumerated in the State List. While both the Union and the States have power to legislate on matters enumerated in the Concurrent List, only Parliament has power to make laws on matters not included in the State List or the Concurrent List. In the event of repugnancy, laws made by Parliament shall prevail over law made by State Legislatures, to the extent of the repugnancy. The State law shall be void unless it has received the assent of the President, and in such case, shall prevail in that State.

Applicability of Laws

Laws made by Parliament may extend throughout India and those made by State Legislatures may generally apply only within the territory of the State concerned. Hence, variations are likely to exist from State to State in provisions of law relating to matters falling in the State and Concurrent Lists.

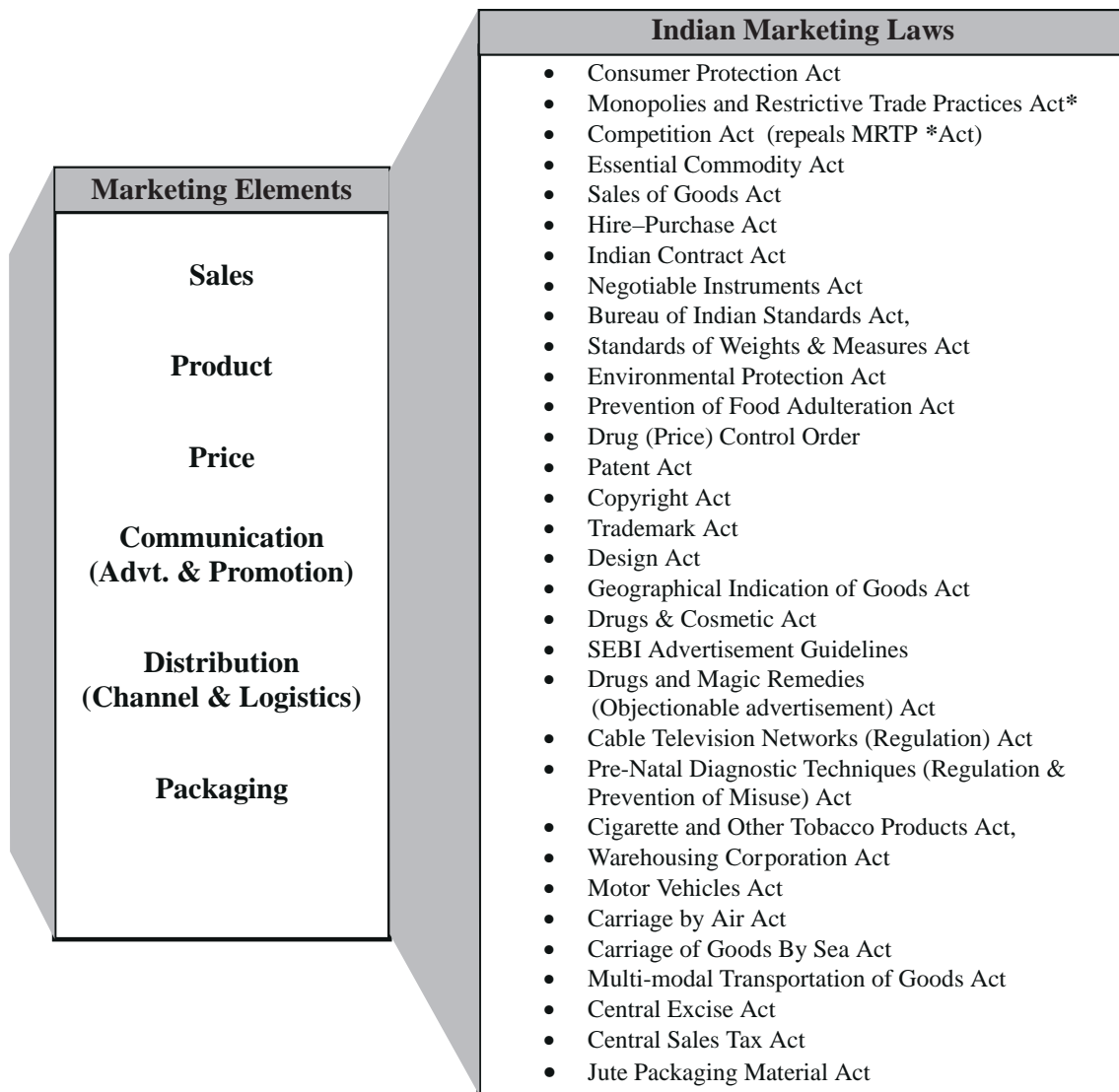
India Judiciary

One of the unique features of the Indian Constitution is that, it provided for a single integrated system of Courts to administer both Union and State laws. At the apex of the entire judicial system, exists the Supreme Court of India below which are the High Courts in each State or group of States. Below the High Courts lies a hierarchy of Subordinate Courts. Panchayat Courts also function in some States under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc. to decide civil and criminal disputes of petty and local nature. Different State laws provide for different kinds of jurisdiction of courts. Each State is divided into judicial districts presided over by a District and Sessions Judge, which is the principal civil court of original jurisdiction and can try all offences including those punishable with death. The Sessions Judge is the highest judicial authority in a district. Below him, there are Courts of civil jurisdiction, known in different States as Munsifs, Sub-Judges, Civil Judges etc. Similarly, the criminal judiciary comprises the Chief Judicial Magistrates and Judicial Magistrates of First and Second Class.

2.2 INDIAN LAWS IN MARKETING-OVERVIEW

The legal environment in the country greatly influences the marketing decisions of business organization. The marketing managers must adjust and organize marketing mix to cope with the laws of the land. The recent ban on marketing of 'GUTKA' in Maharashtra is a classic example of legal power exhibited by the State to protect the public health from bad effect on the health of the consumes. Similarly ban on selling 'Lottery' tickets in state of Madhya Pradesh

shows how business can be influenced overnight through the legislation. In other case the Maharashtra government under Drug and Cosmetics, Act 1940 has made it compulsory to store and display of pharmaceutical products in temperature controlled shop in class A and B towns from January 01, 2003. The existing pharmaceutical shops needs to air condition their establishment till December 31, 2005. The above legislative measures may be for the specific purpose considering the criticality in the wakes of protection to individual and society at large from far reaching effect on the economic condition or may be health of the buyers because of undue indulgence in the activities and unfair practices in the business. In general following Indian laws have the major influence on the marketing activity of the business firms.



Indian laws, which are influencing marketing process are basically enacted to curb the unfair and restrictive practices to:

- to protect consumers
- to protect the business from each other and ensure healthy competitive environment
- to safe guard the interest of the society and nation as whole by way of reduction in wastages, proper utilization of scarce national resources and preservation of environment.

The Acts covers both the general ones affecting all areas of marketing (product, price, place, promotion and packaging) and specific ones to cover one element of marketing mix or the particular industry type.

Consumer Protection Act, 1986

The Consumer Protection Act, 1986 is an important social legislation intended to protect the consumers from exploitation from the business and trading community with bad intentions. Under this act the government has made provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for the matters connected therewith to secure speedy and in-expensive redressal of their grievances. With the enactment of this law, consumers now feel that they are in a position to deal with the business community and corporations against their exploitation.

The broad salient features of Consumer Protection Act are:

- ♦ The Act is exclusively passed for the interest of the consumers.
- ♦ It seeks to promote the rights of the consumers
- ♦ The law is applicable to all states in India except Jammu and Kashmir
- ♦ Goods and services are covered in the law except those notified by the Central Govt.
- ♦ It provides speedy, simple and inexpensive redressal of consumer grievances.
- ♦ It covers private, public and co-operative sector
- ♦ The provisions of Act are compensatory in nature.
- ♦ The Act envisages the establishment of three tier consumer protection councils
- ♦ The goods purchased for business or resale and free services are not covered

In short it protects the consumers from influences of the seller's (marketer/manufacturer) coercive power by way of unfair trade practices to restrict competition.

Monopolies and Restrictive Trade Practices Act, 1969 (Replaced by Competition Act 2002)

It protects consumers and small industrialists and traders against exploitation arising out of the growth of monopolies and consequent misuse of market conditions by resorting to restrictive trade practices by the large business corporations and industry houses with financial muscle and market dominance.

The Central Government body called Monopolies and Restrictive Trade Practices Commission (MRTPC) administered this Act and regulated the growth and actions of large

business houses and ensures that they do not lessen the competition by resorting to restrictive trade practices. In this respect, the Act protects the consumers indirectly.

The Act also defines the unfair trade practices, an area of direct concern for the consumers and any affected consumer or group of consumers can send his/their complaints to the Commission. The act also defines the restrictive trade practices, which are resulting into concentration of power, dominant market position, exploitation of small businesses, distortion of competition and indirectly affecting consumer.

This act prohibits the following unfair trade practice (Section 36A):

- ♦ False representation of the quality, composition, style or model of goods and services.
- ♦ Falsely alleging affiliation and misleading statements about the usefulness of goods and services.
- ♦ Warranties or guarantees given without adequate tests, or expressed in misleading terms, giving false or misleading facts disparaging the goods, services or trade of others.
- ♦ Announcing bargain prices for goods which are either not put on sale or are offered in quantities which are not reasonable with respect to the nature of the trade, offering gifts, prizes or other items with the intention of not providing them as offered.
- ♦ Sale of substandard and hazardous goods under defined conditions.

Section 33(1) of The Act defines the following trade practices as restrictive and any agreement between the seller and purchase stipulating the conditions on sale and purchases needs to be registered with MRTP commission.

- ♦ Restrictions on the sale of goods to certain person or class of persons
- ♦ Restrictions on purchase of goods on the conditions of purchase other type of goods
- ♦ Restricting the purchases of goods on the conditions such as not to deal with goods other than those of seller.
- ♦ Restricting purchasing and selling of goods only at prices stipulated therein
- ♦ Allowing the concession or benefits by way of discounts, rebate, allowances, credit terms in connection with dealing
- ♦ Restrictions on resale prices (lower than stipulated) of the goods or otherwise stated.
- ♦ Restrictions on the quantity, output and the area of disposal of goods.
- ♦ Restriction on employment in manufacture of good
- ♦ Restriction on resale prices with a result of elimination of competition

With a complaint from the aggrieved party (individual or firm) or on its own, regarding the unfair or restrictive trade practices, the commission is empowered to initiate enquiry and impose the penalty or issue 'cease-and-desist' order. The MRTP Act is replaced by Competition Act, 2002.

Competition Act, 2002

It repeals the Monopolies and Restrictive Trade Practices Act, 1969, which has become obsolete in view of developments in the Indian and global markets. It endeavors to shift the

focus from restricting monopolies to promoting fair competition, so that the Indian market is equipped to compete with market world-wide. The object of Competition Act are to promote fair competition in the market, to protect consumers, firms from each others and the interest of the society. The highlights of the CA are as follows:

- The registration of restrictive trade practices agreement as required in MRTP Act, 1969 is dropped
- The anti-competitive practices such as price fixing, output restrictions, bid rigging and market restriction are prohibited
- Regulates the mergers and acquisitions above threshold limits
- Penalties of offences are enhanced upto 10% of the average turnover for last three years
- Deletion of unfair trade practices indicated in MRTP Act 1969 and the pending cases are transferred to Consumer Courts.
- CA emphasizes on competition advocacy.
- Stipulate constitution of 'Competition Commission'
- Competitive abuses in IPR not addressed
- Soft on competitive abuses like hardcore cartel
- Competition Commission not independent as the it has to adhere to policy guidelines from Central Government

Though the overall direction of this new Act is good, certain areas need reconsideration and amendment.

Essential Commodity Act, 1955

This acts empowers the Government to issue orders for regulation, production, storage, transportation and distribution of the essential commodity in the interest of the general public. With the power under this act Government can ensure the availability of essential commodity at **fair prices**, curbing the hoarding, black marketing and profiteering in such commodity by the sections of the trade and middlemen. Government is now armoured with power to meet emergency and difficulties in economy, trade and commerce in the production, storage and distribution of essential commodities.

According to this act the following classes of commodities are categorized as essential commodities:

- Cattle fodder, including oil cakes and other concentrates
- Coal including coke and other derivatives.
- Components, parts and accessories of an automobiles.
- Cotton and woolen textile
- Drugs as defined in Drugs and Cosmetics Act, 1940
- Foodstuff and edible oils
- Iron and steel
- Papers–News prints, paper boards and straw boards

- Petroleum and petroleum products
- Raw cotton and jute

In addition to above the Government is empowered to declare any commodity as essential by order. The order made under this act provide for regulation on the following:

- Production–by licenses and permits
- Distribution–by licenses and permits for storage, transportation and disposal
- Sales–For use and consumption at stipulated fair price in the particular geographical area
- Transactions–Financial and commercial in public interest
- Information–Collection and maintenance of records
- Fees–For issue of licenses and permits
- Search, seizure and confiscation in case of violations of provisions under the Act

Every offence punishable under the act is cognizable and non-bailable. In cognizable offence a police officer may arrest without warrant. The offences against the individuals and organizations are punishable by way of fines and or imprisonment upto seven years. The offences under this act are triable in only in special court constituted for the area in which offence has been committed.

Sales of Goods Act, 1930

Under this act, a transaction of goods from seller to buyer is an act of transfer of 'property in goods' with change of title of ownership, and is a 'contract', which may be absolute or conditional. In a sales contract delivery or immediate payment or goods is not necessary and can be done at the future date. However, it is essential that under the sales contract the ownership of the goods must be immediately transferred from the seller to the buyer.

Under this act the sale contract may be made in writing or by words of mouth in the following way.

- An offer from seller and acceptance by buyer
- Stipulation of delivery terms - immediate or at future date
- Payment terms - in cash or credit
- Meaning of other stipulations and warranties as mutually agreed.

This act covers the rights and duties of the seller and the buyer. The performance of the contract is observed through the delivery of goods by the seller and acceptance by the buyer as per the terms of the contract. In case of breach of contract of sales the remedies available for both buyer and seller are to file suit for damages due to non delivery of goods, non payment or breach of warranty or non-performance.

This Act does not contain much of the protection to the consumers, but find that there is general caution "**CEVEAT EMPTOR**" that means 'let buyer beware'. The buyer must take care of himself in respect of goods he buys. In other words it is buyers duty to select the goods for his use or requirement. If the goods turned to be defective or do not suit his purpose, the buyer cannot hold seller liable for the same.

Hire-Purchase Act, 1972

This Act provides the balanced protection to the interest of the hirer and the owner. The hirer need the goods but does not have money for immediate payment. The producer is in look out for the customer and goods fail to meet their destiny if the goods are not made available to a person or firm that can make use of the same. Hence, the goods are offered on hire-purchase. In this the possession of the goods is delivered by the owner to a hirer on condition that he pays the agreed amount in periodic installment. The ownership of the goods remains with the owner till the last installment of hire price is paid. This act governs the conditions and warranties of hire purchase agreement and limits the hire-purchase charges collected from the hirer by the owner. The hire-purchase acts enumerated the rights and obligations of hirer and the owner. In case of breach of agreement terms, the Act provides remedy such as, termination of contract, seizure of goods, filing a suit or make application for recovery of goods against non-payment of hire in arrears.

Contract Act, 1872

The contract provision includes conditions on communication, acceptance and revocation of proposals, performance of contract, breach of contract indemnity and guarantee on contract, duties of agent and principal. Under this act the status of consumer arises under contract entered into by him. The buyer is a consumer having agreed to buy goods or services. When the seller transfers the goods to buyer under the contract and the goods are defective, unfit or dangerous for use, the liability to compensate to buyer for them rest with seller. The remedy for breach of contract is available to the parties to the contract.

With the principles laid down in the act, the parties may create rights and obligations between themselves (i.e. between manufacturer and whole seller, dealer or customer). It is essential that the contracting parties are competent (not insane and are above age of 18 years) and obligations must be legally enforceable. The act regulates the conduct of the parties to the creation, performance and breach of the promises. The act also deals with particular contract like indemnity, guarantee, bailment and agency which arises out of transactions of trade and merchandising.

Negotiable Instruments Act, 1881

Negotiable Instrument means a written document, which creates right in favour of the person and is freely transferable. The procedure of transfer of ownership right of the instrument is very simple. Anyone by signing the Negotiable Instrument and by delivering the same, can create a right in favour of the person to whom it has been transferred. Negotiable Instruments are need of the hour, as they are necessary for easy and quick transfer of money.

The Negotiable Instrument deals with three kind of instruments, they are:

1. Promissory Note,
2. Bill of Exchange,
3. Cheque Payable either to order or to bearer.

Section 13 of the Negotiable Instrument defines Negotiable Instrument as a promissory note, bill of exchange or cheque payable either to order or to bearer. This act has important bearing on the payment transactions with customer, suppliers and the banks by the business

firm. A cheque drawn by a person or a firm for the discharge of a liability, if it is returned by the bank **for the reason of the insufficiency of the amount** of money standing to the credit of the account is a crime and is punishable as per the provisions of this Act.

Bureau of Indian Standard Act, 1986

It sets standards for products, commodities, materials and processes at national and international level and issues certification to the products that meet certain quality standards. It also enforces standards declared as mandatory by the Act.

Standards of Weights and Measures Act, 1976

This Act provides for uniform weights and measure throughout the country and prescribes that every unit of all weights and measures will be in metric system. The Standards of Weights and Measures (packaged commodities) Rules, 1977 safeguards the consumers against such unfair and deceptive practices in respect of packaged commodities. The penalties for the offences are fines for the first time and the imprisonment alongwith fine for subsequent offences.

Prevention of Food Adulteration Act, 1954

This act is for prevention of adulteration of food items or articles of human consumption and protecting consumer and the booking the defaulters. The Act prohibits the manufacture, sale and distribution of not only adulterated foods but also foods contaminated with toxicants and misbranded foods.

The adulterated foodstuffs cause not only economic loss, but also a great health hazard to the consumer. Hence, one should be careful in buying food articles and be on the alert to detect adulteration. This is all the more necessary because adulterators generally choose an adulterant, which resembles the food articles either in appearance or in one or more of its qualities. As per the act, the food article is called as adulterated under the following conditions:

1. If the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and as it is represented to be.
2. If it contains any other substance or not processed as it should be.
3. If any inferior or cheaper substance has been substituted wholly or in part for the article.
4. If the article had been prepared, packed or kept under unsanitary conditions whereby it has become contaminated or injurious to health;
5. If the article consists of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance or is insect-infested or otherwise unfit for human consumption.
6. If the article is obtained from a diseased animal;
7. If the article contains any poisonous or other ingredient which renders its contents injurious to health;
8. If the container of the article is composed of any poisonous or deleterious substance which renders it contents injurious to health;

9. If any colouring matter other than as prescribed and in amounts not within the prescribed limits of variability is present in the article;
10. If the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;
11. If the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities, which are in excess of the prescribed limits of variability.

The adulterated articles may sometimes prove fatal to the human body. For example a high residue of pesticide in food articles damages nerves and vital organs and causes serious poisoning. Mustard oil is sometimes adulterated with Argemon oil and such adulteration can cause blindness, dropsy, tumor and heart diseases. Some other edible oils like Coconut oil and Badam oil are adulterated with mineral oil, which damages liver and has carcinogenic effects. Adulterated Haldi can cause anemia, epileptic convulsions and blindness. Sweet and aerated waters sometimes contain inedible colors to make them look attractive. Such colors damage the liver and can cause cancer. Similarly, alcoholic drinks are often adulterated with poisonous and unprompted coal tar dyes. Consequences can be dreadful to consumer's health.

The Food Health Authority is appointed at state level, who is the Director of Public Health and Preventive Medicine. He is responsible for the good quality and standards of foods available to the consumers. Under FHA are the Local Health Authority (LHA). There is a Local Health Authority appointed in each city in every state. The food Inspector is appointed by the Central or State Government by notification in official gazette.

The Government of India promulgated a Fruit Products order in 1946. In 1955, the order was revised. The Fruit Products Order (FPO) lays down statutory minimum standards in respect of the quality of various fruits and vegetable products and processing facilities.

Meat products order promulgated, provides means to detect and destroy meat of diseased animals and ensure that the preparation and handling of meat and meat products be conducted in a clean and sanitary manner, prevent the use of harmful substances in meat roods and see that every cut of meat is inspected before sale to ensure its wholesomeness. The order also lays down rules and conditions for procedure to be adopted for the selection of disease-free animals, slaughterhouse practices.

Cold storage order, 1980, promulgated under the Essential commodities Act, 1955, has the objective of ensuring hygienic and proper refrigeration conditions in a cold store, regulating the growth of cold storage industry and rendering technical guidance for a the scientific preservation of food stuffs.

Various committees, including representatives from the government, consumers and industry, formulate the Indian Standards Institution (ISI). Standards are laid for vegetable and fruit products, spices and condiments, animal products and processed foods.

The products are checked for quality by the ISI in their own network of testing laboratories at Delhi, Bombay, Calcutta, Madras, Chandigarh and Patna or in a number of public and private laboratories recognized by them.

Drug (Price) Control Order, 1995

There is statutory price control for bulk drugs and formulation operates in India. Certain drugs (known as scheduled drugs, as they are listed in the First Schedule to Drug Price Control Order) 76 in number and accounting for 50 % of Indian retail sales, are under price control. These may be locally manufactured or imported, are subject to price control under the above act. The non-schedule drugs can be priced freely subject to certain restrictions.

Patent Act, 1970

The Indian Patent Act 1970 repeals the Indian Patent and Designs Act, 1911. The Act confers on the patentee or its authorized agent/licensee the exclusive right for limited period for commercial exploitation of his patent in consideration of the disclosure of its invention.

A patent right is a form of industrial property. The owner can sell the whole or part of his property. These rights could be licensed for commercial purposes. Patent is defined as a statutory grant of right to an inventor in his own invention from which all others are excluded, as long as the grant runs.

The patent rights are granted only to new inventions, which are capable of industrial application. Patent is a statutory right, which accrues to the inventor on registration of his invention with the Patents Office. All inventions having novelty and utility for a manner of new manufacture are entitled to acquire patent. The Controller of Patents grants patent rights to the patentee.

Under the Indian Patent Act, 1970 discovery of the Abstract Scientific theory, discovery of a new property, machinery or apparatus cannot be patented unless it results in a new form of product or employs a new reactant. Section 3 of the Indian Patent Act sets out the test of the inventions, which cannot be patented and this includes inventions, which are prohibited in most parts of the world and inventions which are contrary to law and morality or are injurious to public health. Similarly inventions relating to atomic energy cannot be patented.

Copyright Act, 1957

This Act confers on the owner of the Copyright exclusive rights to multiply copies of his work for commercial exploitation. It also grants negative rights to refrain others from illegally multiplying the copies of his work. The Copyright protection exists in unpublished as well as published works. The work includes literary, dramatics, musical, computer, programming, artistic work, cinematographic film, sound recording etc.

Copyright law also extends protection to works of art intended for quasi-commercial purposes i.e. artistic designs used on Cartons, catalogue lists, drawings, monograms, advertisement drawings, computer software and paintings produced on Christmas cards.

Trademark Act, 1999

Act is to confer protection to the user of the trademark on his goods and to prescribe conditions for acquisition, and legal remedies for enforcement of trade mark rights. It also grants negative rights to refrain others from illegally using the trademark.

Trade Mark Laws are governed by the Indian Trade Mark Act, 1999. The definition of trademark as defined in Indian Trade Mark Act means a registered trademark or mark used

to identify the origin and manufacture of the goods. The trademark includes the use of the design, brand, heading, label, ticket, name, signatures, word, letter or numeral separately or in any combination. To sum up, a trademark performs the following three functions:

- it identifies the product and its origin;
- it guarantees unchanged quality; and
- it advertises the product.

The owner of trademark has no right to the exclusive ownership of the symbol, which constitutes the trademark except for its use and application in connection with some vendible commodity. The property right in the trademark is in use for the goods produced by the manufacturer.

The owner of an unregistered trademark selling his goods in a particular territory, acquires the right of trademark in that territory only. The same trademark can be used by any other person outside the territory without violating the trademark rights vested in the owner.

The Indian Trademark Act, 1999 provides for registration of trade mark with the Registrar of Trade Mark.

The use of hybrid trademarks is permitted in India. This practice has recently been adopted in India. Such foreign trademarks registered in the country of its origin are registered jointly with the Trademark Registry in India along with the trademark of the Indian party. The joint application is made to the Registrar of the Trade Marks for registering of the hybrid trademark in the name of the company, which has been floated for using the trademark.

Registration of a trademark is initially valid for a period of ten years subject to renewal for a further period.

Design Act, 2000

Design refers to the features of shape, configuration, pattern or ornamentation, which can be judged by the eye in finished products. This Act allows the registration of product to protect the visual appearance of manufactured products. A registered design gives you a legally enforceable right to use your product's design to gain a marketing edge. It also prevents others from using the design without your agreement. Design registration is valid for ten years.

Geographical Indication of Goods (Registration and Protection) Act, 1999

Some geographical names have acquired a lot of distinctiveness and importance in the Global commercial market particularly with regard to the goods associated with such geographical names. Most commonly, a geographical indication consists of a name of the place of the origin of the goods such as: agricultural goods, natural goods or manufactured goods or any goods of handicraft or goods of industry including food stuff, generally bears the geographical indications to attracts the attention of the consumers.

To prevent unauthorized persons from misusing geographical indications, the Government of India has passed this Act. Hence the protection under the said Act helps the consumers from deception.

Drugs and Cosmetics Act, 1940

This Act controls manufacture, store and selling of medicines and cosmetics, which are directly affecting the human health. It also restrains manufacturers to make false and misleading claims for the drugs and cosmetics products.

As the medicines and drugs are made for human consumption and are directly affecting the human life, it is necessary that utmost care should be taken in the manufacture, sale prescription and use of medicines. A wrong medicine or a substandard drug can take the human life. Hence for protecting the consumers, the government, realized the importance of medicines, enacted the Drugs and Cosmetics Act, 1940.

As per this act, anyone who wants to manufacture, store or sell medicines should comply with following the following rules:

- Possess prescribed qualification.
- Maintain prescribed level of hygiene in the premises, where medicines are manufactured, stored or sold.
- He should not sell the medicines, which are banned,
- He should sell drugs and medicines that are not banned and are of assumed quality and efficacy as directed by the drugs controller.

The Act is administered through a network of drug inspectors, who have the power of entry, inspection, search and seizure as specified in the Act. It is statutory that for every medicine there should be mention of details of contents, batch number, date of manufacturing, date of expiry on the wrapper as per requirements laid down in the Standards of Weights and Measures (packaged commodities) Rules, 1977.

As per this Act, the notified drugs should be sold under specified conditions and the sellers should maintain the record of the sales. Except for certain drugs, none will be sold without the prescription of a registered medical practitioner. The drugs price control orders fixes the price of the drugs, which are notified in the said order.

The cosmetics, are also manufactured under license granted by the drugs controller with the assurance from the manufacturer to the licensing authority that he will follow rules and regulations stipulated in law ..

For controlling the manufacturing and sales of the spurious drugs the enforcement staff has the powers of carrying out raids on such premises, seize goods and prosecute the seller/manufacturer.

SEBI Advertisement Guidelines, 2000

The Securities and Exchange Board of India (SEBI) has issued comprehensive guidelines to protect the investors from unscrupulous companies making offers in public issues for equity shares and debentures. As per the SEBI (Disclosure and Investors Protection) Guidelines, 2000 on advertisement, it is mandatory for the companies offering the equity and debentures to public to make certain disclosures in their offers.

Drugs and Magic Remedies (objectionable advertisement) Act, 1954

Provides restrictions against advertisement that claims certain deceases.

Cable Television Networks (Regulation) Act, 1995

It puts regulation on cable television network to curb lot of undesirable programs and advertisement, which are becoming available to the viewers.

Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994

This Act specifies role and responsibilities of advertisers and prevents the misuse of media for advertisement in any manner regarding facilities of pre-natal determination of services available at any center, laboratory, clinic or any other place.

Cigarette and Other Tobacco Products (Prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act, 2003

This act bans the advertisement of cigarette and tobacco products. It prohibits sponsorship of sports and cultural events. This Act repeals Cigarette (Regulation of production, supply and distribution) Act 1975. This Act is passed by parliament on April 2003, but due to pending notification still not in force. In this Act the tobacco products are broadly defined to include cigarette, cigar, cheroots, beedis, pipes tobacco, hooka tobacco, chewing tobacco, snuff, pan-masala or any chewing material having tobacco (such as guthka or tooth paste containing tobacco).

Self Regulation of Advertisement Through ASCI

Advertising Standards Council of India is a voluntary organization with the membership of advertisers, advertising agencies and the media, which includes proprietors or publishers of newspapers, periodicals, TV commercial channels, has adopted a Code for Self-Regulation in advertising amongst its members to control the offensive contents in the advertisement.

Warehousing Corporation Act, 1962

This act provides for the incorporation and regulation of corporations for purpose of warehousing of agricultural produce and other commodities and for matters connected with it.

Motor Vehicles Act, 1988

The Motor Vehicle Act, is the principal instrument for regulation of motor vehicular traffic throughout the country which falls under concurrent list of VII Schedule of the Indian Constitution. The major provisions of the act, are maintenance of state registers for driving license and vehicle registration, constitution of road safety councils, control of air and noise pollution, liberalization of permits for owners of transport vehicles on the national routes and fixing age limit for different types of vehicles. It prohibits overloading of the truck to ensure safety during transit. Central Motor Vehicle Rule, 1989 provides for the emission norms.

Carriage by Air Act, 1972

This covers the conventions relating to rights and liabilities of the carrier, consigner, and consignee. According to this law, the air carrier must deliver an air consignment note to consigner for the goods being booked for carriage.

Carriage of Goods By Sea Act, 1925

According to this act for transport of goods by sea, shipping carrier should issue a bill of lading to the consigner for goods being booked for carriage. This act also covers the responsibilities, liabilities and risk involved on the part of consigner, carrier and consignee.

Multi-modal Transportation of Goods Act, 1993

This is an Act to provide for the regulation of multi-modal transportation (Rail, Road, Sea, and Inland Waterways) of goods, from any place in India to a place outside India of a multi-modal transportation contract and matters connected therewith or incidents extends to the whole of India except state of Jammu and Kashmir. The Act provides for registration (with payment of prescribed fees) of multi-modal transportation activities with the proper regulatory authority in the area of operations. The operator has to maintain and issue the prescribed documentation for movement of goods.

Central Excise Act, 1944

This Act empowers the government to collect the levied tax called Excise Duty imposed on the commodities produced and products manufactured as per the goods classification in 1 st and 2 nd Schedule of Section 3 of the Act. As per the regulations excisable goods cannot be removed from manufacturing premises unless the excise duty is paid to the Excise Authority. The holder of the goods has to maintain the proper record of inventory of excisable goods in store. The goods dispatch documents, which are sent along with vehicle carrying the goods should include the excise gate pass, duly endorsed by the excise authority. The transporting the goods without excise gate pass is a crime. **MODVAT**, which stands for modified value added tax was subsequently introduced in 1986 to avoid the double charging of excise duty on the item used in the manufacture of the finished products.

Central Sales Tax Act, 1956

The CST Act, provides for levy on Inter-State sales. The local state sales authority administers CST collection. Even each state has imposed the levy on sales within the state. **VAT**, which stands for value added taxation was introduced in finance bill 2002, (Implementation by April 01, 2003) for assessment and collection of sales tax similar to MODVAT for excise duty.

Jute Packaging Material Act, 1987

This act stipulates the use of jute for the packing of foodgrains, sugar and fertilizers.

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Chapter 3



CONSUMER RIGHTS AND CONSUMER PROTECTION LAW

– Changing the Power Equation

- ♦ Consumer Movement
- ♦ International Scenario
- ♦ Consumer Rights in India
- ♦ Consumer Protection Law
- ♦ Cases: Consumer Protection

Consumer being the member of the society has certain rights. Rights are enjoyed through the control exercised by the law over the acts of others on behalf of the person in whom the right is vested. A right therefore is a legally protected interest. Interests are things, which are to a man's advantage. The unscrupulous marketers for their selfish and vested interest use the unfair practices to deceive or cheat the consumer. Thanks to the growing consumerism and the host of consumer protection laws enacted during last few years. Today there are numerous consumer guidance societies at national and international level to guide the consumer and there are national and international laws to protect the consumers against the unscrupulous marketers. The legislation certainly has the onus to protect the consumer rights against the bad intentions of the marketers. However, the 'Alert Customer' is the best-protected consumer.

3.1. CONSUMER MOVEMENT

Philip Kotler defines 'Consumerism'¹ is an organized movement of citizens and Government to strengthen the rights and power of buyers in relation to sellers. Consumerist groups seek to increase the amount of consumer information, education and protection". Stanton² has rightly

¹Philip Kotler, Marketing Management, Prentice Hall of India, New Delhi, 1992, pp. 136

²Stanton W.J. 'Fundamentals of Marketing', McGraw-Hill, New York, 1994 pp. 626-627

said that 'Consumerism is a protest against and attempt to remedy perceived injustices in the relationship between business and consumers. Many consumers feel that, in a transaction, a business has much more power than the consumer. Consumerism is an expression of this opinion and an effort to obtain a more equal balance of power between buyers and sellers'. Consumerism has three dimensions:

- It fights for guarding the interest of the consumers against the unscrupulous marketers
- It seeks the government involvement in formulating the government policies and enactments to impart justices against the exploitation of gullible consumers by the seller
- It educates the consumer to become alert to get protected against the bad intentions of the marketers.

The first consumer movement in India had started in the early part of the 20th century with the formation of Passenger and Traffic Relief Association and Women Graduates Union in Bombay in 1915. The real expansion of consumerism was seen in sixties (1960s) with setting up of Consumer Guidance Society of India, All India Bank Depositors Association and Surat Consumer Association. During the same time the then president of USA Mr John F. Kennedy taken keen interest in protection and promotion of consumer interest, which resulted into setting up of International Organization of Consumer Union.

In India, 'The Monopolies and Restrictive Trade Practices Act, 1969', was passed by the parliament to curb the restrictive and unfair trade practices (in the business transactions), which was ultimately affecting the gullible consumers. MRTP commission was empowered to take punitive action against the defaulters. This was an inexpensive and quick redressal means available then to protect the gullible consumers against the unfair business practices.

The first consume activism movement started in India around 1970s. The credit goes to Mrinal Gore who through 'dharanas' and 'picketing' attracted the attention of government administration machinery to look into the common man's problem. Such as water shortages, food adulteration, police excess etc. In 1976, Pune Grahalk Panchayat was formed to draw the attention to the problem of rampant adulteration in food products. In 70s through 80s the consumer movement got fillip due to active involvement of Mr. Mohan Dharia and A.K. Antorny as Consumer Affair Ministers. Later in eighties many consumer groups formed mostly in urban areas to create consumer awareness.

In 1986 when Mr. Rajive Gandhi was prime Minister, there was a landmark development of passing 'The Consumer Protection Act, 1986' creating three-tier consumer redressal mechanism at district, state and national level, respectively. In nineties there was lot of judicial activism to help consumers to assert their rights. In 1999, Supreme Court had given a landmark judgment to ban diesel run commercial vehicles in Delhi and relocation of small-scale industries out of residential areas to protect consumers from environmental pollution.

3.2 INTERNATIONAL SCENARIO

In 1985, the United Nations General Assembly adopted, by consensus, the **United Nations Guidelines for Consumer Protection** in its resolution 39/85. The Guidelines constitute a

comprehensive policy framework outlining what governments need to do to promote consumer protection in the following eight areas: basic needs, safety, information, choice, representation, redressal, consumer education and healthy environment.

The Guidelines are particularly designed for governments of developing and newly independent countries to use in structuring and strengthening consumer protection policies and legislation. The Guidelines were adopted “recognizing that consumers often face imbalances in economic terms, education levels, and bargaining power, and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the importance of promoting just, equitable, and sustainable economic and social development.” In this respect, consumer protection was to address not only issues of product safety and economic efficiency, but also to promote social justice and economic development. The consumer protection movement, which began in Europe and North America in the 1960s, reached the international stage in the 1970s when the Economic and Social Council (ECOSOC) requested the Secretary-General to formulate a “survey of national institutions and legislation in the area of consumer protection” which was later followed by a comprehensive report containing proposals for consumer policy and legislation to be considered by Member States. By the early 1980s, it was apparent that an international policy framework was needed to provide general guidance and specific objectives, addressing the particular needs of developing countries. In 1983, draft guidelines for consumer protection were submitted to ECOSOC. In 1985, following extensive discussions and negotiations among various Governments on the objectives and the guidelines were adopted by consensus. Since 1985, increased attention has been given to linkages between environmental concerns and economic and social development, involving discussions in new areas such as that of sustainable consumption. ECOSOC later requested, in resolution 1997/53, that the Secretary-General continues efforts to implement the Guidelines for Consumer Protection.

Consumers International (CI) has played an integral role in the preparatory work for the extension of the UN Guidelines for Consumer Protection. The text was prepared by Consumer International on consumer protection on the basis of extensive consultations among its members in many countries. The establishment of standards and guidelines to protect consumers is not new to the United Nations system. The Commission on Transnational Corporations, established in 1974, prepared a draft code of conduct for multinational corporations, although no such code was adopted. WHO and FAO prepared the “Codex Alimentarius” Commission to develop guidelines in the areas of food safety and standards, including the formulation of international standards and codes of practice on a wide range of food commodities, the encouragement to consumers to participate in decision-making on all matters related to food quality and safety, labelling and advertising, and the integration of food safety into health education programmes. The Economic and Social Council has adopted a number of resolutions, which mandate the United Nations to promote the implementation of the Guidelines for Consumer Protection.

During the last decade, there has been increased awareness amongst consumers that their purchasing choices make an impact on the environment. Through various media campaigns sponsored by governments and NGOs, consumers are urged to consider not only the quality of goods, but also the conditions under which goods are made, and to distinguish needs from desires. The inclusion of sustainable consumption objectives in the Guidelines for Consumer

Protection would reinforce recognition of the crucial role that consumers can play in protecting the global environment.

However, the United Nations Guidelines for Consumer Protection remain relevant for all countries. In countries where governmental interest in consumer protection is relatively recent, the Guidelines define essential issues to be dealt with, such as in the areas of health and safety, access to goods and services, and measures for redress. ECOSOC in resolution 1995/52, recognized: "that the need for assistance in the area of consumer protection, particularly in developing countries and countries with economies in transition, remains great."

3.3 COSUMER RIGHTS IN INDIA

Every citizen in the country becomes a consumer in one way or the other while purchasing and using various goods and services. A consumer is anyone who buys or agrees to buy any goods or services for a price, which has been paid or promised to be paid under any system of deferred payment. A consumer also includes any user of such goods other than the person who actually buys goods and such use is made with the approval of the purchaser. However, a person is not a consumer if he purchases goods for commercial or resale purposes. There are four basic consumer rights as the consumer consumes the products and services as a part of the social process and consequence and these rights are:

The right to be protected. To be protected against products, production processes and services which are hazardous to health or life.

The right to be informed. To be given the facts needed to make choice, and to be protected against dishonest or misleading advertising and labelling.

The right to choose. To be able to select from a range of products and services offered at competitive prices with an assurance of satisfactory quality.

The right to be heard. To have consumer interests represented in the making and execution of government policy, and in the development of products and services.

Over the years, Consumers International, by consensus among its members, has further expanded these rights to eight and they are:

The right to redress. To receive a fair settlement of just claims, including compensation for mis-representation, shoddy goods or unsatisfactory services.

The right to consumer education. To acquire knowledge and skills needed for choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.

The right to a healthy environment. To live and work in an environment which is non-threatening to the well being of present and future generations.

The right to satisfaction of basic needs. To have access to basic, essential goods and services such as food, clothing, shelter, health care, education and sanitation.

This expansion from four to eight rights indicates the evolution of consumer advocacy from "value for money" to "value for people." This vision has since been broadened to encompass "social and economic justice for all consumers all over the world." Achieving this vision by

strengthening civil society through empowerment of consumers as citizens and activists was the central theme of CI's 15th World Congress, November, 1997.

US consumer activist Rhoda Karparkin asserting the consumer rights says: "No Right to Deceive. This means the producers do not have the right to harm people, nor to damage the environment. As citizens, we do not have the right to cheat or rob one another and neither do manufacturers. However, a claim for rights also brings with it a parallel commitment to assume certain responsibilities. Consumption is now seen as a social process with social consequences."

In light of the consumer rights to get proper justices, on the part of the consumer there are few responsibilities to protect him and society at large from the unscrupulous marketers. These are:

Critical awareness. The consumer should be more alert and questioning about the price and quality of goods and services we use.

Action. The consumer should assert and act to ensure that he gets a fair deal. As long as one remains passive consumers, he will continue to be exploited.

Social concern. The consumer should be aware of the impact of their consumption on other citizens, especially disadvantaged or powerless groups whether in the local, national or international community.

Environmental awareness. The consumer should understand the environmental consequences of his consumption. Consumers should recognize individual and social responsibility to conserve natural resources and protect the earth for future generations.

Solidarity. The consumer should promote and protect his and other consumers' interests. The rights of the consumers can be further categorized into six areas, which are of critical concern to him.

The consumer rights can also be categorized as following:

- ♦ Fundamental Rights
- ♦ Constitutional rights
- ♦ Investors Rights
- ♦ Medical Rights
- ♦ Legal Rights

Fundamental Rights

As a citizen of India, consumers are bestowed with six "Fundamental Rights" by our constitution, which are aimed at protecting your primary interests in the country.

Exhibit 3.1: The Six Fundamental Rights given by Indian Constitution

Right to Equality	Equality before law. Equal importance to all citizens immaterial of religion, race, caste, sex or place of birth Equality of opportunity in matters of public employment.
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Right to Freedom	Freedom of speech and expression. Assemble peaceably and without arms. Form associations or unions. Move freely throughout the territory of India. Reside and settle in any part of the territory of India. Practice any profession or occupation, trade or business.
Right Against Exploitation	Forced labour. Employment of children below 14 years in factories, etc.
Right to Freedom of Religion	Freedom of conscience and the right to freely profess, practice and propagate any religion. Freedom to manage religious affairs such as establishment and maintenance of institutes for religious and charitable purposes, owning and acquiring movable and immovable property for religious purposes, and managing own affairs in matters of religion. Freedom as to payment of taxes for promotion of any particular religion. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.
Cultural and Educational Right	Conserve the distinct language, script or culture of any section of citizens residing in any part of the territory of India. Protection of interests of minorities including their right to establish and administer educational institutions.
Right to Constitutional Remedies	This includes the rights to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by the constitution to citizens.

Apart from these fundamental rights, **the constitution also offers various other rights such as**, Constitutional Rights not having the status of fundamental rights such as:

- ◆ Statutory rights
- ◆ Rights flowing from subordinate legislation
- ◆ Rights based on case laws
- ◆ Customary rights
- ◆ Contractual rights

Investors Rights

The various government and private organizations all over the world have been working to protect consumers from frauds and exploitations of investment brokers and other middlemen, apart from the stock issuing companies. A few details about various rights and protection at the national and international level, as an investor are given below.

At the International Level, A Bill passed by a consortium of various financial monitoring bodies and consumer protection associations, under the name “Investors Bill of Rights”, which protects the interests as investor.

In India, Finance Ministry, and Securities and Exchange Board of India have framed a following three-tier qualifying check process for issuing companies to protect investors:

Stage 1. Eligibility Norms for Companies Issuing Securities or Shares

Stage 2. Pre Issue Obligations of Companies Issuing Securities or Shares

Stage 3. Post Issue Obligations of Companies Issuing Securities or Shares

The Indian consumers (investors) have enough rights and protection in India and even Internationally also.

The “**Investor’s Bill of Rights**” framed by various International finance monitoring organizations (Both government and Private Bodies) has granted the following rights to investor, in the form of “Liabilities of the Issuers”.

- ♦ Honesty in Advertising
- ♦ Full and Accurate Information
- ♦ Disclosure of Risks
- ♦ Explanation of Obligations and Costs
- ♦ Time to Consider
- ♦ Responsible Advice
- ♦ Best Effort Management
- ♦ Complete and Truthful Accounting
- ♦ Access to Your Funds
- ♦ Recourse, If Necessary

In many important ways, an investor is not simply a consumer but a party to a legal contract. Both the offerer and purchaser of an investment have rights and responsibilities. This “Bill of Rights” is designed to assist the investor in making an informed decision before committing the funds.

Shareholders of a company as defined by the law, are the owners of the company and as such they have certain rights and responsibilities. The companies cannot be managed by shareholder referendum and the shareholders cannot take responsibility for the management of corporate affairs. The shareholders have to delegate many of their responsibilities as owners of the company to the directors who then become responsible for corporate strategy and operations of the company. The shareholder’s rights as a consumer, include the five basic rights such as,

- ♦ Right to transfer and registration of shares,
- ♦ Obtaining relevant information on the company on a timely and regular basis,
- ♦ Participating and voting in shareholder meetings,
- ♦ Electing members of the board, and
- ♦ Sharing in the residual profits of the corporation.

These rights have been made mandatory by the following recommendations of SEBI:

- “The shareholders have a right to participate in, and be sufficiently informed on the decisions concerning fundamental corporate changes. They should not only be provided

information as under the Companies Act, but also in respect of other decisions relating to material changes such as takeovers, sale of assets or divisions of the company and changes in capital structure which lead to the equity ownership.

- The information like quarterly results, presentation made by companies to analysts may be put on company's website or may be sent in such a form so as to enable the stock exchange on which the company is listed to put in on its own web-site.
- The half yearly declaration of financial performance including summary of the significant events in the last six months, should be sent to each household of shareholders.
- A company must have appropriate systems in place, which will enable the shareholders to participate effectively and vote in the shareholders' meetings. The company should also keep the shareholders informed of the rules and voting procedures, which govern the general shareholder meetings.
- The annual general meetings of the company should not be deliberately held at venues or the timing should not be such, which makes it difficult for most of the shareholders to attend. The company must also ensure that it is not inconvenient or expensive for shareholders to cast their vote.
- Currently, although the formality of holding the general meeting is gone through, in actual practice only a small fraction of shareholders of that company do or can really participate therein. This virtually makes the concept of corporate democracy illusory. It is imperative that this situation, which has lasted too long, needs an early correction. In this context, for shareholders who are unable to attend the meetings, there should be a requirement, which will enable them to vote by postal ballot for key decisions.
- A board committee under the chairmanship of a non-executive director should be formed to specifically look into the redressing of shareholder complaints like transfer of shares, non-receipt of balance sheet, non-receipt of declared dividends etc. The formation of such a committee will help focus the attention of the company on shareholders' grievances and sensitize the management to redressal of their grievances.
- To expedite the process of share transfers, the board of the company should delegate the power of share transfer to an officer, or a committee or to the registrar and share transfer agents. The delegated authority should attend to share transfer formalities at least once in a fortnight.
- In case of the appointment of a new director or re-appointment of a director, the shareholders must be provided with information such as, a brief resume of the director, nature of his expertise in specific functional areas, and names of companies in which the person also holds the directorship and the membership of Committees of the board."

As per SEBI guidelines Shareholders' Responsibilities include a few duties on their part such as,

- "The shareholders should use the forum of general body meetings for ensuring that the company is being properly stewarded for maximizing the interests of the

shareholders, and through their effective participation, shareholders should maintain the decorum during the General Body Meetings.

- The shareholders must show a greater degree of interest and involvement in the appointment of the directors and the auditors. They should demand the complete information about the directors and auditors before approving their appointment, thereby ensuring the effective functionality of corporate and financial operations of the company.
- Institutional shareholders who own large stakes in the companies and have the power of influencing corporate governance decisions, should utilize their voting power for company's good by taking active interest in composition of the Board of Directors, being vigilant, maintaining regular and systematic contact at senior level for exchange of views on management strategy and performance, ensuring that voting intentions are translated into practice, and evaluating the corporate governance performance of the company."

Medical Rights

The practicing medicine is a noble profession and doctor is regarded as a very respectable citizen. The Indian patients have unquestioning trust in their doctors. However, in some cases, medical negligence has resulted in severe harm physical, mental and financial to the patient. In addition, unqualified practitioners have brought suffering to gullible patients. Doctors have been liable to prosecution in civil court, but few malpractice victims sue the doctors for compensation, through time consuming and costly litigation process. However, in, 1995 the Supreme Court declared the medical profession as a "service" under the Consumer Protection Act, 1986. The patients has following rights to know as a consumer.

- Right to be told all the facts about your illness; to have your medical records explained to you; and to be made aware of risks and side effects, if any, of the treatment prescribed for you. Every patient has right to ask question to your doctor about any of these aspects.
- Right to be handled with consideration and due regard for being modest during medical examination.
- Right to know doctor's qualifications. If you cannot evaluate them yourself, do not hesitate to ask someone who can.
- Right to complete confidentiality regarding the illness.
- Right to get a second opinion from any specialist in case of any doubts about the treatment prescribed and especially an operation suggested.
- Right to be told in advance what an operation is for and the possible risks involved. If this is not possible because of the patient being unconscious or for some other reasons, the nearest relatives must be told before they consent to the operation.
- Right to be informed in advance and to make own choice of hospital of nursing home, in consultation with the doctor, in case of discharged or removal to other hospital.
- Right to get case papers upon request."

Legal Rights

The Legal Services Authority Act, 1987 permits the government to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice which is not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

As per 'The Advocate Act 1961', the advocate is not above the law and is also controlled by the code of ethics formulated by the Bar Council of India/State Bar Councils. The Bar Council of India under Section 36 of the Advocates Act has the powers to initiate disciplinary proceedings against an advocate on receipt of a complaint or otherwise, if it has reason to believe that any advocate on its roll has been guilty of professional or other misconduct.

According to the Consumer protection act, Service by an advocate to his client falls within the definition of the said expression given in Section 2 (1) (o) of the Act, unless it is free of charge or under a contract of personal service. Breach of any of the obligations, which the advocate has undertaken to render to, for or on behalf of his client, may amount to deficiency in service. The disciplinary proceedings can be initiated against an advocate for professional or other misconduct of the following types:

- ♦ Professional and other misconduct: i.e., any conduct which in any way renders a man unfit for the exercise of his profession, or is likely to tamper or embarrass the administration of justice by any Court, such as putting indecent questions to the victim in a trial for rape.
- ♦ Duty towards client: i.e., where an advocate fails in discharging his duty towards his client, for e.g. accepting a brief in criminal case and not attending trial.
- ♦ Misconduct in relation to fees: such as agreement between an advocate and client that he will receive his fees only as a share from the subject matter of the case, even when the advocate demands fees to be paid in such manner only if the case is won, as this would amount to speculating on litigation.
- ♦ Misappropriation of client's money: such as sale of client's shares in personal capacity and appropriating the proceeds towards fees, retaining client's money and not returning it for a long time, treating such money as loan, etc.
- ♦ Changing sides: i.e. where an advocate is retained exclusively by a client and he accepts a brief against such client.
- ♦ Negligence: such as giving improper legal advice accompanied by moral delinquency not safeguarding the client's interests.
- ♦ Contempt of Court: such as, scandalizing the Court, creating disturbance in the work of the Court, making allegations upon fairness or impartiality of the judge.
- ♦ Criminal offences: i.e. where such conviction shows such advocate to be unfit to be a pleader.
- ♦ False statement: such as filing a false affidavit, i.e., a document containing certain statements, which are sworn before the Court as being true.
- ♦ Other cases of misconduct: such as snatching of briefs, communal remarks, perjury, advertising oneself directly or indirectly, etc.

Under Section 35 of the Act, the State Bar Council is empowered to initiate proceedings against an advocate for misconduct, either on a complaint or on its own and if proved Bar Council can take action such as suspension of practice for a period, or in grave cases striking the name of such advocates of the roll.

The Act does not provide for withdrawal of complaint. A complaint once filed cannot be withdrawn and the process of inquiry once set in motion cannot be stopped.

Article 39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system, which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society.

3.4 CONSUMER PROTECTION LAW

A consumer is anyone and everyone, who makes a purchase. He is the person, who buys (goods) hire or avail services for a consideration (price). He uses the goods with the approval of person who has bought the goods for the consideration. He is beneficiary of services He may be a child buying a chocolate, an adult purchasing a shirt or an elderly person buying a passenger car or a lady buying the vegetables for her family. The products purchased cover both tangible products (like daily consumption items, consumer durable or complex technical products) or services which are intangible such as transportation, insurance, banking, health care, hospitality etc.

With most of the consumers becoming increasingly aware of their rights and also their civic responsibilities, protecting the consumer's welfare has been one of the paramount concerns of the Government in the post-Independence period. Policies have been designed and legislation enacted to protect the interests of consumers and grant them the rights of choice, safety, information and redressal. A separate Department of Consumer Affairs has been created at the Centre to exclusively focus on protecting the rights of consumers and promotion of standards in goods and services.

The consumer protection program is on the priority list of the Government agenda to protect the gullible consumer from the unfair, deceptive and restrictive trade practices with bad intentions adopted of the business and trading community in the country. Department of consumer affairs in the Ministry of Food and Consumer Affairs has been made responsible to deal with the subject. Since enactment of the law the Department has initiated a number of measures indicated below to promote a strong and broad based consumer movement in the country. In this case, one of the most important milestones in the area of consumer protection in the country has been the enactment of the **Consumer Protection Act, 1986**. This Act was very much required since the well-organized sectors of manufacturers, traders and service providers with the knowledge of market and manipulative skills continue exploiting the consumers, despite the existence of various laws protecting their interests. In India, we have the Indian Contract Act, the Sale of Goods Act, the Dangerous Drugs Act, the Agricultural

Produce (Grading and Marketing) Act, the Indian Standards Institution (Certification Marks) Act, the Prevention of Food Adulteration Act, the Standards of Weights and Measures Act, the Trade and Merchandise Marks Act, Indian Penal Code etc, which to some extent protect consumer interests. However, these laws required the consumer to initiate action by way of a civil suit, which involves lengthy legal process proving, to be too expensive and time consuming for lay consumers. Therefore, the need for a more simpler and quicker access to redressal to consumer grievances was felt and accordingly, it led to the legislation of the Consumer Protection Act, 1986.

It is one of the most progressive and comprehensive pieces of legislation and provides for separate three-tier quasi-judicial consumer dispute redressal machinery at the national, State and District levels. Its National Consumer Policy statement takes into account, inter alia, the following two rights of the consumers:

- ◆ Basic needs and
- ◆ Healthy environment.

The basic needs includes goods and services such as adequate food, clothing, health care, drinking water and sanitation, shelter, education, energy and transportation. A healthy environment is the right to a physical environment to maintain and enhances the quality of life. It includes protection against environmental damage and acknowledges the need to protect and improve the environment for future generations as well. The important objectives of the National Consumer Policy is to make it mandatory that consumer impact assessment is required in every area of governance where consumer interests are affected. As against the existing laws, which are punitive or preventive in nature, there is a need of Act, which is compensatory in nature. The Act is intended to provide simple, speedy and inexpensive redressal to the consumers' grievances and relief of a specific nature and award of compensation wherever appropriate to the consumer. It applies to all goods and services and it covers private public and cooperative sectors.

Objects of the Consumer Protection Act, 1986

The preamble to the Act states that the Act is legislated to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith. The basic rights of consumers as per the Consumer Protection Act (CPA) are:

- the right to be protected against marketing of goods and services which are hazardous to life and property
- the right to be informed about the quality, quantity, potency, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices
- the right to be assured, wherever possible, access to variety of goods and services at competitive prices
- the right to be heard and be assured that consumers' interests will receive due consideration at appropriate forums
- the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers

- the right to consumer education

The CPA extends to the whole of India except the State of Jammu and Kashmir and applies to all goods and services unless otherwise notified by the Central Government.

The Extension and Coverage of CPA

- The Act applies to all goods and services unless specifically exempted by the Central Government.
- It covers all the sectors whether private, public or cooperative.
- The provisions of the Act are compensatory in nature.
- The provisions of this Act are in addition to and not in derogation of the provisions of any other law for the time being in force.
- The Act envisages establishment of Consumer Protection Councils at the Central and State levels, whose main objects will be to promote and protect the rights of the consumers.

Meaning of Goods under CPA

The provisions of this Act cover 'Products' as well as 'Services'. The products are those, which are manufactured or produced and sold to consumers through wholesalers and retailers. The services are of the nature of transport, telephones, electricity, hospitality, entertainment, constructions, banking, insurance, medical treatment etc. etc. The services are, by and large; include those provided by professionals such as Doctors, Engineers, Architects, and Lawyers etc.

Persons held as consumers	Persons not held as consumers
Bank customer Subscriber of telephone Consumer of electricity Passenger traveling in train/bus Patient receiving medical treatment Depository of money Beneficiary of services Person allotted plots/houses by State Housing Board Insurance policy holder Nominee of a person insured under LIC	Patient receiving treatment in Government Hospital Student hiring services of a private tutor Person obtained goods for resale Purchase of shares/debenture for resale Person presenting documents for registration Government servant-availing of Govt. Services Tenant
What are held as services ? Hospital and Nursing Services charging fees Transport agencies (Passengers and goods) Entertainment and amusement Services Supply of foods on board of Air Craft Banking and financial institution Publication and news agencies Electric supplying companies Hotels, lodging and boarding Post and telegraph services Housing construction Insurance services	

Redressal Machinery

A three-tier quasi-judicial machinery, popularly known as consumer courts, at the National, State and District levels has been set up to render free redressal to the consumers' disputes against any defective goods and deficient services, which include unfair and restrictive trade practices. The Act stipulates the establishment of Central Consumer Protection Council and the State Consumer Protection Councils for the purpose of spreading consumer awareness. Central Council is headed by Minister, in-charge of the Consumer Affairs in the Central Government and in the State it is the Minister in-charge of the Consumer Affairs in the State Government who heads State Council. In addition to above agencies, to provide cheap, speedy and simple redressal to consumer disputes, quasi-judicial machinery is set up at each District, State and National levels called District Forums, State Consumer Disputes Redressal Commission and National Consumer Disputes Redressal Commission respectively. At present, there are 569 District Forums (active only 539), 33 State Commissions with apex body as a National Consumer Disputes Redressal Commission (NCDRC) having its office at Janpath Bhawan, A Wing, 5th Floor, Janpath, New Delhi.

National Commission was constituted in the year, 1988 and is headed by a sitting or retired Judge of the Supreme Court of India. National Commission is empowered to issue instructions regarding,

- ♦ adoption of uniform procedure in the hearing of the matters;
- ♦ prior service of copies of documents produced by one party to the opposite parties;
- ♦ speedy grant of copies of documents; and
- ♦ generally over-seeing the functioning of the State Commissions or the District Forums to ensure that the objects and purposes of the Act are best served without in any way interfering with their quasi-judicial freedom.

State Commissions are headed by a person who is or has been a Judge of High Court. And the District Forums are headed by the person who is or has been or is eligible to be appointed as a District Judge.

The Consumer Protection Act is an alternative and cheapest remedy already available to the aggrieved persons/consumers by way of civil suit. In the complaint/appeal/petition submitted under the Act, a consumer is not required to pay any court fees or even process fee.

Proceedings are summary in nature and endeavour is made to grant relief to the parties in the quickest possible time keeping in mind the spirit of the Act, which provides for disposal of the cases within possible time schedule prescribed under the Act. If a consumer is not satisfied by the decision of the District Forum, he can challenge the same before the State Commission and against the order of the State Commission a consumer can appeal to the National Commission.

In order to attain the objects of the Consumer Protection Act, the National Commission has also been conferred with the powers of administrative control over all the State Commissions by calling for periodical returns regarding the institution, disposal and pendency of cases.

Powers of the Redressal Agencies

The District Forum, State Commission and the National Commission are vested with the powers of a civil court under the Code of Civil Procedure while trying a suit in respect of the following matters:

- ☐ the summoning and enforcing attendance of any defendant or witness examining the witness on oath;
- ☐ the discovery and production of any document or other material producible as evidence;
- ☐ the reception of evidence on affidavits;
- ☐ the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
- ☐ issuing of any commission for the examination of any witness; and
- ☐ any other matter, which may be prescribed.

Under the Consumer Protection Rules, 1987, the District Forum, State Commission and the National Commission have the following powers :

- ◆ to produce before, and allow to be examined by an officer of any authorities, such books of accounts, documents or commodities as may be required and to keep such book, documents etc. under its custody for the purposes of the Act;
- ◆ to furnish such information which may be required for the purposes to any officer so specified.
- ◆ to pass written orders authorizing any officer to exercise power of entry and search of any premises where these books, papers, commodities, or documents are kept if there is any ground to believe that these may be destroyed, mutilated, altered, falsified or secreted. Such authorized officer may also seize books, papers, documents or commodities if they are required for the purposes of the Act, provided the seizure is communicated to the District Forum / State Commission / National commission within 72 hours. On examination of such documents or commodities, the agency concerned may order the retention thereof or may return it to the party concerned.
- ◆ to issue remedial orders to the opposite party.
- ◆ to dismiss frivolous and vexatious complaints and to order the complainant to make payment of costs, not exceeding Rs. 10,000 to the opposite party.

Complaint Filing Procedure

Under the Act, a complaint means any allegation in writing made by a complainant in case of defective or hazardous goods, deficiencies in services, and charging of excess price by the trader other than the fixed price. If the cost of the goods or services and compensation asked for is up to rupees twenty lakh then the complaint can be filed in the District Forum where the cause of action has arisen or where the opposite party resides. It can also be filed at a place where the branch office of the opposite party is located. If the cost of goods or services and compensation asked for is more than twenty lakh rupees but up to one crore rupees, the

complaint can be filed before the State Commission. If the cost of goods or services and compensation asked for exceeds rupees one crore, the complaint can be filed before the National Commission at New Delhi. It is not obligatory to engage a lawyer. Even a consumer organization can be authorized to represent the case. The complaint can be sent by post to the appropriate Forum/Commission.

Procedures for filing complaints are simple. There is no fee for filing a complaint before the District Forum, the State Commission or the National Commission. (A stamp paper is also not required). Three to five copies of the complaint on plain paper are required to be submitted by the complainant or his authorized agent in person or could be sent by post to the appropriate Forum / Commission.

A complaint should contain the following information:

- ◆ The name, description and the address of the complainant.
- ◆ The name, description and address of the opposite party or parties, as the case may be, as far as they can be ascertained;
- ◆ The facts relating to complaint and when and where it arose;
- ◆ Documents, if any, in support of the allegations contained in the complaint.
- ◆ The relief, which the complainant is seeking.

The complainant or his authorized agent should sign the complaint. The complaint is to be filed within two years from the date on which cause of action has arisen. In short with introduction of Consumer Protection Act 1986, the Indian Government has given one effective weapon in the hands of the consumers to fight against the deceptive marketing and sales practices of the business and trading community. The consumer gets speedy redressal of the complaint and the compensation for damages he has suffered as a consumer of the product or services.

A consumer can file a complaint free of cost against the decision of a District Forum before the State Commission within a period of thirty days. Any appeal against the decision of a State Commission can be filed before the National Commission within thirty days. Appeal against the orders of the National Commission can be filed before the Supreme Court within a period of thirty days from the date of the order. This limitation period can be condoned on merits by the redressal forum. The procedure for filing the appeal is the same as that of complaint except that the application should be accompanied by the orders of the District Forum/ State Commission as the case may be and grounds for filing the appeal should be specified.

The National Commission, State Commissions and District Forums are required to decide complaints, as far as possible, within a period of three months from the date of notice received by the opposite party where the complaint does not require analysis or testing of the commodities and within five months if it requires analysis or testing of commodities. Where the opposite party or its agent fails to appear on the date of hearing, the Commission/Forum may decide the complaint ex-parte.

Remedies Granted under the Act

The consumer protection Act, 1986, provides for the better protection of consumers. Unlike existing laws, which are punitive or preventive in nature, the provisions of this Act are

compensatory in nature. The act is intended to provide simple, speedy and inexpensive redressal to the consumers' grievances, award relief and compensation wherever appropriate to the consumer. The act has been amended in 1993 both to extend its coverage and scope and to enhance the powers of the redressal machinery.

The District Forum / State Commission / National Commission may pass one or more of the following orders to grant relief to the aggrieved consumer :

- to remove the defects pointed out by the appropriate laboratory from goods in question;
- to replace the goods with new goods of similar description, which shall be free from any defect;
- to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to negligence of the opposite party;
- to remove the defects or deficiencies in the services in question;
- to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- not to offer the hazardous goods for sale;
- to withdraw the hazardous goods from being offered for sale;
- to provide for adequate costs to parties.

Appeals

Any person aggrieved by an order made by the District Forum may prefer an appeal to the State Commission in the prescribed form and manner. Similarly, any person aggrieved by any original order of the State Commission may prefer an appeal to the National Commission in the prescribed form and manner. Any person aggrieved by any original order of the National Commission may prefer an appeal to the Supreme Court. All such appeals are to be made within thirty days from the date of the order provided that the concerned Appellate authority may entertain an appeal after the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period. The period of 30 days is to be computed from the date of receipt of the order by the appellant. Appeal is granted alongwith prescribed fees/deposits.

Where no appeal has been preferred against any of the orders of the authorities, such orders would be final. The District Forum, State Commission or National Commission may enforce respective orders as if it were a decree or order made by a Court and in the event of their inability to execute the same; they may send the order to the Court for execution by it as if it were a Court decree or order.

Penalties

Failure or omission by a trader or other person against whom a complaint is made or the complainant to comply with any order of the State Commission or the National Commission shall be punishable with imprisonment for a term which shall not be less than one month but

which may extend to 3 years, or with fine of not less than Rs. 2,000/- but which may be up to Rs. 10,000/- or with both. However, if it is satisfied that the circumstances of any case so requires, then the District Forum or the State Commission or the National Commission may impose a lower fine or a shorter term of imprisonment.

3.5 CASES: CONSUMER PROTECTION

Case1: Deficiency in service

Surya Floor Mill vs. New India Manufacturing Co. Ltd. Surya Floor Mills (SFM) purchased the small floor mill machinery from New India Manufacturing Company Ltd. (NIMCL). In addition to the machinery price SFM paid Rs 25000/- towards the installation cost of machinery. In consideration whereof the NIMCL who supplied the machinery was to undertake the installation of the machinery at the SMF premises. As NIMCL could not undertake the installation, SFM has to engage another contractor to complete the installation and commissioning work. The other contractor charged SMF total sum of Rs.39000/- i.e. Rs.14000/- more than what NIMCL has to agreed to charge for the rendering such services.

For this deficiency in services SFM filed a complained Consumer District Forum as well as State Commission. The District Forum considered that the machinery was purchased for the commercial use and SFM having not pleaded that it was exclusively for earning his livelihood, the case could not be covered by the definition of consumer in The Consumer Protection Act 1986. SFM approached to State Commission for the justice and there they endorsed the same views as District forum.

The complainant further approach to the National Forum that heard the case along with the plea of the complainant that the machinery was purchased for earning his livelihood. This the only means of earning the money for livelihood, National Forum after hearing the case given the following verdict.

1. As the machinery was purchased for earning his livelihood, and self employment and this does not fall under 'the use of machinery under commercial application'. Hence under Consumer Protection Act 1986, Section 2(I)(g), 2(I)(d), this case falls under 'Deficiency in Services.'
2. The contract was for Rs. 25000, which SFM paid in advance and receipt of which by NIMCL is not in dispute.
3. NIMCL has done nothing about the installation and SFM was put to additional expenditure for the purpose of installation of the said machinery.
4. SFM had engaged the agency for the work that charged Rs. 39000 i.e. Rs. 14000 more than the NIMCL had agreed to charge for rendering the said work.
5. NIMCL is clearly case of deficiency in services.
6. The respondent i.e. NIMCL is entitled to not only to refund Rs. 25000 but also to pay additional amount if Rs.14000.
7. SFM is entitled to a total amount of Rs. 39900/- together with interest at the rate of 15 % from the date of purchase till the date of payment.

{Source : I (2000) CPJ79 (NC)}

Case 2: Supreme Court Hauls Citibank for Unfair Trade Practices

J.L. Jain vs. City Bank. The Monopolies and Restrictive Trade Practices Commission (MRTPC) have pulled up Citibank for practicing unfair trade by not reflecting the already paid payments in a statement of account of a customer who had taken loan from the bank. Stating it as “deficiency in service on Citibank’s part”, MRTPC acting chairman RK Anand and member M Mahajan said, “Therefore, the charge of unfair trade practices having been established on the part of the respondents, they are directed to cease from carrying on such practices and also desist from following the same in future.” One J.L. Jain against Citibank NA and Northern India Credit Factors Ltd, who had arranged loan from the Citibank, filed the complaint. The bench said that the practices as adopted and indulged in by the respondents had proved to be prejudicial to the interest of the consumer. The complainant had alleged that despite he had paid three months’ installments of the loan taken from Citibank for financing a Maruti Gypsy, his driver was forced to hand over the vehicle’s key at gun point and was handed over a statement of accounts in which the payments already paid were not reflected. The complainant also said that Citibank duly acknowledged the already paid installments. The MRTPC had earlier issued a notice of enquiry against Citibank and Northern India Credit Factors. In its reply to the notice, the respondents said that for default of three monthly installments, they were within their rights to recover the vehicle in terms of the agreement executed between the parties. It further said that non-reflection of payment for three monthly installments was on account of belated payment made in cash, which was to be transmitted to Chennai office, where the central accounting was done. However, the bench also noted that vehicle was recovered before the expiry of the extended time granted by the respondents. The bench said, “By adopting deceptive method was not only a breach of a promise but an unfair trade practice adopted by the Citibank.”

Case 3: Medical Negligence

Sudha Nursing Home vs. Ms C.H. Padma. The complainant Ms. C.H. Padma was admitted to Sudha Nursing Home for the complications like ulcers with chills and rigors for 15 days vomiting and had a pain in abdomen. She was toxic and in agony. She was kept on conservative treatment. Even though she had partial relief her parents got her discharged on 31-07-1991 against the medical advice. She did not recover fully and still she was having complaints. She was again brought back to clinic on 02-08-1991 in precarious condition with complaints of fever, vomiting pain in abdomen and her condition was moribund. Her parents were asked to take her to Hyderabad, as her survival chances were only 10-15 %. Her parents insisted to be treated at the same hospital and prepared for any worst. After investigation the doctors found that the patient was suffering from acute abdomen due to enteric perforation with peritonitis. An emergency surgery was contemplated and parents were informed but as the parents were not willing to for said course, the surgery was postponed but the parents gave the consent only on 05-08-1991.

Dr Reddy conducted the surgery, after opening the abdomen it was found that there was fulminant peritonitis due to perforation of the small intestine because of typhoid ulcer. The adhesives were removed and the perforated gut was repaired and end-to-end anastomosis was carried out. The appendix was removed. She had stormy postoperative period. For her single day was a struggle between life and death. The hospital charged Rs. 30,000/- towards the operation.

After the investigation and hearing both the sides, the judgment was given that this is a case of medical negligence and deficiency in service. The hospital doctors were not able to identify the disease early till the complication rose. The patient brought back to hospital on 02-08-1991 and not operated till 05-08-1991. Though the operation was done by qualified doctor, looking into the seriousness of the disease the postoperative treatment was done by not qualified in Allopathy. Due to negligence the patient developed fecal fistuls and bedsore because of injections and deficiency in postoperative care. There upon the patient was referred to Apollo Hospital on 21-10-1991 and accordingly admitted and was again operated. The operation was done in view of the complications developed after the post operation negligence at Shudha Nursing Home. The patient was discharged from Apollo Hospital after a month in with full recovery.

Hence as per Consumer Protection Act 1986, Section 2(1)(g) the complainant is entitled for compensation. The complainant claimed for Rs. 30000/- for expenses in Sudha Nursing Home, Rs. 39566/- at Apollo Hospital and Rs. 15000/- for the family's expenses during one-month stay in Hyderabad. The court held that there is not negligence during the surgery but the negligence was in postoperative treatment. Accordingly Andhra Pradesh State Consumer Dispute Redressal Commission asked the Sudha Nursing Home to pay a sum of Rs. 50000/- with interest @12 % pa from the date of filing the complaint till date of payment together with further sum of Rs.5000/- towards the costs.

[Source :I (2000) CPJ 53]

Case 4. Compensation

Union of India and Northern Railways vs. Ms. Madhu P. Singh. Ms Madhu Singh was to travel from Delhi to Kalka. However, she boarded the train going from New Delhi to Amritsar instead of train going from New Delhi to Kalka. The ticket examiner treated Ms. Madhu Singh rudely and fined charges for boarding a wrong train. She appealed to the ticket examiner that she boarded the train displaying the name as Kalka-Shatabdi. Ms Singh. argued that she purchased a ticket for traveling by Shabdhi Express Train No 2005 from New Delhi to Chandigarh on 31-03-1997. She was allowed a seat in Coach No C-5 of the train. Ms. Singh reached the station on 31-03-1997 and on platform No12 found a board on the train displaying Kalka-Shatabdi Express and accordingly she boarded the train in coach C-5. Soon after the train started moving, passenger approached Ms Singh and told her that seat occupied by her was allotted him. Upon contacting the Superintendent of the train she learnt that she has boarded a wrong train, which was from Delhi to Amritsar instead of Kalka. She requested the superintendent to stop the train at next railway station Sabzi Mandi to enable her to get down, but he refused. He treated Ms Singh rudely and fined her Rs.700/- and finally stopped the train one kilometer ahead of Ambala Cant. Railway Station and was forced to get down the train alongwith the other passengers causing them inconvenience and harassment in reaching the railway station along side the railway track to board the Kalka-Shatabdi.

As per Consumer Protection Act 1986 Section 15, District Forum-II gave a judgment that in favor of Ms Singh and directed the Railway authority to refund Rs. 700 charged as fine, alongwith the interest @10 % pa from 31-03-1997 till payment is done and also awarded the compensation of Rs15000/- to her by NR.

[Source :I (2002) CPJ162]

Case 5. Hospital Negligent–Awards Compensation

Spring Meadows Hospital and Another Vs. Harjol Ahluwalia. The Supreme Court found the hospital negligent in handling the case of a child who was admitted there for treatment. The Court awarded compensation to both the child and the parents.

The patient, who was a child, was brought to the Spring Meadows Hospital (SMH for short) for treatment. In the hospital the Senior Consultant Pediatrician examined the child and on his advice the child was admitted as an in-patient at the hospital. The Doctor diagnosed that the patient was suffering from typhoid. The parents were intimated that the child was suffering from typhoid and that medicines have been prescribed for the same.

After a few days, the nurse at the hospital wrote out the name of an injection that had to be administered to the child and asked the child's father to buy it. The father bought the injection and handed over the same to the nurse. The nurse injected the child. The child collapsed immediately after being injected.

The doctors at the hospital could not revive the child and asked the parents to shift the child to another hospital. Thereafter, the child was shifted to All India Institute of Medical Science (AIIMS), New Delhi. After thorough examination the doctors informed the parents that the condition of the child was critical and even if he did survive it would only be in a vegetative state as irreparable damage has been caused to its brain.

The shattered child's parents filed a petition before the National Commission. On enquiry, the National Commission found that the child had suffered from cardiac arrest due to high dose of intravenous injection that the nurse administered without testing.

The Commission observed that there had been considerable delay in reviving the heart of the minor on account of which the brain of the child had got damaged. The Commission held that the child had suffered on account of negligence, errors and omissions on the part of the nurse as well as the doctor on duty. But since the nurse and doctor were employees of the hospital, the hospital is responsible for the negligence of the employees. The Commission awarded a compensation of Rs.12.5 lakhs to the child and Rs.5 lakhs to the parents for the acute mental agony caused to them and for having to see their only son reduced to a vegetative state who would require life long care and attention.

Aggrieved by the said order the hospital took the matter to the Supreme Court. The Supreme Court reiterated the stand taken by the National Commission. The Supreme Court held that the child was a consumer within the meaning of 'consumer' under the Consumer Protection Act, 1986. Consumer being not only a person, who hires services, but is also the beneficiary of such services. Therefore, the parents of the child also fall under the term 'consumer'. The compensation awarded by the National Commission was upheld and the appeal was dismissed with cost of Rs. 5000/-.

{Source: (2000) CPJ (SC)}

Case 6. Consumer court fines Coca Cola

Naresh Thakkar vs Hindustan Coca Cola Beverages Private Limited. Naresh Thakkar complained that the bottle of coke, sold to him by the company's agent, contained something more than he just drink and that the "foreign particle" upset his stomach. The company rebutted that Thakkar had not come with clean hands as he never had a proper receipt of the transaction.

Though it could not be determined whether contents of the bottle were injurious to health as neither party went ahead with the test, the district forum noted that foreign particles were indeed present in the bottle, adding there was deficiency in service to that extent.

Coca Cola further appealed before the State Commission, which dismissed it saying there was a 133-day delay. It did not accept the ground sought for condonation of delay that the clerk had lost a certified copy. The company then approached the National Commission, which also turned down the petition saying that there was no ground to interfere with the order of the State Commission.

Coca Cola finally approached to National Consumer Dispute Redressal Commission which dismissed a revision petition filed by Hindustan Coca Cola Beverages Private Limited for not filing it within the stipulated time, Further, National Consumer Disputes Redressal Commission upheld a district forum order directing the company to pay the compensation amount of Rs.2500/- and litigation cost of Rs.500/- to an aggrieved person for selling him a bottle of soft drink containing “foreign particles”.

(Source: Eco Times 10 May 2003)

Case 7: Highly Inflated Electricity Bill and Defective Meter -Deficiency in Services

Y N Gupta vs DESU. In the final decision by National Consumer Dispute Redressal Commission held that electricity bill charged was very high, which was obviously due to defective meter. In this case, DESU did not raise bills in keeping with the cycle normally adopted. It also did not replace the defective meter. However, it slapped the bill for over Rs. 1.06 lacs for a period from 21st December, 1988 to 25th March, 1990. The power connection was also disconnected but restored after making a complaint to the General Manager. The National Commission ruled that it was difficult to envisage a situation where the consumer could have utilized over 1 lakh units of electricity and the expect a poor consumer to pay bills of over a lakh. The National Commission ruled that the bills were casually prepared. DESU did not have the authority to raise bills upon a defective meter beyond six months under the Electricity Act, 1910. In these circumstances, the National Commission concluded that there was deficiency in services on the part of DESU and awarded a compensation of Rs.30000/- and costs of Rs. 5,000/-.

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Chapter 4



TRADE PRACTICES AND COMPETITION

– Legislation to Curb Unfair, Restrictive & Anti-competitive Trade Practices

- ◆ Deceptive (Unfair) Trade Practices
- ◆ Restrictive & Anti-competitive Trade Practices
- ◆ Counterfeiting
- ◆ Indian Laws
- ◆ Cases

The marketers are sometimes accused of deceptive sales practices because the customers feel that they are cheated through the sellers' promotional schemes and would get better value for the money if they pay elsewhere. The product they get is of not the same quality, grade, standard, style or specifications, which they were promised through the advertisement. However, an alert consumer can sometimes protect himself against such illegal and unethical practices of the seller. But, this may not be a case for majority of the consumers. They fall prey of the various deceptive sales practices of the sellers. In addition, due to competitive pressure these marketers who are stronger than others create entry barriers to the smaller players with a result to reduce the competition or create monopolistic situation, which indirectly put the consumers at disadvantage. To deal with such unfair, restrictive and anti-competitive trade practices, Indian legislature has initiated policy measures and enacted the number of Acts from time to time to protect consumers, business firms and the society.

4.1 DECEPTIVE (UNFAIR) TRADE PRACTICES

Due to greed of making quick money, the unscrupulous marketers adopt the variety of deceptive practices to attract the gullible customer and sell the product or service which consumer finds not worth the value for the price he has paid. Such deceptive practices commonly used fall under the following three categories:

Deceptive pricing—This includes false list price (over priced) on which large discounts are offered to lure the customers. The price fixing is done by an individuals or group of firms, resulting into lessening of competition in the market.

Deceptive promotion—This includes over emphasizing or overstating the quality, features, standard, applications and performance of the product to attract the customers.

Deceptive packaging—Packaging giving the misleading information about the product contained therein and also not conforming to the statutory requirements, resulting into customers being misguided to buy it. In deceptive packaging, information regarding the product usage and its safety not revealed. However, the marketers always argue that they avoid the deceptive sales practices and manufacture the quality products as the unfair practices will spoil their image in long run. In the competitive markets the customer will switch over to the competitor's product if he/she is not satisfied with the products or services of the marketing firm. In addition the unsafe product will result into product liability suits and huge damage compensation to the affected consumers.

In spite of the above arguments, you will find many unscrupulous manufacturers to make the fast money, will lure the gullible customer through unfair practices in product, , pricing or promotion. Hence, to protect the gullible consumers, it is always the policy of the State to promote and encourage fairest and equitable relations among parties in consumer transactions and protect the consumer against deceptive and unfair sales acts or practices. A sales act or practice is considered deceptive whenever the producer, manufacturer, supplier or seller, or owner or operator of a consumer service or repair firm, through concealment, false representation or fraudulent manipulation, induces a consumer to enter into a sales or lease transaction of any consumer product or service. Without limiting the scope of the above, certain sales acts and practices are considered deceptive, when...

- It is claiming for a sponsorship or approval of a body or a person which it does not have;
- Product/ Service has the performance, characteristics, ingredients, accessories, uses or benefits it does not have;
- Product / Service does not have a particular standard, quality, grade, style or model as claimed.
- Product is claimed as a new, when in fact, it is in a deteriorated, altered, reconditioned, reclaimed or second-hand state;
- Product is available to the consumer for a reason that is different from the fact;
- Product has been supplied in a quantity greater than the supplier intends;
- Needed a service or repair when in fact it does not;
- It does not involve a warranty, particular warranty terms or other rights, remedies or obligations or the indication of warranty is false;
- The seller or supplier claims for a sponsorship, approval or affiliation he does not have.

These rules shall apply to acts and practices in the sale or lease of any consumer product and in the availment of any consumer service. A deceptive sales act or practice by a seller

or supplier in connection with a consumer transaction violates the Consumer Protection Act, 1986, whether it occurs before, during or after the transaction.

The words “No Return, or No Exchange”, or words to such effect shall not be written into the contract of sale or receipt in a sales transaction, in any document evidencing such sale or anywhere in a store establishment. The “No Return, No Exchange” notice is considered deceptive because it creates a misconception on the part of the consumers that they do not have the right to return shoddy or defective goods or demand for remedies in case of defective or imperfect service. On the contrary, consumers may return or exchange the goods or avail of other remedies in case of hidden faults or defects, or any charge not known to the buyer. By provision of law, sellers are obliged to honor their implied warranties and grant corresponding remedies to consumers. The other sales acts and practices which are considered deceptive are:

- ♦ **Deceptive Presentation of Consumer Products.** The appearance of consumer products shall be reasonably enhanced as to deceive consumers on their true characteristics or condition.
- ♦ **Deceptive Demonstration of Performance of Consumer Products or Services.** Fraudulent tricks or machinations shall be employed in the demonstration of the performance of a consumer product or service.

An act or practice of the producer, manufacturer, seller or supplier of a consumer product or the owner or operator of a consumer service or repair firm of inducing, or enticing a consumer to enter into a sales or lease transaction of a consumer product or to avail of its services grossly inimical to his interests or grossly one-sided in favor of the producer, manufacturer, distributor, supplier or seller, owner or operator, by taking advantage of the consumer's physical or mental infirmity, ignorance illiteracy, lack of time of the general conditions of the environment of surroundings is called as deceptive sales practices..

The following circumstances shall be considered in determining unfair and unconscionable sales acts or practices:

- when the producer, manufacturer, distributor, supplier or seller took advantage of the inability of the consumer to reasonably protect his interest because of difficulty to understand the language of an agreement or similar factors;
- when the consumer transaction was entered into, the price grossly exceeded the price at which similar products or services were readily obtainable in similar transaction by like consumers;
- when the consumer transaction was entered into, the consumer was unable to receive a substantial benefit from the subject of the transaction;
- when the consumer transaction was entered into, the seller or supplier was aware that there was no reasonable probability of payment of the obligation in full by the consumer;
- when the transaction that the seller or supplier induced the consumer to enter into was excessively one-sided in favor of the seller or supplier.

The unfair and deceptive practices are just what they sound like. They take place when someone in the position of a seller acts unfairly to or deceives a buyer. In deciding whether a practice not specifically mentioned in the law is illegal, the courts consider whether it violates

some established concept of fairness, whether it is immoral or unethical, whether it is likely to cause substantial harm to consumers and whether it is dishonest and/or violates the general notion of fair dealing between sellers and buyers.

The buyer does not have to intend to act unfairly. There is no intent requirement. If the conduct is conduct that most people would consider unfair, it is illegal whether or not the seller meant to act unfairly. The action must be either unfair or deceptive. It doesn't need to be both. Some examples of unfair or deceptive Practices are:

- ♦ **False advertising and other misrepresentations.** The statement in the copy of advertisement, which has the tendency to mislead the buyer. These include actual false statement about a product's quality, ingredients, or effectiveness, fake testimonials and endorsements pictures of the wrong merchandise in ads trying to sell one other item that imply the picture is of the item being sold, faked pictures of the product performing in a way that it cannot actually perform and use of prices in ads that are not the real price of the merchandise described or pictured.
- ♦ **Product physically not available.** Advertising sale items that are not actually available to convince people to visit the sellers store or business or sending flyers with some sale items, where the actual items that are on sale are not clearly identified.
- ♦ **False statements of guarantees in advertisements.** The statement may not be identifying the nature of the guarantee and who is offering it (the manufacturer, the seller or someone else), what parts of the product are covered and what is required of the consumer to make a claim under the guarantee. If an advertisement says that a product is "unconditionally guaranteed" or says "satisfaction or your money back" or words to that effect, the use of the term is deceptive unless the seller will refund the full purchase price, replace the product or repair the product and the buyer has the right to choose which of these alternatives he or she wants.
- ♦ **Deceptive Pricing Practices**
 - Claiming that the item is on sale by artificially and untruthfully pretending the product usually sells for a price higher than its normal price. The price represented to be the product's "regular" price must be a real price that the product in fact sold for during some significant time in the recent past in the seller's own stores.
 - Misrepresenting the price that the same product is sold at by competitors
 - Placing fake price stickers on merchandise with higher than actual prices so that the product appears to be marked down when in fact it isn't
 - Claiming that a product may be purchased for one price when in fact the actual price is higher
 - Advertising an item at a very good price to induce customers to come in and then only selling the item at that price if the purchaser also buys another more expensive product.
 - Using the terms "special price" or "priced for sale" or "clearance priced" or similar terms when the items are not being sold at reduced prices and without clearly

disclosing the actual former price or the percentage reduction from the former price that is actually being offered.

- Charging for good or services at higher rates than the marked, published or advertised price;
- Giving an unrealistically low estimate for a job in order to get it and then charging for a variety of “extras” to increase the price of the job when those extras should clearly have been included in the regular price of the job.

This is by no means is a complete list - these are only examples of the kinds of conduct that are covered.

4.2 RESTRICTIVE AND ANTI-COMPETITIVE TRADE PRACTICES

Restrictive arrangement is an arrangement between persons carrying on business, according to which at least one of the parties restricts himself in the manner that could prevent or reduce competition between himself or other parties to the arrangement or some thereof or between himself and a person who is not a party to arrangement. One of the following are deemed to be restrictive trade practices.

- ♦ The price to be demanded, offered or paid
- ♦ Profit to be obtained
- ♦ Divisions of all parts of market, accordingly to location of business or according to type of person with whom business is carried out
- ♦ Restrictions on the quality, quantity or type of goods or services in business to be offered.

In addition any trade practice, which requires a consumer to buy, hire or avail of any goods or services as the case may be, as a condition preceding to buy, hire or avail of the goods or services, are also called restrictive trade practices. As a result with the restrictive trade practices adopted by the manufacturers or marketers the following emerge out.

- Monopolistic situation in the market
- Distort, eliminate or curb the competition in the market
- Restriction to access by customers to competitive products
- Concentration of economic power in few hands

4.3 COUNTERFEITING

The business of counterfeiting is old one. It is quite prevalent in pharmaceutical and electronic consumer goods industry. In India the estimated market for spurious drugs is about Rs 3000-4000 Crores, considering that the total pharmaceutical market is under 20,000 Crores. This means that one fifth of all drugs being sold in India are spurious. The illegal business of drug counterfeiting not only eats into the revenues of legitimate pharmaceuticals business, but also jeopardizes the health and well being of the patients. The Global Forum on Anti-counterfeiting (September 22-25, 2002), at Geneva, Switzerland was a major initiative into focusing on the increasing dimensions, of the unscrupulous business of counterfeit drugs.

The counterfeiting of pharmaceuticals goes beyond the limits of business, social and moral standards, by putting the health and longevity of patients, and reputations of legitimate drug manufacturers and health-care providers, at stake, even if one ignores the massive loss of revenues that result for the industry. The whole ethical business of pharmaceuticals is based on trust-doctor and pharmacist trusting the industry, and patient trusting the doctor. The counterfeiter is actually playing this dangerous game on the foundation of this very trust.

Data published by International Federation of Pharmaceutical Manufacturers Associations (IFPMA) shows that 5–7 percent of all drugs sold around the world are counterfeit. Because of inadequacies of controls, and its entry into organized crime have contributed to the further insidious growth.

Even for medical practitioners, it is difficult to differentiate a counterfeit drug from an original. They appear alike since the mal-intentioned manufacturer spends few cents in making the tablet or solution look the original- missing out the most expensive part, the drug ingredient itself.

Almost any pharmaceutical formulation may be counterfeited if it is in demand, related healthcare provider and patient population are naïve, and the illegal revenues are high. However, survey on this subject show that some drugs are more vulnerable to counterfeiting in the world. These include antibiotics, anti-malarial drugs, cough syrups, skin ointments, antipyretics and analgesics, contraceptives, general health and multivitamin products, antacids and anti peptic-ulcer drugs and HIV/AIDS primary and adjuvant drugs.

A few reasons, that can make the industry, healthcare provider and end-users alert and active in developing strategies to combat this menace, are:

- ✧ High prices of some drug categories make counterfeiting lucrative
- ✧ Co-existing black market for high-demand drugs makes entry for counterfeits more easy
- ✧ Low-cost medicines, including generics, with demands in high volumes in poor communities, ensure at least a minimum level of illegitimate revenues
- ✧ Products that employ outdated packaging and production technologies that can be easily purchased from the recycled machinery market, and the product mimicked
- ✧ Products that need little dosage and usage information, since otherwise, printing of packaging inserts or extensive labels could be too cumbersome for counterfeiting
- ✧ Products that are very easy to copy in terms of color, design or size
- ✧ Disease or indication profile related to candidate is complex, and in usual circumstances it becomes difficult for the healthcare provider to identify the cause of poor prognosis, adverse reactions or even death due to the counterfeit drug.

Drug counterfeiting is a global crime that hurts a vulnerable population. It can be curbed better with the proper education of end-users and healthcare providers. The intensity of this menace can also be reduced by resorting to more advanced packaging technologies that discourage counterfeiting.

The money is the only apparent motive for counterfeiting. The statistics shows that all big and small and generic brands are counterfeit. The precautionary measures needs to be

taken by manufacturers and the government to check the menace of the counterfeit drugs for the health safety of the society.

4.4 INDIAN LAWS

In Indian unfair and restrictive trade practices can be dealt with the following laws

- Consumer Protection Act, 1986
- Monopolies and Restrictive Trade Practices Act, 1969 (Replaced by Competition Act)
- Competition Act, 2002,

Consumer Protection Act 1969

This Act (For details see sec 3.4 of Ch 3 and Sec 2.2 of Ch 2) was enacted to provide for better protection of the interest of consumers against the unfair and restrictive trade practices adopted by the marketers to cheat the gullible consumers. It provides to make provision to establish three tier system of quasi-judicial body (district, state and Center) to provide speedy, simple and inexpensive redressal of consumer disputes. Section 36A and Section 2(1)(nn) defines the unfair and restrictive trade practices for which an aggrieved consumer can lodge a complaint with an appropriate consumer redressal agency against the unscrupulous marketer. Under this Acts the relief granted to the consumers are compensatory in nature.

Monopolies and Restrictive Trade Practices Act, 1969 (Replaced by Competition Act 2002)

With the growth of trade and commerce activities, the competition amongst business increased. Some became more stronger than others and had financial muscle to restrict or eliminate the competition. For some it became the question of survival first and growth afterwards. The some businessmen, out of greed to make fast money resorted to deceptive sales practices to lure gullible consumers. To curb all these activities government has enacted Maintenance of Unfair and Restrictive Trade Practices Act, 1969 (MRTP Act).

The Central Government body called Monopolies & Restrictive Trade Practices Commission (MRTPC) administers this Act and regulates the growth and actions of large business houses and ensures that they do not lessen the competition by resorting to restrictive trade practices. In this respect, the Act protects the consumers indirectly. **Even though this Act is repealed, it is essential for the students to understand the provisions of this Act vis-à-vis Competition Act.**

Objectives

The Monopolies and Restrictive Trade Practices Act, 1969, was enacted to prevent the concentration of economic power to common detriment, control of monopolies, prohibition of monopolistic and restrictive trade practices and matters connected therewith.

This Act has been enacted with a view to protect consumers and small industrialists and traders against exploitation arising out of the growth of monopolies and consequent misuse of market conditions by resorting to restrictive trade practices by the large business corporations and industry houses with financial muscle and market dominance.

Unfair Trade Practices

The Act also defines the unfair trade practices, an area of direct concern for the consumers and any affected consumer or group of consumers can send his/their complaints to the Commission.

An Unfair Deceptive Practice adopted for the purpose of promoting the sale, use or supply of any goods or for the provision of any services, is an unfair trade practice under the Monopolies and Restrictive Trade Practices Act, 1969. Unfair Trade Practices under the Act include, practices such as making false statement in relation to the quality, quantity (the statement could either be oral or in writing or even by visible representation), sponsorship, uses or benefits of goods, passing off old goods as new, or giving of warranty/guarantee which is not based on proper test, making public representation that purports to be a guarantee or warranty or a promise to replace articles if there is no reasonable guarantee that the warranty/repair or replacement will not be carried out.

Section 36A of the MRTP Act, defines an unfair trade practice as:

- ♦ False representation of the quality, composition, style or model of goods and services.
- ♦ Falsely alleging affiliation and misleading statements about the usefulness of goods and services is also an unfair practice.
- ♦ Warranties or guarantees given without adequate tests, or expressed in misleading terms, giving false or misleading facts disparaging the goods, services or trade of others also amount to unfair trade practices.
- ♦ Announcing bargain prices for goods which are either not put on sale or are offered in quantities which are not reasonable with respect to the nature of the trade, offering gifts, prizes or other items with the intention of not providing them as offered also constitute unfair trade practices
- ♦ Sale of substandard and hazardous goods under defined conditions also constitutes unfair trade practice.

Monopolistic Trade Practices

Section 2 (i) of the Act defines monopolistic trade practice while Section 31 provides for investigation into such practices by the MRTP Commission, either on reference by the Central Government or on receipt of information as to the carrying on of such activities by any such undertaking.

Monopolistic Trade Practices such as maintenance of prices and profits at unreasonable levels, arbitrary price increases, high expenditure on advertisement and high power salesmanship to maintain the undertaking in a monopoly situation, limiting technical detriment to common detriment or allowing quality of goods to deteriorate, are some of the situations which would call for investigation and action under this enactment. Under Section 32 of the Act, such monopolistic trade practices are deemed to be prejudicial to public interest.

Monopolistic Trade Practices that may be Permitted

The Central Government may permit such practice if satisfied that it is necessary for defense purposes, to ensure maintenance of supply of essential goods/services or to give effect to any terms of an agreement to which the Central Government is a party.

Prevention of Concentration of Economic Power

Under this enactment, any undertaking producing one fourth or more of any type of goods and having assets of more than Rupees One Crore, is required to obtain clearance for any scheme of expansion. Initially, for the purpose of computing the total goods produced by the undertaking, goods that were exported were also taken into account. By an amendment in 1980, those goods, which are exported, are no longer taken into account while computing the total goods produced. This was in view of the objective of the enactment to control such practices within India.

Restrictive Trade Practices

Section 2 (o) defines restrictive trade practices, which may be investigated by the MRTP Commission under Section 37 of the Act. Restrictive Trade Practices such as differential or discriminatory incentive based on quantities, stipulation in agreement as to the prices that should be charged on re-sale, territorial restrictions and restricting terms of guarantee, bumper prize contests, wherein the prices of goods are increased to cover the cost of prizes, announcing loan facilities without a guarantor while charging guarantor's commission, sale of goods for a particular price and issue of cash memos for a lesser sum, display of price-lists indicating maximum recommended rates and absence of indication that a lower price could be charged thus encouraging consumers to ask for rebates, prohibiting film producers from selling/assigning video rights, fixing prices and discounts in concert, collusive tendering, predatory pricing and cutting prices below cost price, boycott of products of a particular company by traders, or for obtaining higher commission, and such other practices would call for investigation and action under this enactment. Every agreement falling within one or more following categories of restrictive practices (Section 33) shall be subject to the registration at and clearance by MRTP Commission.

- any agreement by any method, which restricts, or likely to restrict, the person or classes of persons to whom goods are sold or from whom goods are bought;
- any agreement requiring a purchase of goods, to purchase some other goods as a condition of such purchase;
- any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of seller or any other person
- any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at price or on terms or conditions agreed upon between the sellers and purchasers
- any agreement to grant or allow concession or benefits, including allowances, discounts, rebates or credits in connection with, or by reason of dealings;
- any agreement to sell goods, on condition that the price to be charged on resale by the purchaser shall be the prices, stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;
- any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of goods;

- any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;
- any agreement for the exclusion from any trade association of any person carrying on or intending to carry on in, good faith the trade in relation to which trade association is formed;
- any agreement restricting in any manner, the class or number of wholesaler, producers or suppliers from whom any goods may be bought;
- any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for the sale of goods;
- any agreement not referred above, which may be specified by Central Government in future on restrictive trade practices
- any agreement to enforce the carrying out of any such agreement
- any agreement making provision for services as they apply in relation to agreement connected with the production, storage, supply, distribution or control of goods

Restrictive Trade Practices that may be Permitted

The Act provides for registration of agreements containing clauses that are indicated under Section 33 as a restrictive trade practice as above. Such practices may be permitted by the Commission under Section 37, on such steps taken by the undertaking to ensure that such practice is not prejudicial to public interest. This however does not apply in case of restrictive trade practices under Section 2 (o). If any clause in an agreement is a restrictive trade practice as defined in Section 2 (o) the same is void and cannot be permitted.

Power of the MRTP Commission

The Commission may, on satisfaction that the practice is an unfair trade practice, direct that such practice shall be discontinued, and in cases in which agreements in relation to such practices are made, the Commission may also direct that such agreement shall be void or specify the manner in which it shall be modified. Further the Commission also has the power to direct that any information relating to such unfair trade practices shall be disclosed, issued or published. Where such party takes such steps to ensure that the trade practice is no longer prejudicial to public interest, or the interest of any consumer or consumers generally, the Commission may permit such party to carry on such trade.

Advantages

In cases where it is proved that any undertaking is about to carry on any monopolistic, restrictive or unfair trade practices, which is likely to prejudicially affect public interest, or the interest of any trader or consumer, the Commission may restrain such undertaking from carrying on such activity by way of Injunction, which includes the power to grant *ex parte* temporary injunction also. The Commission is also empowered to hold investigation on receipt of a complaint by any trader, consumer or such affected party.

Disadvantages

The Monopolies and Restrictive Trade Practices Commission established under Section 5 has its central office in Delhi which makes the remedies available under this Act, inaccessible to other parts of the country and also entails delay.

Remedy

Any trade association, consumer or registered consumers' association aggrieved by such of the practices mentioned above can seek relief by filing a complaint before the Monopolies and Restrictive Trade Practices Commission, which on such complaint has powers to conduct an inquiry into such practices. Any consumer can approach the Commission irrespective of whether such consumer is a member of the consumers' association or not. The Commission can also conduct inquiry on the reference of the Central/State Government, on an application by the Director General or on its own knowledge or information.

Competition Act, 2002

The salient features of the Act are to cover prohibition of anti-competitive agreements, prohibition of abuse of dominance, regulation of combinations (acquisitions, mergers and amalgamations of certain size); establishment of the Competition Commission of India (CCI) and definition of its functions and powers.

The Act also states that the CCI may, upon its own knowledge or information relating to certain "combinations", enquire as to whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India. A provision, however, has been inserted to stipulate that the Commission shall not initiate enquiry into certain forms of acquisitions, merger or amalgamation, or acquiring of control after the expiry of one year from the date of which such a combination has taken affect.

For an acquisition, the regulation of such a combination would arise where — (i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or having acquired jointly have — (a) either, in India, the assets of value of more than Rs. 1,000 crore or turnover more than Rs. 3,000 crore; or (b) in India or outside India, in aggregate, the assets of the value of more than \$500 million or turnover more than \$1,500 million; or (ii) any group or an enterprise belonging to such group whose control, shares, voting rights or assets have been acquired or being acquired jointly have — (a) either, in India, the assets of value of more than Rs. 4,000 crore or turnover more than Rs. 12,000 crore; or (b) in India or outside India, in aggregate, the assets of the value of more than \$2 billion or turnover more than \$6 billion.

In the case of **merger or amalgamations**, the regulation of combinations relates to — (i) the enterprise remaining after merger or enterprise created as a result of amalgamation, as the case may be, have — (a) either, in India, the assets of the value of more than Rs. 1,000 crore or turnover more than Rs. 3,000 crore; or (b) in India or outside India, in aggregate, the assets of the value of more than \$500 million or turnover more than \$1,500 million; or (ii) the group, or its constituent enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have — (a) either, in India, the assets of Rs. 4,000 crore or turnover more than Rs. 12,000 crore or (b) in India or outside India, the assets of the value of more than \$2 billion or turnover more than \$6 billion.

The Act also seeks to create a fund to be called the 'Competition Fund'. The grants given by the Central Government, costs realized by the Commission, and the application fee charged will be credited to the fund.

On the composition of the CCI, the Act states that the Commission will consist of a chairperson and not less than two and not more than 10 other members to be appointed by the Central Government. In the first year of its establishment the Central Government shall appoint the chairperson and the member.

The chairperson and the every other member shall be appointed by the Central Government on the recommendation of the selection committee consisting of the Chief Justice of India or his nominee (chairperson), the Union Finance Minister, Union Minister in-charge of the Department dealing with this Act, RBI Governor and Cabinet Secretary (members).

The Competition Act, 2002 (CA), repeals the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), which has become obsolete in view of developments in the Indian and global markets. It endeavors to shift the focus from restricting monopolies to promoting fair competition, so that the Indian market is equipped to compete with the markets world-wide. It aims at promoting and sustaining the competition in the market by preventing anti-competitive practices and creating conducive economic environment. CA ensures to protect the interest of the consumers while ensuring the freedom of trade.

Objectives

- ◆ to promote and sustain competition in markets;
- ◆ to protect the interest of consumers;
- ◆ to ensure the freedom of trade; and
- ◆ to provide for the establishment of the CCI.

Prohibition of Anti-Competitive Agreements

Section 3(1) of the CA 2002 prohibits enterprises and persons from entering into agreements with respect to production, supply, distribution, storage, acquisition or control of goods, or provision of services, which may have an appreciable adverse effect on competition. An agreement is deemed to hinder competition if it:

- ◆ directly or indirectly determines purchase or sale prices;
- ◆ limits or controls the production, supply, markets, technical development, investment or provision of services;
- ◆ shares the market, source of production, or provision of services, by allocating the geographical area of the market, the type of goods or services, the number of customers in the market, or in any other similar manner; or
- ◆ directly or indirectly results in bid rigging or collusive bidding.

As per Section 3(2) of CA 2002, any agreement containing the restrictions as above is void. Under the Section 3(4), agreements relating to tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance, between enterprises or persons at different levels of the production chain in different markets, are void if they have adverse effect on the competition in the market.

Power Of CCI

This Act empowers CCI to inquire into anti-competitive agreements under Section 19 of the CA 2001. As per Section 19(3), the following factors are considered, while determining anti-competitive nature of the action.

- ♦ posing or creation of barriers to new entrants in the market;
- ♦ driving existing competitors out of the market;
- ♦ foreclosure of competition by hindering entry into the market;
- ♦ accrual of benefits to consumers;
- ♦ improvements in production or distribution of goods or provision of services; or
- ♦ promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Based on the complaint received, if CCI is convinced that there exists a case of anti competitive practices, then it can order the Director General to conduct an investigation pursuant as per Section 26 of the CA 2002. The Director General cannot conduct investigations on its own motion. The CCI may grant an interim injunction restraining any party from carrying out activities with respect to the agreement that may be anti-competitive until the conclusion of its inquiry. After inquiry, the CCI may direct modification or order termination of the anti-competitive agreement. The CCI may award compensation to affected parties and may also impose a fine on the parties to the anti-competitive agreements in an amount not exceeding ten percent of the average turnover of the three preceding financial years, pursuant to Section 27 of the CA 2002.

CA 2002, contains provisions declaring anti-competitive agreements based on certain facts and evidences. Such agreements must be made subject to the scrutiny of the CCI before they are declared void.

Prohibition of abuse of Dominant Position

As per the Act enterprise is permitted to enjoy its dominant position, i.e., its position of strength in a relevant market within and outside India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors, consumers or relevant markets in its favor. However, Section 4 of the CA 2002, prohibits any enterprise from abusing its dominant position. An enterprise is said to abuse its dominant position if it:

- ♦ directly or indirectly, imposes unfair conditions or pricing stipulations, (including predatory price in the purchase or sale of goods or services;
- ♦ limits or restricts the production of goods or services or their market, or the technical or scientific development relating to such goods or services;
- ♦ denies market access to others;
- ♦ enters into contracts subject to conditions which have no connection with the subject matter of the contract; or
- ♦ uses its dominant position to enter into or to protect another relevant market.

Section 19 of the CA 2002, empowers CCI to inquire into any alleged abuse of dominance by an enterprise, either on its own motion or on receipt of a complaint or reference. The following factors are considered, while inquiring whether an enterprise enjoys a dominant position or not:

- ◆ market share of the enterprise;
- ◆ size and resources of the enterprise;
- ◆ size and importance of the competitors;
- ◆ economic power of the enterprise including commercial advantages over competitors;
- ◆ vertical integration of the enterprises or sale or service network of such enterprises;
- ◆ technical advantages including advantages such as copyright, patents, permitted use, collective mark, registered proprietor, registered trade mark, registered user, geographical indications, design, or similar commercial rights acquired by the enterprise;
- ◆ dependence of consumers on the enterprise;
- ◆ monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- ◆ entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- ◆ countervailing buying power;
- ◆ market structure and size of market;
- ◆ social obligations and social costs; and
- ◆ any other factor that the CCI may consider relevant for inquiry.

As in the case of anti-competitive agreements, the CCI can direct the enterprise or person to stop abusing its dominant position, award compensation to the affected parties and impose a fine in an amount not exceeding ten percent of the average turnover of the three preceding financial years, on the party abusing its dominant position. The CCI may also recommend to the Central Government that the enterprise enjoying a dominant position be divided to ensure that it does not abuse its dominant position. Based on this recommendation, the Central Government may pass an order in writing, directing division of the enterprise enjoying a dominant position. The order may also provide for the transfer of property, allotment of shares, payment of compensation, the amendment of the memorandum and articles of association of the enterprise, etc.

Combination (Mergers and Acquisition)

Section 5 of the CA2002 pertains to the combinations of enterprises and persons through mergers and acquisitions. The acquisition of enterprises by persons, the acquiring of control by enterprises, and the merger or amalgamation of enterprises are considered combinations when their asset value and turnover cross certain threshold limits. As per Section 6(1) of the CA2002 the combinations having an adverse effect on competition are void. The CA2002 has

specified high asset and turnover levels above, which enterprises would fall within the realm of this provision, as follows.

As per Section 5 (a), (b), (c), the parties to the acquisition; the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control; or the enterprise remaining after merger or the enterprise created as a result of the amalgamation must have –

1. assets worth more than rupees one thousand crores or a turnover of more than rupees three thousand crores in India; or
2. assets worth more than five hundred million US dollars or a turnover of more than fifteen hundred million US dollars, in aggregate, in India or outside India.

Or

the group companies must have –

1. assets worth more than rupees four thousand crores or a turnover of more than rupees twelve thousand crores; or
2. assets worth more than two billion US dollars or a turnover of more than six billion US dollars, in aggregate, in India or outside India.

Therefore, most enterprises with a lower asset value and turnover would be excluded from this stipulation.

As per Section 6(2) enterprises and persons have the option to notify the CCI of the proposed combination. Although Section 6(2) of the CA2002 gives persons and enterprises the option to notify the CCI about the proposed combination, it is subject to Section 6(1), which renders the proposed combination, if it has an adverse effect on competition, and termed as void. Section 6 refers to Sections 29, 30 and 31, which provide the procedure for investigation into the combination by the CCI. As per Section 9(1) of the CA2002, the CCI can issue a notice to the parties to a combination that the CCI considers anti-competitive, to show cause against an investigation into the combination. Under Section 29(2) of the CA2002, the CCI may require the parties to a combination to publish the details of the combination. As per Section 29(3) of the CA 2002, the CCI may invite any person or member of the public affected or likely to be affected by the combination, to file a written objection.

As per Section 31(2) of the CA2002, the CCI may direct that the combination will not take place, if it is of the opinion that the combination will have an appreciable adverse effect on competition. Section 20(4) sets out the factors that the CCI must consider while determining whether a combination has an adverse effect on competition, as follows:

- actual and potential level of competition through imports in the market;
- extent of barriers to entry to the market;
- level of combination in the market;
- degree of countervailing power in the market;
- likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- extent of effective competition likely to sustain in a market;

- extent to which substitutes are available or are likely to be available in the market;
- market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in market;
- nature and extent of vertical integration in the market;
- possibility of failing business;
- nature and extent of innovation; and
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

As per Section 31(3) of the CA2002, the CCI may also propose a modification to such combinations or pass an order with respect to the combination within ninety days of the publication under Section 29(2) of the CA 2002, failing which, the combination is deemed to be approved by the CCI.

As per Section 20(1) of the CA2002 the CCI can inquire into any combination, on its own or upon receiving information, within one year from when such combination takes effect.

Section 5 of the CA2002 contains provisions regarding acquisitions, acquiring of control, mergers and amalgamations. However, the CA2002 does not delve into the repercussions of arrangements on competition.

Clause 5 of the CA2002 limits its application to companies with the prescribed asset value and turnover limit and smaller companies are kept away from being anti-competitive but by virtue of Section 4 of the CA2002, which prevents a company from abusing its dominant position.

International Transactions

As per Section 32, CCI has powers to inquire into agreements, abuse of dominant position, or combinations taking place outside India, if they have or are likely to have an appreciable adverse effect on competition in the relevant market in India. Therefore, international companies having subsidiaries in India will have to adhere to the provisions of Section 3, 4 and 5 of the CA 2002.

Powers of Competition Commission

Under the CA 2002, the CCI has the power to inquire into any contravention of the Act. The CCI has the power to order the Director General to investigate into any contravention. It can pass various orders, including, but not restricted to, granting interim orders and compensation. Section 37 of the CA 2002 gives the CCI the power to review its orders on an appeal by an aggrieved person within thirty days. The CCI may, under Section 38 of the CA 2002, rectify any mistake in its order either in its own motion or where the mistake has been brought to its notice by any party to the order. An appeal against any ruling of the CCI lies to the Supreme Court of India pursuant to Clause 40 of the CA 2002. The appeal must be filed within sixty days from the date of communication of the order to the party. Under Chapter VI of the

CA 2002, the CCI may levy penalty for failure to comply with its orders or directions, submission of false statements, etc. Every order of the CCI can be enforced in the same manner as an order of the High Court or the principal civil court. Under Section 59 of the CA 2002, civil courts do not have the jurisdiction to entertain any suit with respect to any matter that the CCI is empowered to deal with.

Unfair Trade Practices

Provisions of the MRTP Act regarding unfair trade practices have not been included in the CA 2002. Currently, Consumer Protection Act, 1986 deals with both unfair & restrictive trade practices.

4.5 CASES

Case 1: Non-printing of sale price on packages of films imported and sold in India by its distributors is an unfair trade practice

Kodak Photographic Co. Ltd. Vs. D.Shourie. Kodak India Ltd. was selling the imported films as a representative of Kodak, Japan without price being printed on the packages containing films. The respondent filed a complaint before the District Consumer Disputes Redressal Forum, Delhi under the Consumer Protection Act 1986, with a prayer for the issuance of appropriate directions to protect the interests of the consumers. District Forum held that the price printed on the packages was mandatory under the provisions of the Packaged Commodities Rules promulgated under the **Standards of the Weights and Measures Act, 1977**. The complaint filed was in the general interests of the consumers, who were entitled to know the price of the product, which was required to be conspicuously displayed and if that was not done, the interests of the consumers would be jeopardized resulting in the charging of exorbitant price by the unscrupulous retailers dealing in the sale of Kodak films. Being satisfied that the action of the appellant was in violation of the rules applicable in the case, the District Forum vide its order dated 28.2.1989 directed the appellant to display the sale price of the film on the package in a manner so as not to violate the order of stay passed by the High Court where writs were pending within one month from the date of the order under intimation to the District Forum. Not satisfied with the judgment of District Forum Kodak subsequently moved to State Forum, and then finally filed appeal at National Forum. After detailed scrutiny of case the National Forum held that non-printing of sale price on packages of films imported and sold in India by its distributors is an unfair trade practice and dismissed the appeal.

Case 2: Substandard Product Allegation-Unfair Trade Practices Not Proved

DG (I&R) & Somaiya Organics Ltd. vs. Thermax Pvt Ltd. Thermax supplied two boilers to Somaiya Organics Ltd in 1987. It was alleged that Thermax has supplied old rusted boilers and that which suffered innumerable breakdowns, when operated and that boiler never generated the contractually stipulated steam pressure and hence it is case of unfair trade practices under Section 36A of MRTP, 1969. The MRTP commission initiated the enquiry as per Section 36B, 36 D and 12B. After the enquiry the following fact emerged out.

- Thermax has supplied boilers keeping in view the customers requirement.
- All the parts and components were tested during the manufacture as required under Boiler Act 1923, and Indian Boiler Regulations 1950 and accordingly the certificates were issued.
- The boilers were erected and commission in August 1987 and were reported to be running ok.
- Due to negligence of the application the tubes of the boilers burst due to over heating. As a gesture of goodwill, Thermax replaced all the burst tubes.
- Further rear portion of boiler developed crack due to overheat, which Thermax is not obliged to rectify.
- It was found out that applicant is using single sieved coal as opposed to double sieved required for running the boiler despite clear instructions given in the manual supplied by Thermax along with the equipment.
- The root cause of the boiler not achieving the stipulated efficiency was that applicant not following the instructions in the manual regarding the quality and standard of the coal to be used in operating the boiler.

In view of the above the commission held that there is no substance in allegation of unfair practices and hence the enquiry is accordingly dismissed and question for claiming compensation does not arise.

{Source: 2003 CTJ 17h(MRTP)}

Case 3: Misrepresentation in Advertisement - Unfair Trade Practice

Siddhartha Chowdary vs. UPTRON India Ltd. Uptron advertised in the various news papers proclaiming that “ A Golden Business Opportunity with Uptron - Opportunity to start your own Television Training and Service Centre. Depending on the location and size of the business the initial investment shall be Rs.4 Lakhs. This business will provide the investor for regular income. In addition your income will be supplemented by professional training courses in the repair of profession consumer electronics products like VCR, Audio Systems, Two-in-ones etc”.

Mr Siddhartha Cowdhary an educated unemployed attracted by this advertisement. On approaching UPTRON, they asked Siddhartha to pay Rs. 2 Lakh for project report, documentations on servicing, training, commercial and administration. He being an unemployed, UPTRON asked him to pay Rs. 0.5 Lakhs/- initially and balanced Rs. 1.5 Lakhs afterward and accordingly both the parties had signed an agreement. Against the payment of Rs. 50000 as first installment, only a project report was handed over to Siddharth and it was falsely stated in the covering letter that if he fails to pay Rs. 1.5 Lakhs, the first installment will be forfeited and UPTRON shall have right to recover balance amount with interest rate of Rs. 18 %, which he will have to pay . This condition was contrary to the condition stipulated in the agreement between the two parties. A complaint was lodged against UPTRON under Section 36(A) of Consumer Protection Act and National Consumer Dispute Redressal Commission directed to refund Rs 50000/- to Siddhartha. UPTRON failed to appear before the court and refund Rs. 50000/-, inspite of repeated opportunities given to them. Subsequently a complaint was lodged with MRTP (Sec12B) Commission, which after investigation held it to be

unfair trade practice and the notice was given to UPTRON to refund of amount within six weeks of notice. {Source: 2003 CTJ 162 MRTP}

Case 4: Holiday Resort - Unfair Trade Practices

Smt Sunita R. Malkani vs. Five Star Holiday Pvt Ltd. Five Star Holiday Pvt Ltd, floated a time sharing scheme and offered to sell membership of Ambee Holiday Resort situated in Karnataka, Goa and Puri. The advertisement mention about the affiliation of the Holiday Resort with RCI . Attracted by the offer Mrs. Malkani purchased the time share in 1994 and deposited a sum of Rs. 1,27,812 which were duly receipted. She was registered as a member of the Amblee Holiday Resort and the agreement between the parities was executed. She was given to understand that resorts are ready constructed and she can avail the facilities at any time. After asking for the promised facilities, she came to understand that resort is not all ready. In the meeting held with MD of the firm it was promised to refund the amount, which never happened. Thus aggrieved she filed a complaint with under Section 36A of MRTP for the alleged Unfair Trade Practice. The court held that within the meaning the Sec 36 A of the MRTP Act the not providing the time share facility and not refunding the deposited amount amounts to deficiency in services and unfair trade practices respectively. The court further directed the firm to refund Rs 1,27, 812 with 12 percent interest.

{Source: 2003 CTJ 134 MRTP}

Case 5 : Supply of product which was never manufactured

B.J. Patel vs. Model Domestic Gas Co Pvt Ltd. Model Domestic Gas Company initiated the process of appointing the agents for selling LCG (Liquid Coal Gas) cylinderized gas (equivalent to LPG) before the factory was set up. The agents were asked to security deposit and the other charges. Accordingly Mr. Patel paid Rs.25000 towards the security deposit and Rs.50000 as cash in addition to above amount. The agent was allotted the quota of 5000 gas filled cylinder and allowed a commission of Rs. 3.75 per cylinder. During the process the agents were kept in dark regarding the setting up of the factory and the factory inaugural dates were frequently changed and postponed. The amount received was not refunded even after the several representation. MRTP Commission initiated enquiry, based on the complaint received from Mr. Patel. It was revealed that the manufacturer painted a rosy picture of the business and collected the amount before the factory foundation stone was laid down. The continuous changes in the inauguration ceremony of the factory showed that the MDGCPL had no intension to construct the factory and manufacture the gas. On the other hand the money was colleted from the agents much in advance. On asking for refund, the false promises were given to the agents. Based on the facts of the enquiry, the court held that activities of the MDGCPL fall under unfair trade practices (Sec 36 A) of MRTP Act and directed the manufacturer to refund the amount with interest of 12% p.a. {Source: II(2003) CPJ 37 (MRTP)}

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Chapter 5



PRODUCT SALES AND HIRE-PURCHASE *- Contractual Rights and Obligations*

- ◆ Sales of Goods Act, 1930
- ◆ Hire-Purchase Act, 1972
- ◆ Contract Act, 1872
- ◆ Negotiable Instrument Act, 1881
- ◆ Cases

Philip Kotler defines marketing as a social process by which individuals and groups obtain what they need and want through creating, offering, and freely exchanging product and services of value with others. Hence, exchange is process by which a person can obtain the product. Exchange is the core concept of marketing and it is the process of obtaining desired product from someone by offering something in return. To make it happen two parties enter into negotiations. A contract is normally the result of negotiations between the parties. The marketing transactions for sales and purchase of goods & services are contracts. Such contracts have legal protection with remedies for breach of terms and conditions. In India contracts are dealt with 'The Indian Contract Act', 'Sales of Goods Act' and Hire-Purchase Act. In addition, The Negotiable Instrument Act governs the payments involved in marketing transaction using various instruments

5.1 SALES OF GOODS ACT, 1930

The first bare necessities of the human beings were the movables, which later on became a subject of barter system in the society. The immoveable property came later on after expansion of population. With the exploration of economic and commerce the shape of the movables changed. This system of exchange was further regulated by law-which later on became the basis of the law of contract in India and elsewhere.

Movables, which were essentials to life and also for trade and commerce, were later known as 'goods'. Every property, moveable in nature, excluding the actionable claims and money were termed as goods. Even the stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale have been included in definition of goods.

Law relating to sale of goods is a branch of Contract Law as the general principles of contract are applicable to contracts of sale of goods such as offer by the seller, its acceptance by buyer, capacities of parties involved, free consent, consideration and legal obligations and remedies to breach of contract etc. In year 1872, British Parliament enacted a statute known as the Indian Contract Act, 1872. Separate provisions of Indian Contract Act were devoted to contract regarding sale of goods. In later years a necessity was felt to enact a separate statute for sale of goods. Aforesaid sections were repealed and a new enactment known as the Sale of Goods Act, 1930 was brought into existence. The provisions of new Act if the same are not inconsistent with the unrepealed provisions of Contract Act shall continue to apply to sale of goods, general principles of the Indian Contract Act are still applicable.

The enactment is divided in seven chapters dealing with different captions. It begins with preliminary in Chapter No. I, formation of contract in Chapter II, effect of contract in Chapter III, performance of contract in Chapter IV, Rights of unpaid sellers against the goods in Chapter V and suit for breach of contract in Chapter VI. Last Chapter deals with miscellaneous matters.

Scope of the Act

This applies to only movables other than actionable claims and money and not to the immovable, which are governed by The Transfer of Property Act 1882.

Definition of Goods

Goods, means every kind of moveable property other than actionable claims and money and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Shares and stocks are goods, even things like goodwill, copyright, trademark patent etc are goods. Gas and electricity though not governed by Sales of Goods Act, are called as goods. Lottery tickets to the extent that they comprise the entitlement to participate in the draw are "goods. Under the definition of "goods" as given in the Sales of Goods Act, "goods" must be property and must be movable. Any kind of property, which is movable would fall within the definition of "goods" provided it was transmissible or transferable from hand-to-hand or capable of delivery, which need not necessarily, be in a tangible in a physical sense.

The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss.

Features Valid Sales Contract

The essential features of any valid sales contract can be enumerated as follows:

- Bilateral transaction between buyer and seller
- Subject matter of sale—movable goods
- Delivering of specified quantity and quality
- Merchantable quality
- Delivery by specific period or date—time essence of contract
- Price to be fixed or mutually fixed according to some formula or reasonable price
- Payment—cash or credit
- Transfer of title of goods
- Passing of risk
- Transport of goods—road, rail, sea, air
- Packing of goods
- Transit insurance
- Inspection of goods—pre delivery or post delivery
- Rejection, damages, return of goods
- Warranty
- After sales service
- Guarantee performance
- Contract termination—process and conditions
- Dispute settlement—jurisdiction.

Contract of Sale and Contract for Agency

A contract of agency differs essentially from the a contract of sales inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of principal and under his instruction and direction. As the agent is not the owner of the goods, he is to be indemnified by the principal in the event of any loss by agent.

FORMATION OF CONTRACT

Sale and Agreement to Sell (Sec. 4)

A sale is a contract between seller and buyer to transfer the movable property of goods to the buyer at a price. Such contract is absolute (with out any condition) or conditional. The conditional contract may include the delivery terms, price variation clause, delivery in phased manner, guarantee for performance, prompt payment by buyer etc. The conditions may from both seller and buyer side and have to be fulfilled.

The agreement to sell contract there is no transfer of property from seller to the buyer. The transfer of property takes place at the future date after the certain stipulated terms and conditions are fulfilled. The ownership of goods by buyer takes place at the future date.

The 'sale' is an executed contract and 'agreement to sale' is a contract to be executory contract. In sales buyer becomes the owner of the goods immediately, while in agreement to sale, the seller remains the owner of the goods until future time or until the certain conditions mentioned in the contract are fulfilled. The agreement to sale becomes a sale when the goods are passed to the buyer.

Sale is actual passing of goods and the risk to the buyer while the agreement to sale is the promise to sell the goods at the future date.

In the hire-purchase agreement the buyer has an option to buy the goods by way of payment of installment. The ownership of goods remains with seller till the buyer pays the full price of the goods till the payment the last installment. Thus the hire-purchase agreement is both 'a contract of bailment and 'agreement to sale.' Here the buyer has an option to discontinue the payment of installments and give the possession of goods to the seller.

Formalities of Contract

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by installments, or that the delivery or payment or both shall be postponed.

Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

The price of the sale may be mutually fixed and accepted. In some cases the third party is involved in valuation and fixing up the reasonable price. In case the third party fails to fix up the price the agreement becomes void.

Subject Matter of Contract (Sec. 6, 7 & 8)

The goods, which form the subject of a contract of sale, may be either existing goods, owned or possessed by the seller, or future goods.

There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency, which may or may not happen. The sales contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement thereby becomes void.

The subject matter of sales should indicate that the goods shall correspond with the description, manufacture, or origin and conforming to technical specifications; and, if the sale is by sample it is not sufficient that the bulk of the goods corresponds with the sample if the

goods do not also correspond with the description. The contract must specify whether it is for supply of existing goods or goods to be manufactured in future.

Contract 'Condition' and 'Warranty' (Sec. 14, 15 & 16)

There are two types of terms in the sales contract, i.e. the condition and the warranty. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

A stipulation in a contract of sale with reference to goods, which are the subject thereof may be a condition or a warranty.

A **condition** is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

A **warranty** is a stipulation collateral to the main purpose of the contract the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

An implied warranty is that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Indication of quality standard and the quantity to be supplied should be included in the contract. The quality should be merchantable (if goods are purchased by description or specification). If buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required there is an implied condition that the goods shall be reasonably fit for such purpose. If specified article is under its patent or other trade name, there is implied condition as to its fitness or the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. The breach of this warranty entitles the buyer to reject the goods and not to terminate the contract.

Caveat Emptor. This means 'let the buyer beware' or buyer to take care. In The Sales of Goods Act there is no implied warranty or condition decide fitness or quality of the goods. It is a buyer, who with his own experience and skill should decide the same. The onus of the risk is totally on the buyer. In case seller gives the implied warranty for quality and fitness of the goods and if the goods are not fit for sale the seller cannot take the defence under 'doctrine of

Caveat Emptor. In the following cases Caveat Emptor does not apply. i.e. custom or usage of trade, fraud, ordered for specific purpose and merchantable quality. (Sec 16)

EFFECT OF CONTRACT

Transfer of property

The transfer of property means transfer or passing of ownership of the goods. As transfer of ownership of property involves various rights and liabilities on the part of seller and the buyer, mere delivery of goods may not constitute the transfer of ownership. Even the ownership of goods may be passed on to the owner without delivery of goods. Unless otherwise agreed the goods remains at seller's risk until the property therein is transferred to the buyer. After the property is transferred to buyer the goods are at buyer's risk, whether the goods are delivered or not. (Sec 26)

Time When Property Transfers (Sec. 18 to 26)

For deciding on the time of transfer of ownership of property, the goods are divided into two categories i.e. specific or ascertained and generic or unascertained or future good.

The specific or ascertained goods are those, which are identified goods. For transfer ownership of the goods, the contract should show the intension of the parties and it is guided through the following rules.

- Specific goods in deliverable state—When the unconditional contract is made and goods are in deliverable state the property of goods is transferred to buyer.
- Specific goods are put to deliverable state—When the goods not reached to the stage deliverable state, the transfer of property cannot take place. The property is changed only when anything, which is remained, to be done is completed and goods are in deliverable state.
- Specific goods on deliverable state, but price has to be ascertained—The goods are in deliverable state, but the seller has to weigh, test or measure or do something for ascertaining the price.
- Goods sent to buyer on 'approval' or on, 'sale or return' basis the property of goods passed to the buyer.

For generic or unascertained goods (which are unidentified goods i.e. goods defined by description or sample or future goods yet to be manufactured) the following rule are applicable for transfer of property in goods.

- Goods should be ascertained by specified to the particular description
- Goods must be unconditionally appropriated by the buyer i.e. buyer agrees to take the delivery of goods after seller inform to buyer through notice that goods are ready for delivery.

The property does not get transferred when, seller reserves the right of disposal of goods or seller sends the bill of exchange for acceptance, together with bill of lading until buyer accept the bill of exchange.

Transfer of title (Sec. 27 to 30)

As a rule, if the seller is not the owner of goods, he cannot transfer the title of ownership to the buyer. However the following are the exception to the above.

- When the owner of goods by his words or conduct or by act of omission causes the buyer that seller has an authority to sell the goods.
- Mercantile agent {Sec. (2) Sub (9)}, with the consent of the owner is authorize to sell the goods and transfer the title of ownership to the buyer.
- Sell by one of the several joint owners by the permission of the other co-owners the property in goods can be transferred to the buyer.
- Sale if goods by a person in possession of goods under voidable contract (Sec. 29). If 'A' is buyer of goods which remained in possession of owner 'B', who sold the same goods to another buyer C. In such case C is title holder of the goods. However, A can sue B for damages.
- Sale by buyer in possession of goods and ownership is not transferred; the buyer can sell the goods to another person to whom the title can be transferred.

PERFORMANCE OF CONTRACT

Delivery of Goods (Sec. 31)

The delivery of goods is voluntary transfer of possession of goods from one person to another (Sec2 (2)). Further as per Sec 33, the delivery of goods may be made by doing anything; as a result goods are out into the possession of the buyer. The delivery may be of two types: one Actual Delivery i.e. handing over of goods to the buyer, two the Symbolic or Constructive Delivery i.e. putting buyer in possession of goods by handing over the delivery documents.

Rules of Delivery (Sec. 31 to 37)

- **Delivery and payment** -It is the duty of seller to deliver the goods and buyer to accept the goods and make the payment as per the term of sales contract
- Delivery of goods to the buyer should be made **by doing anything as agreed by the parties to put the goods in possession of buyer** or any authorized person as appointed by the buyer.
- **Delivery of part of goods** in progress of delivery of whole goods
- Seller of goods is not bound to deliver the goods until the **buyer applies** for the delivery of the goods
- **Mode of delivery** should be as per the contract terms
- **Place of delivery** should be at the place at which it is agreed by both the seller and buyer in the contract.
- **Time or period of delivery** should be as agreed in the contract. In case no time frame is fixed the seller to deliver the goods in reasonable time.
- The buyer should make a **demand of delivery at a reasonable hour**, which is question of fact.

- **Delivery Expenses** should be as per the terms of the contract or otherwise as general rule be borne by the seller.
- **Delivery in phases or installment** is not acceptable otherwise agreed in the contract
- **Delivery of goods at the place other than agreed** shall be at the risk of buyer, unless other wise agreed by the seller.
- **Short delivery.** The buyer has an option to accept or reject the goods if the quantity of goods supplied is less than what is agreed in the contract. If he accepts it, he has to pay for the same.
- **Excess Delivery.** If goods are supplied in excess quantity of what is agreed in the contract, the buyer has option to accept the exact quantity and reject the rest or reject the whole. However he has to pay for quantity he has accepted.
- **Delivery mixed with other goods.** Buyer has option to reject the whole lot or accept only those goods conforming to description as per the contract.

Acceptance of Goods (Sec. 41-43)

The acceptance of goods by the buyer is confirmed if:

- Seller gives reasonable time to buyer to examine the goods for purpose of ascertaining whether they are conforming to the description or specification or otherwise the right of inspection may be waived and to be reflected in the contract.
- Buyer intimates seller that he has accepted the goods.
- Buyer takes possession of goods and not refuses to accept it. Further he is not returning the rejected goods.

Exhibit 5.1 : Rights and Duties of the Seller and Buyer

SELLER	BUYER
Duties <ul style="list-style-type: none"> • Delivery of good as per buyer's demand • Give reasonable time and opportunity to buyer to examine the goods • Compensate buyer for wrong supply • Accept rejected material • Compensate buyer for breach of contract 	Duties <ul style="list-style-type: none"> • Pay to seller for the goods accepted • Apply for the delivery of goods to seller • Compensate the seller for breach of contract • Return the rejected material
Rights <ul style="list-style-type: none"> • To receive the payment for the goods delivered • Receive compensation for damages due to buyer's negligence of the contract terms • Sue buyer for wrongfully refusing to accept the goods and to make payment • Sue for the damages due to buyer repudiating the contract 	Rights <ul style="list-style-type: none"> • Receive delivery of the goods ordered • Get reasonable time and opportunity to inspect the goods • To terminate contract if seller commits breach of contract • Sue seller for non performance of contract • Sue seller for breach of warranty

RIGHTS FOR UNPAID SELLER

Unpaid Seller (Sec. 45)

Within the meaning of Act the unpaid seller is the one who is not being paid for the by the buyer for the goods delivered or negotiable instruments (bill of exchange) have been dishonoured by the buyer. Here seller includes the person who is in the position of seller or an agent of seller or consigner to whom bill of lading is endorsed.

Rights of Unpaid Seller (Sec. 46-56)

These can be categorized in to two heads i.e. when the property in goods is passed to the buyer and when the property in goods has not passed to the buyer.

The following are the rights of unpaid seller

- **Right of Lien (Sec. 47-49).** The unpaid seller has 'right to lien' means he has 'right to retain 'the possession of goods until all the claims are paid or satisfied. The seller can exercise the right of lien if the goods have been sold on without any stipulation as to credit or when goods have been sold on credit and period of credit has expired or when buyer becomes insolvent. However, he loses the right of lien when he delivers the goods to the carrier without reserving the right of disposal of goods or when buyer lawfully obtains the possession of goods or when seller waives the right of lien.
- **Right to Stoppage in Transit (Sec. 50).** In case the buyer of goods becomes insolvent, and seller has parted with possession of goods to carrier, the seller has right to stop the goods in transit and retain them with him till the claims are paid or settled. The right of stoppage exercised only when the buyer become insolvent while right lien is exercised if buyer does not pay though he is able to pay.
- **Right to Re-sale (Sec. 54).** After exercising above two rights seller can exercise the option of re-sale of goods in his possession on the following conditions.
 - Goods are of perishable nature
 - Notice being served to buyer about the intension of resale
 - Re-sale option, if buyer make the default - as per terms of the contract
- **Right to withhold the supplies or disposal (Sec. 55).** Seller has right to withhold the delivery of good or dispose off the goods, if goods has not passed to buyer and he is at default in payments as per the terms of the contract.
- **Right to sue the buyer (Sec. 55 & 56).** Seller may sue the buyer for price of goods or damages for refusing to accept the goods or for recovering interest on the price.

SUIT FOR BREACH OF CONTRACT

In case of breach of contract of sale of goods, the seller has following remedies:

- Suit for price of goods
- Suit for damages

Under this Act the Buyer has following remedies in case of breach of contract of sale by seller:

- Suit for damages for non-delivery of goods
- Suit for specific performance of the goods
- Suit for breach of warranty
- Suit for repudiation of the contract

AUCTION SALE (Sec. 64)

The goods put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale. The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made any bidder may retract his bid. If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

5.2 HIRE-PURCHASE ACT, 1972

The Hire-Purchase Act is an attempt to provide balance protection to the interest of the hirer and that of owner. The Act defines and regulates the rights and duties of the parties to the higher purchase agreement. The individual or the organization needs the goods for which the cash is not immediately available. In case goods are not made available for the business, the trade will suffer. The producer will not get any customer and goods will fail to meet its destiny. Hence, the alternative method is hire purchase. Under hire purchase agreement the goods are immediately physically handed over to the hirer, who makes the payments in installments. However, the cost of the facility, which is provided is much above the natural price of goods.

According to this Act, the hirer means “the person who obtains or has obtain possession of goods from an owner under a hire-purchase agreement, and includes a person to whom the hirer’s rights or liabilities under the agreement have passed by assignment or by operation of law.”

The terms owner used in the Act means “the person who lets or has let, delivers or has delivered possession of goods, to hirer under a hire-purchase agreement and includes a person to whom the owner’s property in goods or any of the owner’s rights or liabilities under the agreement has passed by assignment or by operation of law.”

Hire-purchase Agreement

As per the Section 2 (c) of the Hire Purchase Act, the ‘Hire Purchase Agreement means an agreement under which goods are let on hire and under which the hirer has an option to purchase them in accordance with the terms of the agreement and includes an agreement under which –

- (i) possession of goods is delivered by the owner thereof to a person on condition that such person on condition that such person pays the agreed amount in periodic installments, and

- (ii) the property in goods is passed to such person on the payment of the last of such installments, and
- (iii) such person has a right to terminate the agreement at any time before the property passes,

From the definition there are three main characteristics of hire-purchase agreement emerge out. The first one is the handing over of goods to the hirer but the ownership of the goods remains with the owner. The second one is the options available with the hirer i.e. return the goods and put an end to his liability to pay further installments of hire. The third one is pay all the installments and, convert the transaction into sale and become the owner of the goods he is already in possession. The Act provides the safeguard to the owner by way of allowing him to recover the goods if the hirer has transferred them to any third party. In hire purchase agreement the hirer has option to either return the goods or buy it. He cannot be compelled to buy the goods. This feature of the hire-purchase distinguishes it from sale, agreement to sale, credit sale or sales on installment. In hire purchase agreement, property in the goods is immediately delivered to the hirer, but the ownership of goods remains with the owner till the hirer pays the final installment of price.

Position of Parties to Hire-Purchase Agreement

The transaction of hire-purchase generally involves three parties i.e. dealer, who supplies the goods, the financier who provides the money (immediately) to the dealer and the hirer, who takes the goods for use. The hirer pays installments to the finance. Here the dealer is a party to the hire purchase transaction in his own rights and not the agents of the financier. He is rather intermediary between the hirer and the financier. In reality the customers do not know about the financier. They come to dealer's counter who does every thing for the customers. In the hire-purchase agreement the hirer has to provide the guarantor. The liability of guarantor is as per the ordinary law relating to contracts of guarantee.

Form and Content of Hire-Purchase Agreement

As per the Section 3 of this Act, the hire-purchase agreement should be in writing and duly signed by the parties thereto (hirer, owner, financier and the guarantor). In absence of the above formalities the agreement shall be void. As per Section 4 of the Act, the contents of the hire-purchase agreement shall be:

- (i) the hire purchase price the cash price of the goods i.e. price at which the goods may be purchased by the hirer for cash. of the goods to which the agreement relates.
- (ii) The date of commencement of agreement
- (iii) The number of installments by which the hire-purchase price to be paid, the amount of each installment by date and the mode of payment.
- (iv) The identity of goods i.e. description

Warranties and Conditions (Section 6)

The following two warranties (given by owner) are implied into every hire-purchase agreement

- (i) that the hirer shall have and enjoy the quiet possession of the goods

- (ii) that the goods shall be free from any charge or encumbrance in favour of any third party at the time of property is passed.

The Act implies the following conditions in every hire-purchase agreement irrespective of what agreement may provide

- (i) that the owner has right to sell the goods at the time of property is to pass to the hirer
- (ii) that the goods should be of merchantable quality. This means the goods shall be fit for the purpose for which they have been produced, marketed or should conform to description if meant for trade. The exception this shall be following conditions
 - goods with hidden defects of which owner is not reasonably aware
 - goods with defects, which have been pointed out in the agreement
 - goods after examination by hirer ought to have revealed the defects
 - goods which are second-hands and indicated in the agreement
- (iii) that the goods shall be to the fitness of the hirer's purpose as made known to the owner or stated in the agreement
- (iv) that the bulk of goods shall corresponds to the sample where goods are let in reference to sample
- (v) that the goods shall corresponds to the description, where the goods are delivered under description.

Limitation on Hire-Purchase Charges (Section 7)

In the situation the hirer needs the goods for business or production purpose and he is not in the position to pay for the price by cash, the owner hands over the goods to the hirer for use and let him pay by installments under hire-purchase agreement. Here the position of hirer is more vulnerable, as he needs the goods. Under such circumstances the hirer(dealer) or the finance company may exploit him by increasing the cost of providing the facility much above the natural price of the goods. But this Act imposes a limitation on the hire purchase charges. The percentage by which the natural cash price can be increased is given in the name of "Statutory Charges". This has to be calculated with reference to the each of cash price installments. Section 7(2) says that statutory charges, in respect of cash price installment, means an amount calculated at the rate of **thirty percent per annum**. In case the lower rate is specified the statutory charges should be calculated as follows:

$$SC = \frac{CI \times R \times T}{100}$$

- where :
- SC = Statutory charges
 - CI = Amount of cash price installment in rupees or fraction of rupee
 - R = Rate of interest per annum
 - T = Time expressed in years and fraction of year that elapses between date of agreement and the date on which the hire -purchase installment corresponding to cash price installment is payable under agreement.

In case the hire-purchase charges exceed the statutory charges, hirer may give notice to the owner in writing and may void the agreement or have his liability reduced to the amount by which hire-purchase charges exceed the statutory charges.

Exhibit 5.2 : Rights and Obligations of Hirer and the Owner (Section 9-23)

Hirer	Owner
Rights <ul style="list-style-type: none"> • Right to convert the transaction into sales at any time but with at least 14 days notice to owner. The balance of the hire-purchase price shall be reduced by the rebate to which he is entitled • Right to terminate the agreement with at least 14 days notice to the owner. He has to return the goods and pay installment due up to time of termination • Right to appropriate the payment. In case of indebtedness of hirer to owner in respect of more than one transaction, he may appropriate the payment from whatever agreement to meet his liability • Assignment and transmission of his rights, title and interest with the consent of owner 	Rights <ul style="list-style-type: none"> • Right to terminate the agreement (with prior notice) in the events of more than one default in payment of hire-purchase installment. • On termination, retain the hire already paid and recover the arrears dues up to termination. • Forfeit the initial deposits, if agreement so provide • Enter the premises and seize the goods. The protected goods cannot be seized without the intervention of court. • Recover the goods by application or by means of suit • Recover damages in the event of delays in returning the goods
Obligations <ul style="list-style-type: none"> • Payment of hire-purchase installment as per the agreement • To take care of the goods having been handed over to him by the owner under the agreement • Not to use the goods for unauthorized purpose, which is not in accordance to the conditions of agreement. • To give information on whereabouts of the goods upon request by owner in writing 	Obligations <ul style="list-style-type: none"> • Supply the copies of hire-purchase agreement free of cost to hirer, immediately after signing of the agreement • Supply information to hirer on the amount paid by him or paid on his behalf, amount fallen due or amount became payable • Discharge of price otherwise than price, where the owner has agreed to receive any consideration other than money for any part of hire-purchase price

5.3 CONTRACT ACT, 1872

Indian Contract Act extends to the whole of India and it came into force on the first day of September 1872. An agreement enforceable by law is a contract. Initially, The Indian Contract Act, 1872, had the separate provisions (Sec. 72 to 123), which were devoted to contracts related Sales of Goods. However, in the later years a necessity was felt to enact a separate statute for sale of goods as the provisions of the above sections found inadequate to meet the complexities of growing transactions in marketing and sales. The above mentioned sections were repealed and a new enactment known as Sale of Goods Act was brought into existence. Hence, the law

relating to sales is branch of the Contract Law as general principles of contract are applicable to contracts for sale of goods.

Law of contract is the most important branch of business law and it covers trade, commerce and industry. In industry and trade promises are made, which after negotiations are converted into agreement. The contracts are based on such agreements and create legal obligations binding on the contracting parties.

Thus for the formation of a contract there must be an agreement and the agreement should be enforceable by law.

Formation of Contract

For the formation of a contract the process of proposal or offer by one party and the acceptance thereof by the other is necessary. This generally involves the process of negotiation where the parties apply their minds make offer and acceptance and create a contract. When one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal. When the person to whom the proposal is made signifies his assent thereto, the proposal said to be accepted.

In order to convert a proposal into a promise, the acceptance must be

1. Absolute and unqualified—Any departure from the terms of the offer or any qualification vitiates the acceptance unless it is agreed to by the person from whom the offer comes. An acceptance with a variation is no acceptance; it is simply a counter proposal.
2. Expressed in some usual and reasonable manner—If the proposer prescribes any particular manner of acceptance it has to be in that manner and where no manner is prescribed it should be in a usual and reasonable manner.

Essentials Elements of a Valid Contract (Sec. 10 to 30)

- **Proposal and acceptance.** The first step in the contract creation is that one person will make a proposal or offer to the other person who will accept the proposal. The proposal thus accepted becomes a promise.
- **Consideration—lawful consideration with lawful object {Sec. 2(d)}.** Consideration is important element of contract. A seller promises to supply the goods to buyer. The buyer realizes the goods from seller by paying price to the seller. Hence, price of goods is the consideration. The promise for promise in return is called as consideration
- **Capacity of parties to contract—Competent parties (Sec. 11).** The person who is major in age and having the sound mind is qualified for making a contract.
- **Free consent (Sec. 13).** Both the contracting parties should give their free consent i.e. they should agree for the same thing in the same sense. All agreements are contracts if they are made
 - (a) by the free consent of parties competent to contract—Consent is said to be free if it is not caused by

- **Coercion:** Consent is said to be caused by coercion when it is obtained by pressure exerted by either committing or threatening to commit an act forbidden by the Indian Penal Code or unlawfully detaining or threatening to detain any property.
 - **Undue influence:** A contract is said to be induced by “undue influence” where the relation subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
 - **Fraud:** Means and includes the following acts done with the intention to deceive or to induce a person to enter into a contract. (a) the suggestion that a fact is true when it is not true and the person making the suggestion does not believe it to be true (b) active concealment of a fact by a person who has knowledge or belief of the fact, (c) promise made without the intention of performing it.
 - **Misrepresentation:** When a person positively asserts that a fact is true when his information does not warrant it to be so, though he believes it to be true, it is misrepresentation. A breach of duty, which brings an advantage to the person committing it by misleading the other to his prejudice, is also a misrepresentation.
 - **Mistake:** Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. An erroneous opinion as the value of the thing, which forms the subject matter of the agreement, is not deemed as mistake as to a matter of fact. Unilateral mistake, i.e. the mistake in the mind of only one party does not affect the validity of the contract.
- (b) For a lawful consideration and object. Consideration or object is unlawful if
- It is forbidden by law,
 - Is of such a nature if permitted it would defeat the provisions of any law
 - It is fraudulent,
 - The court regards it immoral,
 - The court regards it opposed to public policy. Every agreement of which the consideration or object is unlawful is void.
- **An agreement should not be explicitly be declared void {Sec. 2(g)}.** The agreement should be enforceable by law. It is void if
 - considerations and objects unlawful in parts.
 - consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused
 - unless it is in writing and registered, or it is a promise to compensate for something done, or is a promise to pay a debt barred by limitation.
 - agreement in restraint of the marriage of any person, other than a minor is void. It is the policy of law to discourage agreements, which restrain freedom of marriage. Where a party is restrained from marrying at all, or for marrying for a fixed period or from marrying a particular person, or class of persons, the agreement is void.

- agreement in restraint of trade. Every agreement, by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
- agreement in restraint of legal proceedings. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.
- agreements for uncertainty. Agreements the meaning of which is not certain, or capable of being made certain, are void.
- agreements by way of wager/ bet. are void; and no suit shall be brought for recovering anything alleged to be won on wager, or entrusted to any person to bide by the result of any game or other uncertain event on which any wager is made. (wager means betting or gambling). However, certain prizes for horseracing are exempted.
- **Writing and registration of agreement (Sec 25).** The contract should be in writing and registered with the appropriate authority with certain documentation like attestation etc.
- **Legal relationship.** Agreement should create legal relationship. For example agreement to buy & sell, to marry create legal relationship, while acceptance to invitation for dinner does not create legal relationship
- **Certainty.** There should be something in the contract, which either party can enforce. A vague contract cannot be enforced by the law. In nutshell the contract should be clear and without any ambiguity.
- **Possibility of performance.** A contract should be such that it should be capable of being performed.
- **Enforceable by law.** The contract should be enforceable by law and aggrieved parties should be able to obtain relief through law in the event of breach of contract.

Performance of Contract (Sec. 37 to 72)

Every contract is consisting of the reciprocal promises. The parties to the contract must perform or offer to perform their respective promises. For example in a work contract where time is essence of contract is enforceable till completion of work, or its abandonment, recession of contract and consequent forfeiture of security deposit.

Breach of Contract (Sec. 73 to 75)

The parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Act, or any other law.

Promises bind the representatives of the promisor in the case of death of such promisor before performance, unless a contrary intention appears from a contract. In a contract the agreement being enforceable by law, each party to the contract is legally bound to perform his

part of the obligation. Non-performance of the duty undertaken by a party in a contract amounts to breach of contract, for which he can be made liable.

Remedies

When a party to the contract makes a breach of contract, there are two possible alternatives available to the other party. Firstly to bring an action for the breach of contract, and secondly he may bring an action for specific performance of the contract.

Compensation for Breach

- **Compensation for loss or damage caused by breach of contract.** For the breach of contract damages is the most appropriate remedy. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach.
- **Compensation for breach of contract, where penalty stipulated for.** When a contract has been broken and a sum has been named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether actual damage or loss is proved to have been caused thereby, to receive from the party who as broken the contract reasonable compensation not exceeding the amount so named or, the penalty stipulated for.
- **Party rightfully rescinding contract entitled to compensation.** A person who rightfully rescinds a contract is entitled to compensation for any damage, which he has sustained through non-fulfillment of the contract.

Specific Performance

Specific performance means actual execution of the contract as agreed between the parties. Specific Performance of any contract may, in the discretion of the court be enforced in the following situations –

- When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or
- When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Exceptions: where compensation would be adequate reliefs are:

- Agreement by a landlord for repair of the rented premises;
- Contract for the mortgage of immovable property;
- Contract for the sale of any goods, for instance machinery or buffaloes. However, a contract to deliver rare coins would be specifically enforceable, as compensation would not constitute adequate relief in such a case;

- An agreement to pay money by installments;
- An agreement for lending money.

Besides the Following

- A contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms, cannot be specifically enforced.
- Another situation when a contract cannot be specifically enforced is where “the contract is in its nature determinable”. A contract is said to be determinable, when a party to the contract can put it to an end.
- A contract the performance of which involves the performance of a continuous duty, which the Court cannot supervise, cannot be specifically enforced.

Persons Who Cannot Obtain Specific Performance

1. The specific performance of a contract cannot be obtained in favour of a person who could not be entitled to recover compensation for the breach of contract.
2. Specific performance of a contract cannot be enforced in favour of a person:
 - (i) who has become incapable of performing the contract that on his part remains to be performed, or
 - (ii) who violates any essential term of the contract that on his part remains to be performed, or
 - (iii) who acts in fraud of the contract, or who willfully acts at variance with, or in subversion, of the relation
 - (iv) intended to be established by the contract.

Contract of Agency (Sec. 182-237)

As per the act the principal can appoint an agent to act for him. An agent is a connecting link between the principal and the third party. Agency is a relation based upon an express or implied agreement whereby one person, the agent, is authorized to act for another i.e. principal in transactions with third party. For discharge of contractual rights and obligations both the principal and the agent should be of major in age and should be of sound mind. The contract of agency may be created by appointing an agent by word of mouth or by writing. The usual form of a written contract of agency is power of attorney on a stamped paper. This called as ‘express agency’. The other types of agency is by ratification i.e. ‘implied agency’ which arise out of situation or relationship of the parties and ‘estoppel agency’ when principal by his conduct or statement induct others to believe that a certain person is his agent. According to Act mercantile or commercial agent may assume any of the form such as broker, factor, commission agent, del credere agent with extra remuneration), auctioneer, banker, pakka/katcha adatias, and an indenter.

Exhibit 5.3 : Duties and Rights of Principal and Agents

Agent	Principal
Duties <ul style="list-style-type: none"> • To conduct business of an agency according to principal's direction • He should conduct business with skills and diligence that is generally possessed by persons engaged in small business • To render proper accounts • In case of difficult, to communicate with the principal • Not to make any secrete profits • Not to deal on his own account 	Duties <ul style="list-style-type: none"> • Agents to be indemnified against consequences of lawful acts, which are done in good faith • Compensate to agent for injury by principal's neglect • Pay agents his commission or remuneration which is due • Non-liability of an employer of agent to do a criminal act
Rights <ul style="list-style-type: none"> • Right to receive reasonable remuneration or agreed commission • Right to retainer i.e. Retain some money received on account of principal towards advances made or expenses incurred by him • Right to lien i.e. retain the goods, papers or property of principal for the amount due to him for commission, service rendered • Right to stoppage in transit when he purchased goods by his own money or he holds himself liable for the price of goods sold • Right of indemnification i.e. Principal indemnifies agents against consequences of lawful acts down on behalf of principal • Right to compensation for injury due to neglect of principal 	Rights <ul style="list-style-type: none"> • Right to terminate agency if agent has no interest in agency • Right to get information on the conduct and operation of business with respect to the goods supplied by the principal • Question agent on the performance of the contract • Sue agent for misrepresentation, fraud or breach of agency contract • Right to compensation for injury due to neglect of agent • Right to get money colleted by agent on behalf on principal

The provision of the Act allows an agent to appoint a sub-agent to act on his behalf. Section 191 states that a 'Sub-agent' is a person employed by and acting under the control of the original agent in the business of the agency. However, there is no privity of contract between sub-agent and the principal. The sub agent cannot sue the principal for any remuneration and similarly principal cannot sue sub-agent for money due from him.

The termination of agency (Sec. 210) is done under the following circumstances:

- By revocation by the principal
- On expiry of fixed period of time indicated in contract
- On performance of specific purpose
- In the event of insanity or death of principal or agent
- On destruction of subject matter of the agency

- In the event of insolvency of principal
- By renunciation of agency by agent

5.4 NEGOTIABLE INSTRUMENTS ACT, 1881

This is an act pertaining to transferable document for payment issuing and collection in the trade, commerce and industry. The act mentions about only three kinds of negotiable instruments viz; bill of exchange, promissory notes and cheques. The cheque is quite versatile negotiable instrument being commonly used in the business and commercial transaction. Under the acts dishonouring of the negotiable instrument is an offence and punishable with fine or imprisonment.

What Constitutes an Offence ?

- ♦ Where any cheque drawn by a person for the discharge of a liability is returned by the bank **for the reason of the insufficiency of the amount** of money standing to the credit of the account on which the cheque was drawn or for the reason that it **exceeds the arrangement made by the drawer** of the cheque with the bankers for that account
- ♦ The payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within thirty days of the receipt of the information by him from the bank regarding the return of the cheque unpaid; and
- ♦ The drawer of such cheque should have failed to make the payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of receipt of the said notice.

Under such case the drawer of that cheque shall be deemed to have committed an offence and he shall be punishable with imprisonment for a term, which may extend to one year, with fine, which may extend to twice the amount of the cheque or both.

However, the cheque is given as a gift or present and if the bank dishonours it, the maker of the cheque is not liable for prosecution.

Offences by Companies

- ♦ If the person committing the offence is a company, every person who, at the time offence was committed, was in charge of, and responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.
- ♦ If a person proves that the offence was committed without his knowledge, or that he had exercised due diligence to prevent the commission of such offence, he shall not be punishable.
- ♦ Where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial Corporation owned or controlled by the Central Government or State Government, he shall not be liable for prosecution.

- ♦ Where any offence has been committed by a Company and if it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary, or other officer of the Company, such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Cheque Presentation

- There is no embargo upon the payee to successively present a dishonoured cheque during the period of its validity.
- There is no restriction regarding the number of times a cheque can be presented and that every subsequent representation and dishonour gives rise to fresh cause of action for filing complaint.
- In the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reason and being presented again by the payee after sometime, on his own volition or at the request of the drawer, in expectation that it would be encashed.
- For dishonour of one cheque there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within 15 days of the receipt of the notice served.
- On each presentation of the cheque and its dishonour, a fresh right and not cause of action accrues. Therefore the payee without taking pre-emptory action in exercise of his right may, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque.
- Cause of action would arise only on failure to pay after notice.
- Once a notice for payment is given a fresh cause of action will not arise if the cheque is presented again and it is dishonoured.

Effect of Stop Payment

- Stop payment instructions cannot obviate the offence.
- Even if stop payment instructions are given and notice of the same is given to the payee or holder in due course liability cannot be avoided.
- The position will not be different even if the drawer had instructed the bank to stop payment prior to the presentation of the cheque for encashment.
- Once the cheque is issued there is a presumption, that the holder received the cheque for the discharge, of any debt or liability and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under the Act.

Notice for Dishonour

- The requirement of giving of notice is mandatory. If no notice making a demand for payment is served upon the drawer within 30 days from the date of dishonour of cheque, a complaint is not maintainable unless the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

- Notice means a notice in writing.
- A postal acknowledgement due containing the signature of the accused is proper proof of service of the notice on the addressee shown in the postal acknowledgement.
- When a notice is returned by the sender as unclaimed such date would be the commencing date in reckoning the period of 15 days. Such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address.
- The notice need not necessarily be by registered post only. It can be sent by a telegram, fax or by a letter as well.

However it is preferable to send the notice by registered post, as that is clear evidence of service.

Period of Payment

If payment is not made within 15 days of the receipt of the notice then the offence shall be deemed to have been committed.

- The cause of action for filing complaint would arise after the completion of 15 days from the date the drawer receives the notice and fails to pay the amount within that period.
- The court cannot take cognizance prior to the lapse of the period of 15 days even if there was a denial of the liability earlier, even after denial liability to pay the amount, the accused can at any time change his mind within 15 days of receipt of notice, make payment and avoid prosecution.
- The offence shall be deemed to be committed only from the date when notice period expired.

The drawer cannot take the excuse that he had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentation for the reasons stated above.

Remedies

For the offence of dishonouring of cheque as mentioned the following remedies are available:

- ♦ To file a civil suit
- ♦ To file a complaint under Section 138 of the Negotiable Instruments Act, 1881
- ♦ To file complaint under Section 420 for cheating under the Indian Penal Code

In case a person has filed suits for recovery, he is not precluded from filing a complaint under Section 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code. Both remedies may be simultaneously possible. A civil suit cannot debar the criminal prosecution.

Filing of Complaint

The court will not take cognizance of any offence unless

- ♦ The payee or holder in due course of the cheque makes a complaint in writing.

- ♦ The payee cannot lodge a complaint after the completion of one month from the date on which the cause of action arose.
- ♦ A complaint can be filed through Power of Attorney, agents of the payee or holder in due course
- ♦ A complaint has to be filed in writing alongwith the list of witnesses and the list of documents.

A complaint can be filed in a court within the jurisdiction of which, the cheque has been drawn, the place where the cheque is presented for collection, the place where it is received after endorsement, the place where cheque is dishonoured.

The offence shall not be triable by any court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the first class.

The complaint has to be filed within one month of the date on which the cause of action arises i.e. within 45 days of the offender receiving the notice to make payment.

Procedure for Action by Court

- If the magistrate is of the opinion that there are sufficient grounds for proceeding he shall call the complainant for pre summoning evidence and the necessary documents are exhibited.
- Thereafter summons are issued for the attendance of the accused and the witnesses.
- The evidence of the witnesses is recorded.
- The particulars of the offence are stated to the accused, and he shall be asked whether he pleads guilty or has any defence to make.
- If the accused pleads guilty, the magistrate shall record the plea and convict him.
- If the accused does not plead guilty the Magistrate shall proceed to hear the complainant and the accused and take all the evidence as may be produced by both.
- On the hearing and evidence the Magistrate shall pass the order of conviction or acquittal.

5.5 CASES

Case 1: Default in Hire Purchase Installments

P.T. Chinnaswamy vs. Nagarjuna Finance Ltd. The complainant Mr. Chinnaswamy entered into a hire-purchase agreement with Nagarjuna Finance co for a lorry, agreeing to pay a specific monthly installment for a total period of 36 months. Due to default of payment the lorry was seized by the finance company as per terms of (based on Hire Purchase Act, 1970). Mr. Chinnaswamy filed a complaint with Consumer Redressal Commission for deficiency of services. However, he could not prove that the lorry was purchased for making out the livelihood and there State Consumer Redressal Commission held that there is no deficiency in service on the part of the finance company. {Source: I (2002) CPJ 405}

Case 2: Acceptance of Delayed Payment - Deemed extension of time

R. K. Saxena vs. Delhi Development Authority. As per Section 55 of Contract Act, 1872, Delhi Development Authority cancelled the allotment of plot (auction sale of plots) as

Mr. R. K. Saxena failed to make payment within the fixed time limit. Auction purchasers were granted some extensions to make payment subject to payment of interest. The payments were made after the expiry alongwith the interest payment, which was accepted by DDA. Even after accepting the payment DDA cancelled the allotment. Court held that DDA after accepting the delayed payment with interest cannot cancel the allotment. The cancellation order may be squashed and directed DDA to allot to Mr. R.K. Saxena the plot purchased by him.

(Source: 2002 AIR SCW 2489)

Case 3: Seller can increase the price as per Market Trends

Gulam Mohamad Wani vs. Timber Corporation of J & K. The J & K Timber Corporation entered into contract with Gulam Mohammad Wani for supply of timber. The corporation sanctioned the supply but the material was not in deliverable state. As per the clause the delivery could be effect subject to the availability of stocks. The sanction order did not indicate any price. The corporation charged the price prevailing at the time of supply, which was higher than the price indicated at time of the contract. As there was no promissory estoppel as to price, the court held that Timber Corporation charged the enhanced prices as per the prevailing market rates.

(Source: AIR 1999 J&K74)

Case 4: Seller if at fault, cannot charge revised higher price

Aluminum Industries (AIL) Ltd vs. Mineral & Metal Trading Corp of India ltd (MMTCIL). MMTCIL entered into contract with AIL for sale & supply of aluminum metal. The contract terms indicated that the price ruling at the time of delivery shall apply. AIL opened the letter of Credit in favour of MMTCIL and as per the delivery note issued, repeatedly approached MMTCIL's godown to get the delivery of the material and which was postponed every time. During this period the prices were revises upwards. MMTCIL asked to take the delivery of the material at the higher price, which AIL refused. The court held that MMTIC was in fault and honoured the writ petition of AIL.

(Source: AIR 1998 Mad 239)

Case 5: Dishonour of Cheque by Reason of "Stop Payment"

Modi Cement Ltd vs. Kuchi Kumar Nandi. The court held that in case the cheque is dishonoured by the reason of "Stop Payment" instruction, an offence under Section 138 can be made out. In such case the presumption under Section 139 is also attracted. by virtue of which the Court can presume that the cheque was received by the holder for discharge of liability or debt in part or in whole. The accused can show that the stop payment instruction was issued not because of paucity of fund but because of some other valid reason, then offence under Section 138 would not be made out. However, the burden of proof lies with the accused.

[Source: 1999 (3) SCC 249]

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Chapter 6



PRODUCT

–Legal Issues in Product Development and IPR Protection

- ◆ Product Development
- ◆ IPR—An Intellectual Capital
- ◆ Indian IPR Scenario
- ◆ Global Vs Indian IPR Landscape
- ◆ IPR—Indian Legal Framework
- ◆ Cases

In today's competitive markets the business organizations need to develop strategies to faster product development and thereafter protect their Intellectual Property Rights. If fail to do so, you may put your business at risk. With IPR you either make money by manufacturing or in case you cannot afford to manufacture, licensing may be the answer for making money from royalties. The globalization has further necessitated a proper legal strategy on the part of the Indian organizations to develop the new products and to capture, preserve and protect intellectual property rights. The organization has to put in place mechanism for avoiding unauthorized use of a third party's IP, which might invite liability at the same time protect IPR by issuing of 'cease and desist' legal notices and initiating infringement and injunction proceedings. Different IP rights vary in the protection they provide. Often, more than one type may be necessary to fully protect your creation.

6.1 PRODUCT DEVELOPMENT

In today's era of mega competition the wherein technology plays a major role, the most of the leading firm adopts the strategy of differentiation through new product development. The classic example is INTELL and SONI, wherein the major strategy focus is on new product development. The product life cycle is deliberately compressed and old products are killed and replaced with the new and innovative products. The firms spend millions of rupees on research

and development. However, the new products should comply with acceptable quality and design standard stipulated by the law. In today's context, the products must be compatible with the environmental standards and should be harmless for usage and human consumption. The key question includes:

- Do the manufacturing process avoid the polluting the environment?
- Do the packaging is not adding to waste generation and creating environmental problems?
- Do the product and it's packaging, after being used have recycling potential?
- Do the product harmless for usage and consumption by human beings?
- Is the product approved by the appropriate agency and certified for usage?

The government and the consumer groups are the watchdogs for the new products introduced in the markets. There is host of legislation for arresting the introduction of harmful products in the market. The classic example is government regulations banning the use of CFC (Chlorofluorocarbons) as refrigerant or as ingredient in aerosol containers. The other example is the recent ban imposed on manufacturing and marketing of 'Ghutka' in the State of Maharashtra under the ' Food and Adulteration Act. Hence, the marketers today needs to add one more step in their new product development process i.e. study of compatibility of new product -its manufacturing process, ingredients, basic design, packaging and environmental effects - to the existing regulations in the country.

The New product development is risky process. But not only for growth and survival alone, corporations are forced to pursue the new product development activity more vigorously than ever as the today the product life cycles are drastically compressed due to advances in technology. In addition the corporations have to develop the new products looking into the safety needs of the potential users under the pressure of growing consumerism and government regulation to avoid the possible legal suits and penalties such as imprisonments and fines. Today, under the various laws the powers of the government agencies to investigate and ban potentially unsafe products have been enhanced. This is particularly in case of pharmaceutical and process foods products. The safety, health and environmental regulations have increased in areas of health care, medicine, automobile, consumer durables, toys, clothing and food products. Marketers must be aware of these regulations, when proposing, developing and launching a new product.

To look into the setting of standards for products, commodities, materials and process at national and international levels, a **Bureau of Indian Standard** came into force. **Bureau of Indian Standards** (National Standards Body of India) is a statutory organization established under the **Bureau of Indian Standards Act, 1986**. The Bureau is a body corporate and comprises members representing industries, consumer organizations, scientific and research institutes, professional bodies, technical institutions, Central Ministries, State Governments and Members of Parliament. The Minister in charge of the Union Ministry of Consumer Affairs and Public Distribution is the President of the Bureau and the Minister of State as its Vice-President. The Executive Committee of the Bureau is responsible for its day-to-day functioning and the Director General is its ex-officio Chairman. The Bureau is responsible for facilitating harmonious development of standards (<<http://www.del.vsnl.net.in/bis.org/sfp1.htm>>), product certification (<<http://www.del.vsnl.net.in/bis.org/cert1.htm>>), quality system certification

(<<http://wwwdel.vsnl.net.in/bis.org/cert2.htm>>) and Environmental Management Systems Certification (<<http://wwwdel.vsnl.net.in/bis.org/cert3.htm>>).

The institution is operating its certification mark scheme under Indian Standards Institution Act 1986. This enables the bureau to grant licenses to manufacturers producing goods in conformity with set standards to apply for ISI mark. Certification is a procedure by which a body independent of the manufacturer or the customer gives assurance that a product or service conforms to specified requirements. BIS Certification encompasses product, quality systems and environment management systems.

For obtaining certification, a product has to undergo testing and inspection. Recently, the penalties for violation of standards have been substantially enhanced. During the operation of the license, the ISI inspector carry out regular and surprise inspections of manufacturers' works to ensure that the quality standards are being properly adhered to. The Bureau of Indian Standards has a full-fledged Grievance Cell functioning at its HQ in Delhi with Public Grievance Officers at all its Regional and Branch Offices to provide consumers with prompt attention and speedy redressal of their grievances. If a customer feels unhappy about the quality of a BIS certified product, he/she should get in touch with the nearest office of the Bureau of Indian Standards. BIS arranges for their redressal by way of replacement/repair of the product in case the complaint is found to be genuine.

Complaint on a BIS certified product can be lodged in the manner by personally contacting/writing to Public Grievances officer of the nearest Regional/ Branch/ Inspection office or directly to the Director (Consumer Affairs & Public Grievances Department).

Public can complain regarding the quality of BIS certified product and indicate the name/type/size/grade of the product, source and date of purchase and batch no. Specify the nature of complaint. Preserve the cash memo, in case it is available. Keep the product complained about and it's packing in safe custody till the visit of an inspecting officer of the Bureau of Indian Standards.

The ISI marking scheme provides for free replacement of ISI marked products found to be of substantial quality. Besides providing a third party assurance of quality, the operation helps the manufacturer to realize benefits of economies of scale.

The marketing decisions on products are influenced by the development in legal environment. The environment is consisting of the laws, government enforcing agencies and the pressure group like consumer councils that influences and limits the product development process. The laws sometimes create the opportunities for new product developments. For example the enactment of environmental laws, created new opportunities for the business corporations to develop new products for the environmental pollution control, which is mandatory for the organizations. The manufacture of automobiles conforming to EURO II standard of emission is out come of the legal enforcement.

6.2 IPR—AN INTELLECTUAL CAPITAL

M. Porter in his work on 'Competitive Advantage' stated differentiation is key to business competitiveness. The differentiation may be achieved through product, experience, technology or way the things are performed and exhibited to satisfy the customers. However, this all amounts to the knowledge, which in today's highly dynamic and competitive business environ-

ment is the key source of competitive strength to the organizations. The knowledge produced by the employees of the organization through the hard work, experience and inventions is the intellectual capital of the firm or an individual, which needs to be captured, preserved and protected for future use for not being used by the rivals. This intellectual capital may lead to core competency, which can be leveraged for sustainable competitive advantage in the dynamic markets. The intellectual capital includes Patents, Copyrights, Designs, Trademarks, Business Secrets, Product Ideas and Business Processes. Intellectual Capital is intangible wealth that helps the organization, access to the markets, preserve exclusive markets and maintain the profits. Hence, the organizations today need to preserve these rights through legal framework, so as to protect it from infringement or misuse by the competitors.

The term 'Intellectual Property Rights (IPR)', connotes that there is a value attached to the intellectual contribution for the patent, trademark or some innovative work of the individual or organization as a whole. IPR is a mixture of industrial property and copyright.

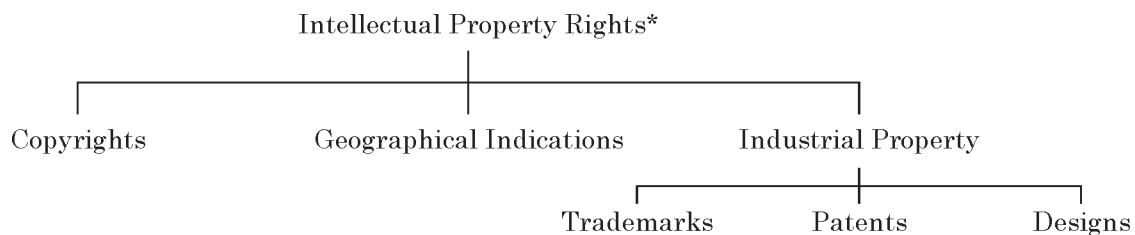


Fig. 6.1. IPR Classification.

There are different ways of dealing with an innovations. One can make it public for free use by publishing in journals or work the invention in secrecy without patenting it such as Coco-Cola keeping the secrecy for composition and put it into market without patenting it or exploit the invention on the basis of poof patent like Rank Xerox.

Intellectual property is a highly specialized area of law designed to encourage creativity and fair competition in the marketplace. It protects the rights of individuals and businesses, who have transformed their ideas into property by granting rights to the owners of those properties.

A Patent can be obtained for a new or improved machine, article of manufacture, chemical composition, process, computer software or business method, or even an e-commerce business model or enabling technology for the Internet. A patent allows you to prevent anyone from producing, using or selling your invention unless you are paid for the privilege. A patent grants you the right to control the fate of your invention in the marketplace.

Trademarks identify the source of goods, while Service Marks identify the source of services. Words, symbols, numbers, slogans, designs, features of packaging, color combinations, animations and even sounds may be used as trademarks or service marks. Such marks are used to create branding strategies that establish consumer loyalty.

A Copyright establishes ownership of original works of authorship "fixed" in any tangible medium of expression. A copyright applies to the expression of an idea, whether published

*Rupa Chanda, IPR Pharmaceuticals, IIM-B Management Review, September 2002, pp. 61.

or not. Once an original work is created and fixed, copyright exists. Examples include: books, poetry, plays, short stories, articles, comic books, musical compositions (words and/or music), audio and video recordings, choreographic works, pantomimes, motion pictures, filmstrips, TV programs, photographs, paintings, drawings, prints, maps, architectural plans, scale models, sculpture, craft works, jewelry designs, fabric designs, computer programs and databases.

The difference between the different instruments of IPR can be explained as follow: “If a new type of ‘wristwatch’ is invented, a Patent can protect the invention. The shape of wristwatch itself can be protected by a Design registration. The name under which the wristwatch is sold is a Trademark and can also be registered. The style in which certain world are inscribed on the wristwatch or literature, which explains the working of the wristwatch will be protected by Copyrights.”

6.3 INDIAN IPR SCENARIO

Intellectual property in India is well established at all levels—statutory, administrative, and judicial—and covers four key areas mentioned below.

Patents

India is progressively tightening the protection available to intellectual properties and is committed to make its patent laws compatible with the Trade Related Aspects of Intellectual Property and Services (TRIPS) agreement under WTO by 2005. Existing patent laws—the Patent Act of 1970 and Patent Rules of 1972—prohibit product patents for any inventions intended for use or capable of being used as food, medicines, drugs, or relating to substances prepared or produced by chemical substances. The processes for making such substances are patentable. The term of patents for such processes are shorter from five years from the date of the grant of a patent or 7 years from the date of filing an application for patent. The term of product patents, where available, is also shorter (14 years from the date of filing of application) than the 20 years required under the TRIPS agreement.

Meanwhile, a comprehensive review of the Patents Act 1970 was made and a Bill to amend the Patents Act was introduced and passed in Parliament in 2002 to put India’s patent laws in line with the TRIPS agreement. However, India has met its obligations under Sections 70.8 and 70.9 of the TRIPS agreement. India has put in place a “mailbox” facility to allow registration of patents on pharmaceuticals and chemical products. In addition, it has extended “Exclusive Marketing Rights”. This gives the patent applicants the right to market their products in India even before India’s patent law is amended to recognize product patents in pharmaceuticals and chemicals. In a major modification to the patent rules, the government has decided to make all applications for patents public within, 18 months after the date of filing. The Patents (Amendment) Act '02 has been made effective from May 20, '03.

In 1998 India joined the Paris Convention for Protection of Industrial Property and the Patent Co-operation Treaty (PCT) and extends reciprocal arrangements to all countries party to the Convention. Now, simultaneous registration of patent in 115 PCT countries is possible.

Trademarks

Trademarks, once registered, are valid for ten years. Registration confers on the registered proprietor the exclusive right to use of the trademark. Stringent penalties are imposed for falsifying a trademark or selling goods to which a false trademark is applied. There is no restriction on use of foreign-owned trademarks for goods sold in India, and foreign companies need not assign or register their trademarks as Indian-owned trademarks.

The Indian Parliament approved a new trademark law in 1999, replacing the Trade and Merchandise Marks Act of 1958, and provided a new basis for protection of trademarks in India. The new Act provided statutory protection to service marks, and simplified the definition of what constitutes an infringement of a registered trademark/service mark. It also increased the duration of registration and its subsequent registration from seven to ten years.

Exhibit 6.1: Basic Concept of IPR Laws

Patent Law	Patent centers around the concepts of novelty and inventions. It relates to new products or processes of manufacturing a product.
Trademark Law	Trademark is based on the concepts of distinctiveness and similarity of marks and similarity of goods. It consists of the word, name, device or get-up used in relation to particular goods to indicate the source of manufacture or trade origin of the goods.
Copy Right Law	Copyright is based on the concepts of originality and reproduction of the work in any material form. It relates to original literary, dramatic, musical and artistic works, cinematograph films and sound recordings.
Design Law	Design law is based on novelty or originality of design, not previously published in India or any other country. It relates to the non-functional appearance of a product, which appeals solely to the eyes.
Geographical Indication Law	Geographical Indication is a sign used on goods, which have a specific geographical origin and possess qualities or a reputation that are available in the goods due to the place of origin.

Copyrights

A new Copyright (Amendment) Act of 1999 replaced the Copyright Act of 1957. The Act vests copyright in the authors on creation of their works and require no registration. However, registration provides prima facie evidence of a copyright's validity and is advisable. The Act covers computer programs, satellite broadcasting and digital technology. The Act provides for copyright enforcement. A person whose copyright is infringed may sue for civil relief, and may even institute criminal proceedings for infringement in certain cases. The Government has

taken some measures over the past two years to strengthen and streamline the enforcement of copyrights. These include establishment of the 'Copyright Enforcement Advisory Council' and special policy cells to deal with cases relating to violation of copyrights.

India is a member of the World Intellectual Property Organization (WIPO), the Berne Union for Protection of Literary and Artistic Works, the Nairobi Treaty of the Olympic Symbol and the Universal Copyright Convention (UCC). This means that any person that enjoys a copyright in any of these convention countries automatically gets statutory copyright protection in India.

Designs

On May 25, 2000, the new Design Act was publicly notified. The international classification will now take effect and priority may now be claimed from applications filed in World Trade Organization and Paris Convention countries. The Design registration in India is intended to protect designs, which have an industrial or commercial use and protect only for the appearance of the article and not how it works.

Geographical Indications

In 1999 the Act for geographical indications for protection of goods was enacted. A Geographical Indication is a sign used on goods, which have a specific geographical origin and possess qualities or a reputation that are available in the goods due to the place of origin. The Controller-General of Patents, Designs and Trade Marks appointed under sub-section (1) of the section 3 of the Trade Mark Act, 1999, shall be the Registrar of Geographical Indication.

6.4 GLOBAL VS. INDIAN IPR LANDSCAPE

In recent years the global IPR landscape has witnessed a significant change. The General agreement on Tariffs and Trade (GATT) was established in 1948 with the objective of removing of trade barriers, promotion of world trade and resolution of trade related disputes. India was one of the founder members of GATT. Through the series of trade negotiations and rounds held at different point of time a strong multilateral trading system was developed under the GATT umbrella. In the year 1970, this agreement was extended to include technical standards & regulations, subsidies, anti-dumping and Government procurement. In 1986-94 Uruguay Rounds led to the creation of World Trade Organization (WTO) on January 01, 1995, which is successor to GATT. It elaborated many earlier GATT obligations and extended its umbrella to service industry. WTO's main objective is to help smooth, fair and free trade flow between the member countries. Apart from the trading of mere goods the WTO agreement has given much importance to the protection of intellectual properties rights to the creators so as to prevent the others to use their inventions, designs and other creations. As the extent of protection and enforcement of these rights varies widely around the world and these differences became a source of disputes or barriers to in international economic relations.

The WTO's agreement on Trade Related Aspects of Intellectual Rights (TRIPS) provides the guidelines to narrow the gaps between the differences amongst the member countries. TRIPS, (for IPR protection around the world) is bringing them under common and uniform international rules. TRIPS laid down the guidelines as to how patents, copyrights, designs,

trademarks should be protected, where the cross-broader trade is involved. Thus TRIPS provides the guidelines for harmonization of IPR laws in the WTO member countries. TRIPS also allow its members to implement the various minimum provisions and retain a balance with domestic national interests. As per TRIPS, the member countries are expected to initiate the changes in their legal framework of IPR protections within the transition period allowed (up to 2005), so as to strengthen it on the lines of WTO directives.

The TRIPS agreement prescribes minimum standards of protection for seven forms of intellectual property:

- ⇒ Copyrights and Related Rights
- ⇒ Trademarks
- ⇒ Geographical Indications
- ⇒ Industrial Designs
- ⇒ Layout designs for Integrated Circuits
- ⇒ Undisclosed Information
- ⇒ Patents

In the first six of the above items, Indian laws meet the minimum standards. But in case of patents our laws differ significantly from the WTO requirements. Patents can be of two categories- process patents and product patents. The process patent means that the process of the manufacturer is patented and nobody can manufacture any product by that process without the consent of the patent holder. On the other hand, the product patent means that nobody other than the patent holder can legally manufacture the particular product.

The Indian Patent Act, 1970, allows process patents in the area of pharmaceuticals. This act was introduced to emphasize the self-efficiency in drug production and to save foreign exchange. Three years after the patent is granted, anybody is allowed to use the process and pay royalties to the patent holder. The strategy that the Indian companies followed was to take a new product that has been patented outside the country, reverse engineer the product and come out with a new production process, which would be patented in India. By this method, it could avoid paying royalty fees to the company which actually owned the product patent. But all these are going to change now.

The TRIPS agreement signed by India in 1994 provides for all countries to make product and process patents available in a non-discrimination fashion for all inventions subject to normal tests of novelty, inventiveness and applicability. The term or life of the patent must be a minimum of 20 years from filing. The product patent is to be implemented by January 5, 2005. In the meantime, legislation has to be passed and specifically, in lieu of providing product patents, developing countries like India must accept applications for the product patents. This mailbox arrangement, named since these applications will go into a mail box that will be opened up in 2005 will determine the right of priority when full fledged product patents will be granted. Interim protection is provided to the applicant through the grant of Exclusive Marketing Rights (EMRS) for a period of 5 years for products that are patented after 1995. EMRS are granted when the following four criteria are satisfied:

- Patent applications are filed in India after 01, January 1995.
- Patent obtained in another WTO country, after 01, January 1995.
- Marketing approval obtained in another WTO country
- Marketing approval obtained in India

The TRIPS provisions have raised several concerns amongst the developing countries and these are:

- India has to change its patent regime that protects process patents to extend to that of product patents for the period of 20 years from 7 years currently being granted.
- Importation, which is not considered as commercial work to exploit invention in India today, needs to be changed to allow the same, which will have impact on domestic R & D.
- For promoting the access to existing drugs and promoting research and development in new drugs a compulsory license is part of TRIPS (Compulsory license is when Government allows someone else to produce the patented product or process without the consent of patent holder). This is done to meet the market demand and it is to be done based on individual merit of the cases.

Exhibit 6.2: Indian Patent Act vs. TRIPS Provisions*

	Indian Patent Act (Before amendment)	TRIPS Provisions
Definition of innovation Macro-organism Plant variety protection Drugs and pharmaceuticals	Not available Not patentable Not available Only process patents	Available Patentable Available Process and product patents
Importation	Without prior permission amounts to infringement; not accepted as working of patent	Importation permissible
Compulsory licensing	Both exclusive and non- exclusive	Non-exclusive licensing only in special cases
License of right	Provision exists	No provision
Term of patent	14 years for patents other than food and drugs, for food and drugs 7 years from date of filing of patent and 5 years from date of grant	Unilaterally 20 years
Burden of proof	On plaintiff	On the defendant

*Round Table, IPR : Pharmaceuticals, IIMB-Review, Vol. 14, No. 3, September 2002, pp. 62.

6.5 IPR—INDIAN LEGAL FRAMEWORK

In India various acts extend protection to most types of intellectual capital. However in many cases the frequently the business organization confuse with the various IPR instruments and use them erroneously and interchangeably. Currently, the Copyright Act 1957, Trade Marks Act 1958, the Patent Act 1970 and Design Act, 2000 contains the provisions, which identify and provide for registration and protect the different types of Intellectual Property Rights.

⇒ Copyrights Act, 1957

Copyright is the very old form of recognized intellectual property. The Act gives the exclusive right to the copyright owner to multiply copies of his work for commercial use. It also does not allow others from illegally multiplying the copies of his work. The copyright protection covers both for published as well as unpublished works. The work for which copyright protection can be granted covers literary, dramatic, musical, artistic, cinematograph films, phonograph records and computer programs recorded on magnetic tape or disc, required for understanding and using computers. The copyright law also covers protection to works of art intended for quasi-commercial purposes i.e. artistic designs used on cartons, catalogue lists, drawings, monograms, advertisement drawings, computer software and paintings produced on Christmas cards.

The Copyright Act 1957 in Section 14 describes copyright as the exclusive right subject to the provisions of this Act. It authorizes the copyright owner for the reproduction or copying in respect of a work or any substantial part thereof, namely:

- Copyright vests in original work involving skill, labour and judgment in respect of literary (such as books, publications including computer software); dramatic and musical works. Artistic works whether usable as trademarks or not;
- Engineering drawings;
- Sound recording;
- Musical work;
- Cinematograph film etc.

Computer programmes are entitled to protection under the present laws. Computer software comprises programme manuals, punched cards, magnetic tapes, discs, papers etc, which are needed for the operation of computers. Manuals, papers and computer printouts can be classified as literary work but the concept of algorithms, normally used in programming, are not capable of a copyright protection. Software containing certain special information in a particular notation, mainly punched cards, may be treated as literary work. Regarding magnetic tapes and discs, if electronic impulses are recorded on them, it is considered as literary work. However, in the absence of an authority on this point, this is a matter of speculation only.

Programmes, which are designed for operating computers, are generally speaking accepted to be within the ambit of artistic and literary work. Under the Copyright Act, the author is recognized as the first owner of copyright. The commissioned work during the course of employment either under a contract of service or of apprenticeship is not covered under this act.

In case of published work Copyright protection is for the life of the author and continues for sixty years from the beginning of the calendar year next following the year in which the author dies. For other categories of work such as records, photographs, the period of protection is 60 years from the date of first publication of the work.

In the Indian Copyright Act the provision is made for registration of Copyright with the Copyright Office. The Copyright Office is located in the Ministry of Education, New Delhi. Copyright registration is not mandatory, but optional. The registration of copyright is useful in safeguarding, protecting and enforcing the legal rights of the owner. As per Section 51 of the Copyright Act, 1957 'Copyright in a work shall be deemed to be infringed:

- when any person, without a license granted by the owner of the copyright or the Register of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act
 - does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
 - permits for profit, any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or
- when any person
 - makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
 - distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
 - by way of trade-exhibits in public, or
 - imports into India.

In India, the unauthorized hire and sale of copies of video films, cassette recordings for public performances and books is regarded as violation of Copyright Laws. Against such violations Civil suits provide remedy for claiming compensation for loss of profits. The infringement of copyright is a cognizable offence and is punishable with imprisonment for a period extending from six months to three years accompanied with or without a fine ranging from Rs. 50,000/- to Rs. 2,00,000/- (approximately US \$ 2000 to \$ 8000). The Act provides also for seizure of infringing copies and confiscation of all duplicating equipments used for manufacturing counterfeit copies.

Copies of the work done outside India, which if produced in India would infringe the copyright of the owner, are banned from being imported in India. Mere import of such material would result in the infringement of the copyright law in India.

India is the signatory to two international copyright conventions viz. Berne Convention and the Universal Copyright Convention. The provisions of these conventions give the copyright protection to works of Indian nationals in all the member countries which are signatory to these two conventions. Similarly, foreign authors from the member countries are entitled to Copyright Protection in India.

In addition to above, India is also signatory to some other conventions such as the “Convention for Protection of Producers of Phonogram against Unauthorized Duplication” of their PHONOGRAMS and convention relating to the distribution of program carrying signals transmitted by satellites, and also the “Rome Convention for Protection of Performers, Producers, Phonogram and Broadcasting Organization.” These conventions are administered by specialized agencies of the United Nations such as WIPO and UNESCO.

⇒ Trademark Act 1999

The importance of Trademark as an intellectual property cannot be ignored. Over the period of time, a trademark usually becomes synonymous with the goods. By constant application of trademark on the product, a person acquires exclusive rights to use that mark in relation to those goods. The Trademark Law in India is now contained in the provisions of Trade Mark Act 1999 (47 of 1999). The earlier Trade & Merchandise Mark Act, 1958 has been repealed. The object of this Act is to confer protection to the user of the trademark on his goods and to prescribe conditions for acquisition, and legal remedies for enforcement of trade mark rights. The definition of trademark as defined in Indian Trade Mark Act means a registered trademark or mark used to identify the origin and manufacture of the goods. The trademark includes the use of the design, brand, heading, label, ticket, name, signatures, word, letter or numeral separately or in any combination. To sum up, a trademark performs the following three functions:

- Identifies the product and its origin;
- Guarantees product quality; and
- Advertises the product.

The owner of trademark has no right to the exclusive ownership of the symbol, which constitutes the trademark except for its use and application in connection with some vendible commodity. The property right in the trademark is in use for the goods produced by the manufacturer.

The owner of an unregistered trademark selling his goods in a particular territory acquires the right of trademark in that territory only. Any other person outside the territory can use the same trademark without violating the trademark rights vested in the owner.

The Indian Trade Mark Act, 1999 provides for registration of trademark with the Registrar of Trade Mark. For purposes of registration of the trademark, India, has been divided into four zones. The trademarks offices are located in Mumbai, Delhi, Calcutta and Chennai. Application for registration of trademark is to be made by the Trademark Attorney on behalf of the owner of the trademark. After the application is processed and examined by the trademark authorities, it is advertised in the Trade Mark Journal issued by the Trade Mark Registry at Mumbai for inviting objections. If no objections are filed within the period of three months from the date of advertisement, the Registrar of Trade Marks may register the trademark. Section 18 of the Act provides for the procedure for making an application for registration.

The salient features of the Act are:

- Definition of trade mark to include registration of shape of goods, packaging and combination of colours. “Trade Mark” shall now include services as well. All 42 inter-

national classifications of goods shall now be applicable in India as well and it would be possible to register “trade mark” in respect of service categories.

- The period of registration is 10 years. Permitting filing of multi-class applications, registration of collective marks and trademarks for service.
- Prohibit registration of a mark, which is merely reproduction or imitation of a well-known mark - even in respect of disparate goods or service. Any mark which takes unfair advantage of or is detrimental to the distinctive character or repute of a well known trade mark is not entitled to registration under Section 9 and such use would amount to infringement of a registered well known trade mark under Section 29. Even advertisements of a registered well known trade mark which takes unfair advantage of and is contrary to honest practice in industrial or commercial matters, or is detrimental to its distinctive character or is against the reputation of the mark, constitute infringement of the mark.
- “Permitted use” to include use of a registered trademark by an unregistered licensee.
- Making offences relating to falsification of trademarks and application of false trade descriptions cognizable. Police are empowered to search and seize goods or other instruments involved in committing an offence.
- Creation of an “Intellectual Property Appellate Board” for hearing appeals against orders and decisions of the Registrar of trade marks for speedier disposal of cases.
- Scope of infringement widened. For instance, use of a registered trademark as a part of a corporate name or use of a mark which is identical or deceptively similar to a registered trademark even in respect disparate goods or services will be regarded as infringement of a trade mark. The definition of infringement has been expanded.
 - ❑ Use of an identical or similar mark in respect similar goods could also constitute infringement.
 - ❑ Even use of an identical or similar mark in respect of goods or services to completely unrelated goods or services could constitute infringement Use of a registered trademark to labeling or packaging materials, on business paper or for advertising goods or services constitute infringement.
 - ❑ In the case of word marks, even spoken use of the words can constitute infringement.
- Allowing a suit for infringement or passing off to be filed in the court within local limits of whose jurisdiction the plaintiff resides or carries on business or works for gain.
- Courts empowered to pass ex-parte injunction orders or other interlocutory orders for (a) discovery of documents, (b) preserving the infringing goods, documents or other evidence, and (c) restraining the offender from disposing off or dealing with his assets in a manner which may adversely affect the plaintiff’s ability to recover damages, costs or other pecuniary remedies.
- Minimum penalties of a six month imprisonment and Rs.50,000/- have now been prescribed for trade mark violations. The maximum penalties have been increased from two years imprisonment to three years and a fine of Rs.20,00,000/-

- Trademark violation is now a cognizable and non-bailable offence. The Act now empowers a police officer (not below the rank of Deputy Suptt. of Police) to search and seize without warrant the goods, dies, block, machine, plate or other instruments or things involved in committing the offence. The police officer is however bound to obtain an opinion of the Registrar of Trade Marks on the facts involved in the offence relating to trade marks.

Foreign Trademarks

Use of foreign trademarks in India is permissible except in cases, which involves direct royalty payments in foreign currency. The permission of the Reserve Bank of India is not required for use of the foreign trademark, which does not directly involve payment of royalty to the owner of that foreign trademark. Proprietors of foreign trademark, who register their trademarks in India must use it in relation to the goods in India either directly or through a local collaboration in India. Non-user of such trademark in India may result in cancellation of the trademark.

Collective Trademarks

The use of collective trademarks is permitted in India. Such foreign trademarks registered in the country of its origin are registered jointly with the Trade Mark Registry in India along with the trade mark of the Indian party.

Period

Registration of a trademark is initially valid for a period of ten years subject to renewal for a further period.

Remedies for Protection

To protect the Registered Trade Mark the following remedies can be resorted to:

- Civil Remedies :
When instances of infringement and passing off occur, the Court of competent jurisdiction can be moved for grant of injunction, damage compensation and rendition of profits illegally earned.
- Criminal Proceedings.
- The complainant can seek award of punishment to the infringer.
- Administrative Remedies—Removal of trademark, if wrongly registered.

⇒ Patent Act, 1970

A patent right is a form of industrial property. The owner can sell the whole or part of his property. These rights could be licensed for commercial purposes. Patent is defined as a statutory grant of right to an inventor in his own invention from which all others are excluded, as long as the grant runs.

The Indian Patent Act 1970 repeals the Indian Patent and Designs Act, 1911. The Act confers on the patentee or its authorized agent/licensee the exclusive right for limited period for commercial exploitation of his patent in consideration of the disclosure of its invention.

Patent is a legal right, which accrues to the inventor on registration of his invention with the Patents Office. The patent rights are granted only to new inventions, which are capable of industrial application. All inventions having novelty and utility for a manner of new manufacture, are entitled to acquire patent. Controller of Patents grants the Patent rights to the patentee.

The Patent system in India is governed by the Patents Act, 1970 (No 39 of 1970) and The Patents Rules 1972, effective from April 20, 1972. Subsequently The Patents Act, 1970 is amended effective from January 1, 1995 and The Patents Rules, 1972 is amended effective from June 2, 1999 and further amendments in 2002 and 2003 respectively.

The Patent Office, under the Ministry of Commerce & Industry, Department of Industrial Policy and Promotion, has been established to administer the various provisions of the Patents Law relating to the grant of Patents & The Designs Law, relating to the registration of Industrial Designs. The patents can be registered under category of Ordinary Patents, Patents of addition or Convention.

The inventor, assignee, legal representative of deceased inventor or assignee may make application, either alone or jointly with another. The inventor is entitled to be mentioned in the patent if he applies to do so.

What is Patentable

An invention, which means any new and useful art, process, method or manner of manufacture; machine, apparatus or other article; or substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention.

What is not Patentable

- ◆ An invention that is frivolous or that claims anything obviously contrary to well-established natural laws;
- ◆ An invention the primary or intended use of which would be contrary to law or morality or injurious to public health;
- ◆ The mere discovery of a scientific principle or the formulation of an abstract theory;
- ◆ The mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;
- ◆ A substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;
- ◆ The arrangement or rearrangement or duplication of known devices, each functioning independently of one another in a known way;
- ◆ A method or process of testing applicable during the process of manufacture for rendering the machine, apparatus or other equipment more efficient, or for the improvement or restoration of the existing machine, apparatus or other equipment, or for the improvement or control of manufacture;
- ◆ A method of agriculture or horticulture;
- ◆ Inventions relating to atomic energy.

The patents will be granted in case of inventions relating to substances prepared or produced by chemical processes (including alloys, optical glass, semiconductors and inter-metallic compounds) and substances intended for use or capable of being used as food. No patent will be granted in respect of claims for the substances themselves, but claims for the methods or processes of manufacture will be patented.

Procedure for Registration of Patent

An application form in triplicate along with the relevant documents and information to be submitted to the office of registrar of patents. All the applications for patent accompanied by complete specification are examined substantively. A first examination report stating the objection(s) is communicated to the applicant or his agents. Application or complete specification may be amended in order to meet the objection(s). Normally all the objections must be met within 15 months from the date of first examination report. Extension of time for three months is available, but application for extension therefor must be made before the expiry of normal period of 15 months. If all the objections are not complied with within the normal period or within the extended period the application will be abandoned. When the application is found to be suitable for acceptance it is published in the gazette of India (Part III, Section 2). It is deemed laid open to the public on the date of publication in the gazette of India. Notice of opposition to the proposed patent must be filed within four months of notification in the Gazette. Extension of one month is available, but must be applied for before expiry of initial four month period.

If the application is not opposed or the opposition is decided in favour of the applicant or is not refused, the patent is granted or sealed on payment of sealing fee within 6 months from the date of advertisement. However, it is extendable by three months.

The Register of Patents will be kept in the Patent Office and its branch offices. Register of Patents can be inspected or extract from it, can be obtained on payment of prescribed fee. Register of Patents contains full details of the Patent, which include Patent number, the names and addresses of the patentee; notification of assignment, renewals particulars in respect of proprietorship of patent etc.

Duration of Patent

A patent lasts for 20 years from the date of filing the complete specification.

Infringement

Infringement can consist of taking away essential features of the patented invention; utilizing claimed features; copying patented substances; mechanical equivalence; taking part of the invention, while the patent is in force. Use by the government or for government purposes is not infringement. Such use must be paid for on terms to be agreed upon before or after use. Accidental or temporary use, use for research, use on foreign vessels, do not constitute infringement.

Appeal

Appeal lies in the High Court. Appeal must be lodged within three months from the decision of the Controller.

Remedies

In case the patent rights are infringed the remedies include injunction, damage recovery and compensation for the loss of profits. The Patent Act also provides for penal action in case of certain practices indicated in the Act. The penalty includes imprisonment for two years and fine.

⇒ **Designs Act, 2000**

Design refers to the features of shape, configuration, pattern or ornamentation, which can be judged by the eye in finished products. Design registration is used to protect the visual appearance of manufactured products. A registered design gives a legally enforceable right to use product's design to gain a marketing edge. It also prevents others from using the design without agreement. The Design registration in India is intended to:

- Protect designs, which have an industrial or commercial use.
- Exclude the designs, which are essentially 'Artistic Works', which are covered by copyright legislation and are not eligible for design registration.
- Protect only for the appearance of the article and not how it works.

The new Designs Act, 2000, had been publicly notified on 25 May, 2000. The international classification will now take effect and priority may now be claimed from applications filed in World Trade Organization and Paris Convention countries. The following principal provisions of the Designs Act, 2000, have taken effect on and from 11 May, 2001.

System of Classification

Lucerne Classification (Classes 1-31) adopted. Additional Class 99 introduced embracing everything not coming within the purview of Classes 1-31. Accordingly to this Act the "Design" has been defined as the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article (which means any article of manufacture and any substance, artificial, or partly artificial and partly natural; and includes any part of an article capable of being made and sold separately) whether in two/three dimensional form or both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye, but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trademark, or property mark or artistic work. The following are not eligible for registration under this Act.:

- Design which is contrary to public order or morality
- Designs which lack novelty (Novelty is judged based on prior publication not only in India but also other countries) or originality (in relation to a design) means originating from the author of such design and includes the cases which though old in themselves yet are new in their application.
- Designs, which have been disclosed to the public anywhere in India or in any other country by publication in a tangible form, or by use, or in any other way prior to the filing date, or where applicable, the priority date of the application for registration;

- Designs, which are not significantly distinguishable from known designs or combination of known designs;
- Designs, which comprise or contain scandalous or obscene matter.

Publication of registered design

A design shall be published in the official gazette on registration and opened to public inspection after publication of the design in the official gazette.

Term

Term of Copyright in a Registered Design is 10 years from the date of registration initially, renewable for a further term of 5 years. Renewal fee should be paid before expiry of the 10th year of the initial term.

Restoration of lapsed design

Registered designs that have lapsed by reason of failure to pay the fee for extension of copyright within the prescribed period, may be restored through an application and on the payment of the appropriate fee(s).

Priority

The right of priority has been extended to include Member Countries of the Paris Convention and the World Trade Organization (WTO). It will now be possible to claim priority from first of the applications filed in a convention country if the corresponding Indian application is filed within 6 months from the date of the convention application.

Penalty

The penalties have been increased to the scale of Rs.25,000/- to Rs.50,000/- thereby strengthening enforcement laws in India.

Enforcement

Infringement action for unauthorized use of registered 'Design' can be filed in the District Court or High Court having jurisdiction. The reliefs available include: Injunction order, Rendition of accounts of profits illegally earned by the defendant, damages, delivery up costs.

⇒ Geographical Indication Act, 1999

A Geographical Indication is a sign used on goods, which have a specific geographical origin and possess qualities or a reputation that are available in the goods due to the place of origin e.g. Basmati rice, Darjeeling tea, Agra peta, Bikaner bujia and Scotch Whisky etc. But the place of origin may be village or town or a region or a country. A Geographical Indication tells consumer that a product is produced in a certain place and has certain characteristics that are due to that place of production. However, as against this Trademark is a sign used by commercial establishments to distinguish their goods and services from those of other traders. Geographical Indications are understood by consumers to denote the origin and the quality of products. Many of them have acquired reputation and goodwill, which may be misrepresented

by dishonest traders. False use of geographical indications by unauthorized traders, for example “Assam” for tea, which was not grown in the Assam area of Indian Territory, is detrimental to consumers and legitimate products. Similarly ‘Basmati’ rice is grown in Punjab State in the particular geographical conditions. Therefore, geographical indication needs protection under the Act.

In the past in case of ‘Basmati’ India could not get help from the WTO on the issue of the patenting of a geographical indication name because India did not have its own legislation for registration of geographical indications. Then Indian government took up the matter with the USPTO and managed to stop the patenting on the basis of geographical indication. The US government supported India on the Basmati rice issue. Thus the Indian companies have used geographical indications of other countries for a long time.

Article 22 of the TRIPs Agreement defines Geographical indications as “indications which identify a good as originating in the territory of a member or a origin, or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin”. The generic use of the geographical indication shows that the product originates from a particular region. Scotch Whisky is a perfect example. Hence, all WTO members must provide means for interested parties to prevent use, which misleads the public on the geographical origin of goods. Secondly the use should not amount to unfair competition. Therefore a tea, which claims to be Darjeeling tea may actually be of the same or better quality than that which comes from Darjeeling. However, the fact that the tea is actually grown in Sri Lanka is a violation of the geographical indications portion of TRIPs. Special protection is provided to wines and spirits. In these cases, usage by other regions is not allowed at all even if the said usage is neither misleading nor constitutes unfair competition. The exceptions deal with the situation where a geographical indication has become a generic term in the local language, or where there are other forms of established usage. In these cases, the country must enter into bilateral or multi-lateral negotiations with the other countries for the protection of individual indications for wines and spirits.

This Act stipulates the establishment of a Geographical Indications Registry. Under the Act, the registered proprietor of the Geographical Indications and the authorized user or users shall have the right to use the Geographical Indications exclusively in relation to goods for which the Geographical Indications is registered. Under the Act owner has right to file for infringement of the Geographical Indications and obtain the relief as provided under the Act. The certificate of registration on Geographical Indications granted by the Registry will be admissible in all courts without further proof for any litigations.

As per the Act a registered Geographical Indications is a public property, which, once registered, cannot further be assigned, licensed or mortgaged. In a nutshell, this is a comprehensive legislation, which covers all aspects of Geographical Indications.

A geographical indication shall be deemed to be applied to goods whether it is woven in, impressed on, or otherwise worked into, or annexed or affixed to, the goods or to any package or other thing. As per Section 37 (2) the penalty is attracted in case of the following:

- ♦ falsifies any geographical indication; or
- ♦ falsely applies to goods any geographical indication; or

- ♦ makes dispose of her in his possession any die block machine plate or other instrument for the purpose of falsifying or of being used for falsifying geographical indication or; or
- ♦ applies to any goods to which an indication of the country or place in which they were made or produced or the name and the address of the manufacturer of person for whom the goods are manufactured required to be applied under section 71 a false indication of such country, place or address; or
- ♦ tampers with alters or effaces an indication of origin which has been applied to any goods to which it is required to be applied under section 71; or
- ♦ causes any of the things above mentioned in this section to be done,

The violation of the provisions of The Act shall attract penalties like imprisonment for term, which shall not be between six months to three years and with fine it will be not be less than fifty thousand rupees extending to two lakh rupees. However for second conviction there will be imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

6.6 CASES

Case1: Misrepresentation regarding quality of product

Vinod Kumar vs. Nuchem Ltd. M/S Vinod Kumar is an interior Decorator. He purchases lot of material for interior decoration from various manufacturers for his clients. Nuchem ltd manufacturers wooden boards under the brand name MDFWUD, which is being sold through the various authorized dealer of Nuchem. These boards after cutting to required size are fitted with laminated sheets, hardware material and are then painted and polished with melamine lacquer.

After seeing the advertisement of the above product and reading about its superior features, Vinod Kumar purchased the above material in bulk from Nuchem dealer M/S Gurinder Sales Agency for interior decoration job for his three clients. Soon after the work was done the parties started complaining about sub-standard quality of board. They mentioned that the boards were started warping and contracting at the joints contrary to the representation made in the advertisement. In view of the above M/S Vinod Kumr has to replace the defective material and redo the job at his cost. He further lodged the complaint with the company for compensation. Even with the series of complaints he could not get any response from Nuchem. And finally after a lot of follow up Vinod Kumar got the reply from the company that the defects seems to have cropped up as guidelines to fit the board were not followed.

Not satisfied with the reply M/S Vinod Kumar lodged a complaint against Nuchem under Section 12B of MRTP, 1969 for wrong representation of the material in the advertisement and claimed for the compensation of Rs 20 L for the loss incurred. Nuchem in reply said that the product of the company is manufactured as per the following standards BIS-IS12406/1988, British standard BS-1142/1989, American Standard-ASTM D-1037-72 and ANSI A-208-2-1980, European Standard CEN-TC-112/WC3 and ISO 9000 system. Nuchem further mentioned that the complainant did not verified with them the guidelines to be followed during fixing the

boards and these were given in the catalogues, which were available with the company's dealers.

After hearing from both the parties The Commission further investigated the case and found the following facts:

- The advertisement states that NUWUD MDF can be used anywhere i.e. in homes, offices, industries in the shape of ceiling, doors, roofing, furniture, paneling, partitioning and windows etc.
- The statement in the advertisement is unqualified and is not subject to any guidelines to be followed for achievements of result as promised as evident from the following:

“Unbeatable advantages-No knots or grain-Homogeneous, Super smooth surface-No seasoning required-No warping , cracking or splitting-Free from termites and fungus, Moisture resistant-Fire retardant, Uniform strength in all directions-Unbeatable machinability-Compatible with all kind of finishes-Cuts wastages and production costs.”

- The advertisement is making a misrepresentation with regards to the qualities of the product.
- The advertisement gives the impression that no guidelines are required while using the subject material.
- The catalogue even though under the heading of ‘applications’ states about cutting and machining, jointing, screw holding, using of safety system such as dust extraction equipment, glasses and gloves etc, there is nowhere in mention of it in the advertisement.

Based on the above facts the Commission concluded that this is a clear case, where misrepresentation in regards to the qualities of the goods in question has occurred as a result of non-disclosure of material facts in the form of guidelines to be followed by the user. Further based on the bills submitted by Vinod Kumar for repurchase of material for rework, the Commission directed Nuchem to compensate Vinod Kumar to the extent of Rs 1,00,000 and not Rs. 9,00,000 as claimed by Vinod Kumar, which is rather inconceivable amount.

{Source: I(2003)CPJ 98 (MRTP)}

Case 2: Trademark and Brand

RiceTec Inc. USA vs. Govt of India. Re-examination request by Indian government agency causes RiceTec Inc. to withdraw four claims of its patent on aromatic, long-grained rice. RiceTec also withdraws UK trademark registration for KASMATI in the face of a cancellation action.

Texas-based RiceTec Inc. has reportedly withdrawn four out of the 20 claims of its US patent pertaining to a strain of long-grained aromatic rice. RiceTec had claimed the novel characteristics of

- a starch index of about 27 to 35;
- a 2-acetyl-1-pyrroline content of about 150 ppb to 2000 ppb;
- a length of about 6.2 mm to 8 mm;
- a width of 1.6 mm to 1.9 mm;

- a length to width ratio of 3.5 to 4.5;
- a length-wise increase of about 75% to 150% when cooked; and
- a chalk index of less than about 20.

The Government of India through its agency the Agricultural and Processed Food Products Export Development Authority (APEDA) filed a re-examination request at the US Patent & Trademark Office, in April, 2000, challenging the novelty of RiceTec's patent claims on the following ground:

- The claims were far too broad and the grain specific traits mentioned were already present in over 90 per cent of the 'basmati' germplasm existing in India and Pakistan much before the date of filing of the patent.

While RiceTec has withdrawn the four grain-specific claims in the patent, the remaining claims pertaining to novel rice lines and methods of breeding them, subsist. These claims include four advanced rice lines (BAS-867, RT1117, RT1121 and BasLgSel).

- producing grains having characteristics similar or superior to those of good quality basmati rice while simultaneously combining the high-yielding, disease-resistant and photoperiod-insensitive traits of modern semi-dwarf varieties; and
- cultivatable in North, Central or South America or the Carribean Islands.

APEDA had argued that -

- The name 'basmati' had been traditionally associated with a specific region of the Indian sub-continent, namely the sub-Himalayan tracts and used to describe a unique long-grained, aromatic rice grown in these parts. Consequently, basmati was a geographical indication for such variety of rice.
- The word 'Kasmati' was deceptively similar to 'basmati' and therefore, contrary to its significance as a well-known geographical indication.

Incidentally, following an APEDA opposition in 1999, RiceTec had withdrawn UK trademark applications to register certain words evocative of basmati, such as 'Texmati', 'Texmati Texas Aromatic Rice' and 'Texmati Aromatic American Rice'.

Case 3: Design Changes

Pfizer vs. Cadila Healthcare. Based on the permission granted by Delhi High Court Cadila Healthcare started to marketing its anti-impotency drug 'Penegra' with some changes in design in Pfizer patented drug 'Vigara'. But Pfizer under Indian Design Act, 2000, appealed to Supreme Court of India in June, 2001 saying that Cadila has copied its design for Penegra. Consequently the Court had granted a 30-day restraint order in favour of Pfizer. Cadila had challenged the restraint order saying that

- There is inordinate delay of five months in filing the suit by Pfizer, as the 'Penegra' was being sold by Cadila since January, 2001.
- Consequent to restraint order Cadila is suffering a huge loss of Rs. 8 millions every month.
- In addition 'Viagra' was not being marketed by Pfizer in India and its not being considered during issue of restraint order.

Supreme Court further directed the Cadila to change the existing blue colour and diamond shape (which is similar to Viagra) of Panegra, before it goes for marketing its product in the Indian market.

Case 4: Trademark Violation

Shayoka Fashions of India vs. AB Volvo. A.B Volvo, a Swedish automobile giant marketing its automobile goods in India under its own trademark and this trademark is used by them abroad, for marketing textile products and fashion garments also. This trademark is being copied and being used by the Delhi based garment company 'Shayoka' for marketing the local made textile products. A case was filed by AB Volvo in the Delhi High Court against Shayoka for infringing its trademark alleging that:

- ♦ The use of trademark by Shayoka "Volvo-denim" and "Volvo-jeanswear", eroded the uniqueness of the Swedish company's trademark;
- ♦ This has resulted into great harm to the reputation of AB Volvo as the Shayoka used the trademark on the inferior quality goods which are locally made without any quality standards.
- ♦ Shayoka has created impression that the goods dealt by them have an international association as these belong to 'Volvo'.

Under The Indian Trademark Act, 1958, The Court granted an ex-parte injunction restraining Shayoka Fashions from carrying on its business using the trademark 'Volvo' or any other trademark similar to it.

Case 5: Patents & Designs Infringement

Cadila Healthcare vs. Instacare Laboratories. Cadila Healthcare, a leading pharmaceutical company claimed the exclusive rights to manufacture and market for five years the drug named LMX a pharmaceutical product incorporating the patented process based on a patent claiming a novel drug delivery process. In this process lactobacilli is delivered in combination with a penicillin-based antibiotic, but separated by a protective film that prevents the antibiotic from reacting with the lactobacilli, thereby enabling it to remain effective to counteract the side effects of the antibiotic, long after the drug is orally consumed.

As Instacare Laboratories was manufacturing and selling a similar combination drug incorporating the patented process, under the names 'Hipen LB' and 'Hipenox LB'. Hence, Cadila filed suit against the Instacare Laboratories for using their manufacturing process stating the following:

- Cadila had been granted the patent for a novel process after satisfying the patent granting procedure under the law
- Against the advertisement for opposition from interested parties, Instacare did not avail of the opportunity to serve a notice of opposition before the grant of the patent
- Instacare, therefore, has no right to defend the action for infringement and Cadila cannot be deprived of the fruits of its invention.
- Further, the Expert's opinion states that the international search report relating to a corresponding PCT international application establishes that the novelty and inventive merit of the present invention is beyond doubt as there is no situation available to counter the claim.

Instacare claimed a right to defend the action for infringement as follows on all grounds available under Section 64 of the Patents Act.:

- The process adopted by Cadila was not new as combination drugs with enteric coating of one of the ingredients was known in the pharmaceutical world.
- Instacare has been marketing its Hipen LB and Hipenox LB drugs since, 1999 which was prior to the grant of Cadila's process patent in 2000.

Affirming the trial court's vacation of the ex-parte injunction and rejection of the application for interim injunction, the Court found the subject process lacking novelty and held that:

- Documentary evidence before the court leaves no doubt that the process of making combination drugs of a chemical material (an anti-infective agent such as penicillin) and a microorganism (such as lactobacilli) and isolation of one of the ingredients by giving it a coating are both known and well accepted processes. Thus, prima facie, the process evolved by Cadila is not found to be patentable and subsequently, Instacare cannot be restrained from using the said process for manufacturing its products.
- The Notice of Allowance issued in the USA, as submitted by Cadila refers to "The process for the preparation of a stable fixed dose, pharmaceutical composition of anti-infective agent/agents and microorganisms as the active ingredients" and expressly informs that "This Notice of Allowability is not a grant of patent right".

The Gujarat High Court on May 2 and 4, 2001, has affirmed the trial court's vacation of an ex parte injunction restraining Instacare Laboratories from infringing Cadila.

Case 6: Similarity in Trademarks

Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd. In the takeover and restructuring process of the Cadila Group, two companies were separated as per the relevant section of Companies Act, 1956, with the right to use Cadila as a corporate name by both the firms. Cadila Health Care Ltd. (CH) and Cadila Pharmaceuticals Ltd. (CP) had a similar trademark for Anti-Malaria drug i.e. '**Falcigo**' and '**Falcitab**' registered with Trademarks Registration Authority. The District Court of Vadodara and Gujarat High Court held that there is no scope for confusion in purchase of above drugs by the end user even though the trademarks are similar as they differ in appearance, formulation and price. However, Supreme directed the authority to submit the official search report from Trade Mark Office before granting the permission to manufacture the drug under a brand name, under Drugs and Cosmetics Act, so that there will be no confusion in the market arising out of the phonetically similar trademarks.

The Appellant CH filed a suit in the District Court of Vadodara seeking injunction relief against respondent CP for infringement of trademark on the following grounds.

- The CP's trademark "Falcitab" for its anti-malarial medication was confusingly similar to the CH's trademark "Falcigo", which is also an anti-malarial drug.
- The CH had applied to the Trademarks Registry for registration of the trademark "Falcigo" and on 7th October, 1996, had obtained permission from the Drugs Controller to market the drug.

- The respondent obtained permission to market its anti-malarial drug “Falcitab” from the Drugs Controller on 10 April, 1997.
- The CP was therefore, using its trademark “Falcitab” to pass off its product for the CH’s drug “Falcigo”, by taking advantage of the confusing similarity between the two names, and also that the drugs were for the treatment of the same ailment - cerebral malaria - and were medicines of the last resort.

Cadila Pharmaceuticals Limited in defence stated that-

- The prefix “Falci” has been derived from the name of the disease “Falcipharum Malaria” and it is a common practice in pharmaceutical trade to derive the trademark from the name of the disease, to indicate to doctors and chemists that a particular product/drug is meant for a particular disease.
- Further both drugs in question being Schedule “L” drugs, they are not sold across the counter but only to hospitals and clinics, thereby eliminating any scope for confusion of deception.”

The Vadodara District Court dismissed the appellant Cadila Healthcare Limited’s interim injunction application stating that as the two drugs “Falcigo” (containing Artesunate) and “Falcitab” (containing Mefloquine Hydrochloride) differed in appearance, formulation and price and were sold directly to hospitals and clinics, there is no scope for consumer-end deception or of confusion. Hence, no case for grant of injunction can be made out.

The subsequent appeal by Cadila Healthcare to the **Gujarat High Court** also failed, with the Court ruling that on the basis of an examination of the packaging of the two drugs it could not said that there was likelihood of confusion being caused to the unwary consumer in respect of the disputed marks and therefore, there was little chance of any passing off.

Supreme Court after granting the Special Leave Petition of appellant/applicant Cadila Healthcare, made the following observations based on several precedential rulings of the this Court, and other precedents:

- “Any application for trademark, which is likely to deceive or to cause confusion to the purchaser who is taken to be man of average intelligence and imperfect recollection, has to be refused. notwithstanding the fact that the mark might have no identity or close resemblance with any other trademark.
- “English cases proceeding on the English way of pronouncing an English word by Englishmen, which it may be stated is not always the same, may not be of much assistance in our country in deciding questions of phonetic similarity. It cannot be overlooked that the word is an English word which to the mass of the Indian people is a foreign word.”
- “... the overall similarity of the composite words [have to be considered] having regard to the circumstance of the goods bearing the two names are medicinal preparations of the same description.”
- “The trademark is the whole thing - the whole word has to be considered”.
- “While an action for passing off is a common law remedy being in substance an action for deceit [t]he action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of “the exclusive

right to the use of the trade mark in relation to the goods". In case of infringement, "if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the getup, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark, would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff." "In an action for infringement, the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, is deceptively similar. This is necessarily to be ascertained by a comparison of the two marks and the object of the enquiry is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff."

- "... in trademark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience".

This Court disagreed that "... the principle of phonetic similarity has to be jettisoned when the manner in which the competing words are written is different ..." and observed that the decisions in the last four decades have clearly laid down that in a case of passing off, the similarity between competing marks need to be examined to determine whether there is a likelihood of deception or confusion. Further the question of the customer has to be approached from the point of view of a man of average intelligence and imperfect recollection.

Though Schedule "L" drugs are not sold across the counter but directly to hospitals and clinics, it is not uncommon that because of lack of competence or otherwise, mistakes can arise when the trademarks are deceptively similar. Courts need to be particularly vigilant where the defendant's drug, of which passing off is alleged, is meant for curing the same ailment as the plaintiff's medicine but the compositions are different. Confusion is more likely in such cases and the incorrect intake of medicine may even result in loss of life or other serious health problems. Public interest would support lesser degree of proof of showing confusing similarity in the case of trademarks in respect of medicinal products as against other non-medicinal products.

- Section 17-B of the Drugs and Cosmetics Act, 1940, indicates, inter alia, that a drug, which imitates or resembles another drug in a manner likely to deceive, should be considered as a spurious drug. Therefore, it would be proper that before granting permission to manufacture a drug under a brand name, the authority under the Drugs and Cosmetics Act be satisfied that there will be no confusion or deception in the market by requiring the applicant to submit an official search report from the Trade Mark Office pertaining to the trademark in question."

Disposing the appeal and remanding the case to the trial court, the honourable Supreme Court set out the following general factors for deciding the question of deceptive similarity in an action for passing off on the basis of unregistered trademark:

- The nature of the marks-word marks/label marks/word and label marks;
- The degree of resemblance between the marks, phonetically and in idea;
- The nature of the goods in respect of which they are used as trademarks;

- The similarity in nature, character and performance of the goods of the rival traders;
- The class of purchasers who are likely to buy the goods bearing the marks, their education, intelligence and the degree of care they are likely to exercise in purchasing and/or using the goods;
- The mode of purchasing the goods or placing orders for the goods; and
- Any other extraneous circumstances which may be relevant in the extent of dissimilarity between the competing marks.” [Source : (2001) SCL 534]

Case 7: Trademark Infringement

Canon Kabushiki Kaisha v Plastician India. Plastician India had obtained registration of the trademark Canon for the geometrical instruments. Canon KK filed and appeal before the Delhi High Court arguing that -

- The word Canon was a vital part of the company’s name and people in India recognized the trademark which originally belongs to the Japanese company;
- Canon KK had registered the trademark Canon in India in various classes of goods including photographic apparatus, scientific apparatus, computer disc and tapes, hand tools and instruments, paper, paper articles, fountain pens and its parts.
- In view of the wide use and publicity of the trademark, Canon, the use of the trademark by any other company would inevitably lead to confusion and deception.

The Delhi High Court ruled in favour of Canon KK and directed the Registrar not to issue registration certificates to the Indian company Plastician India.

Case 8: Copy Right Infringement ...while copying from public domain???

Eastern Book Company vs. Navin J. Desai. Eastern Book Company print and publish books on law and have been publishing law reports under the name of Supreme Court Cases since 1969. The company has published a software package on CD-ROM including a database of the law reports and a search facility under the name “SCC Online Supreme Court Cases Finder”. As a complementary product to the case finder, the company has also developed the full text of the Supreme Court Cases on CD-ROM. Eastern Book Company claims copyright in the headnotes, selection, manner of arrangement and presentation of the judgments both in print and in electronic forms.

Navin J. Desai has developed a software package named ‘The Laws’ published in two CD-ROMs and similarly DB Modak has developed a software package called ‘Grand Jurix’ in three CD-ROMs.

Eastern Book Company filed suits against the Desai & Modak alleging that -

- The software packages Grand Jurix and The Laws had infringed its copyright in the CD-ROMs by copying the head-notes, short notes and the entire text of the copy-edited judgments *verbatim*, including certain mistakes made inadvertently in its journals.
- Desai and Modak were selling their software packages for US\$ 213 (Rs.10,000) while Eastern Book Company’s package was priced at US\$ 1532 (Rs.72,000), thereby causing incalculable loss to the plaintiffs.

Delhi High Court finds judgments published in law reports not protectable by copyright in India. Judgments are borrowed from the public domain and cannot be monopolized. The Delhi High Court has found Eastern Book Company's claim of infringement of copyright in the CD-ROMs of its compilation of Supreme Court Cases untenable as copyright did not subsist in court judgments on the ground that they had been borrowed from the public domain and could not be monopolized.

Case 9: Copyright Violation

Castrol Limited vs Noble Lube Products. Castrol Ltd., and Castrol India Limited sold their oils and lubricants in containers/cartons with a distinctive colour scheme, getup and layout comprising of - a colour combination of red, green and white with the CASTROL logo in a green roundel with a white strip having the word "Castrol" in stylised script in red and the whole logo enshrined in a white square.

Castrol Ltd., was the proprietor of the artistic work in the CASTROL logo and the packaging with distinctive colour scheme and get up. By virtue of long and continuous use, the trademark CASTROL was exclusively identified by the trade and public as associated with the applicants and therefore, considerable goodwill and reputation was vested in the mark.

In 1998, when the applicants became aware of respondents, Noble Lube Products (NLP) and others selling all purpose and automobile greases under the trademark "Noble" in containers that slavishly imitated the CASTROL containers in colour scheme, getup and layout of the logo, the applicants filed two applications seeking injunctive relief against-

- infringement of copyright in the artistic work comprised in the logo and packaging design; and
- passing off of the Noble greases as that of the applicants' by using containers similar in getup to that of the applicants' CASTROL containers.

As the NLP were passing off and enabling others to pass off their products as that of the applicants' products, the applicants have made out a prima facie case and the balance of convenience also rested in their favour.

Allowing both applications of Castrol Ltd and Castrol India Ltd., seeking injunctive relief, the honourable Court held that as the logo and colour scheme of the two containers in suit are identical in all respects, there is every possibility for an unwary purchaser to mistake one product as the product of the other. There is prima facie material to arrive at the conclusion that the respondents have infringed the copyright of the artistic work of the applicants and they have also passed off their goods as that of the applicants.

Case 10: Design Copying

Polar Industries Ltd v Usha International. Plaintiff Polar Industries, proprietor of registered Design No. 173791, had obtained an ad interim injunction restraining defendant Usha International from manufacturing portable table fans with a design that was allegedly an obvious or colourable imitation of the plaintiff's registered design for such fans. Further alleging that Usha was guilty of piracy of the plaintiff's registered design, Polar sought an injunction restraining Usha from infringing its copyright in the registered design No.173791.

Finding no prima facie case of piracy, the Court vacated the ad interim order restraining Usha from manufacturing portable table fans with the impugned design and held that:

- Novelty resided in the design as a whole and not in its component parts. Therefore, as sought by Polar, the “striking features” of the registered design could not be viewed in isolation. Further, components such as mounting brackets being mechanical devices also could not be considered as part of the design as recognised in the Certificate of Registration.
- The question whether Usha’s portable table fan “is an obvious imitation” of Polar’s registered design has to be determined “solely by the eye” as provided under Section 25 of the Designs Act, 1911.
- As the shape, configuration and ornamentation of Usha’s impugned table fan design were clearly dissimilar to those of the Polar’s registered design, no prima facie case of piracy has been made out by Polar.

The Calcutta High Court has dismissed an action alleging piracy of the registered design of a portable table fan on grounds that there was no obvious imitation and therefore, no prima facie case of piracy.

Case 11: Trademark and Brands

SM Dyechem vs. Cadbury India Limited. The Supreme Court of India has dismissed SM Dyechem’s appeal against alleged infringement of its trademark ‘PIKNIK’ by Cadbury’s use of similar sounding PICNIC trademark, both identifying chocolate products. An earlier interim injunction in favour of SM Dyechem had been vacated by the High Court. Hence, SM Dyechem appealed to the Supreme Court arguing that the misspelling in its ‘PIKNIK’ trademark was an essential feature and Cadbury’s ‘PICNIC’ trademark was phonetically and visually similar. The adoption of even one essential feature by Cadbury would infringe its rights in the PIKNIK trademark.

The Supreme Court laid down three tests to be applied in such cases:

1. Is there any special aspect of the common feature, which has been copied?
2. Is the dissimilarity of the part or parts enough to mark the whole thing dissimilar?
3. When there are common elements, should one not pay more regard to the parts, which are not common while at the same time not disregarding the common parts, and what is the first impression?

Applying the above tests, the Supreme Court dismissed SM Dyechem’s appeal and held that:

- In trademark cases, attention must be paid to the question of “comparable strength” of the cases of the contesting parties, besides the balance of convenience.
- The relative strength of the present case was in favour of Cadbury.

S.M. Deychem Ltd. obtained an injunction against Cadburys to refrain from using the word “PICNIC” alleging that it amounted to infringement of its trademark “PIKNIK”. Cadburys contented before the trial Court that the registration of trademark of S.M. Deychem was for label only and not for the word PIKNIK, as it was a misspelling. Issues of invalid registration was also raised. The trial court granted injunction on the ground that S.M. Deychem Ltd. had a valid trademark registration, while cadbury’s registration had expired. The trial court also ruled that Cadburys trademark was deceptively similar to trademark of S.M. Deychem’s.

In appeal before the High Court, the order of the trial court was reversed. High Court held that the word PIKNIK could not be called an essential feature. The caricature of a 'little boy' used by S.M. Deychem Ltd was not used by Cadburys. As the products were different there was no confusion, infringement or passing off. It was further held that though there was a phonetic similarity, the work PIKNIK was a misspelling of the dictionary word PICNIC and hence could not be a subject of a proprietary right.

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Chapter 7



PRODUCT PRICING

—Legal Implications

- ◆ Pricing—A Key Element in Marketing Mix
- ◆ Pricing Decisions—Legal Aspects
- ◆ Indian Laws for Pricing Regulations
- ◆ Cases

In market driven economy market forces decide the price tag on the product. However, the price tag on the product never reflects the true value of the product to the consumer. The gullible consumers always fall the prey of the conspiracies of the unscrupulous marketers for unjustified gains on the product pricing fronts. The law of the land never spares such parasites and gives the protection to the consumers against the pricing machinations of these masked marketing warriors.

7.1 PRICING—A KEY ELEMENT IN MARKETING MIX

In today's context, without pricing there is no marketing. The products and services are purchased with money equivalent to the price tag product is carrying. It facilitates exchange process to take place with ease and convenience for both buyer and seller. Hence, pricing a product is very important and also a sensitive task in the competitive market. In the free market economy, competitive forces rather than the marketers govern the product prices. The exchange process takes place only when the needs of the buyers are matched through the product or services and the buyer agrees to pay price charged by the seller. In some economies the price fixing by individual firm or group of firms resulting into restricting or lessening the competition is considered against the rules of fair competition and falls under the 'unfair trade practices' as defined by the law.

Though in the free market economy there is no government control on fixing the prices of the product, a customer if he feels that prices charged are deceptive with respect to the

value he is deriving out of it, a marketer can be pulled in the court of law to defend the charges. The court may investigate the existence of 'power to control prices' leading to the monopolistic situation in the market resulting into lessening of the competition.

7.2 PRICING DECISIONS—LEGAL ASPECTS

The product pricing decisions are very sensitive in nature and the firms always want to keep secrecy about it. In today's competitive environment, for survival and growth they use pricing tool to make volume sales, increase market share, dispose of the accumulated out dates stocks, or to click a deal with the customer. The objective may be noble, but the means are not acceptable by the law as it smack of 'exercising of power' to control the prices leading to monopolistic situation in market lessening or undermining of the fair competition. The following pricing decisions are viewed as unfair trade practices under Indian laws.

Former price comparison

In a 'Bargaining Price', the marketer offers a reduction on the marketers earlier or former price of the product. In this the former price is actual price at which product was offered to the public on the regular basis. If the former price is genuine, the bargain price advertised is true one. However, if the former price is fictitious the bargain price advertised is false. And buyer is not getting usually low price as he expects. For example Mr. Mehta is retailer of Brand 'A' soap, which cost him Rs. 10 each. His usual markup is 50 % over the cost, then his regular retail price is Rs. 15. In order to subsequently offer a bargain price, he offers Brand 'A' at Rs. 20 each. He realizes that he will not be able to sell any soap or very few soap cake. He maintains that price for few days and then he cuts his price to Rs. 15 and advertises, Terrific Bargain: Soap was at Rs. 20 now at Rs15. It is obviously a false claim. The advertised bargain is not genuine.

Bargain offers based upon the purchase of other merchandise

Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given to a customer on the condition that he purchase a particular article at the price usually offered by the advertiser. The forms, which such offers may take, are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1 Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or '1/2 free', or for only '1 free', when he makes such an offer, since the purchaser is required to purchase an article in order to receive the "free" or "1" item. It is important, therefore, that where such a form of offer is used, care be taken not to mislead the consumer.

Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1' additional merchandise) to the offer, the consumer may be deceived.

Price Discrimination

For same grade or quality of product the price discrimination amongst the different purchasers or group of purchasers, if resulting into lessening of the competition, falls under the unfair trade practices. In such cases law prohibits the price discrimination. However, the seller can maintain the price differentials, if it is justified on the ground like cost in serving the different customers. If challenged by the customer or law enforcing authority the responsibility for explaining discriminative pricing policy lies with the sellers.

Quantity Discounts

This is commonly used for motivating the customer to purchase the goods in large quantity so that landed unit price of the product for the buyer is reduced, resulting into his cost economy. The quantity discounts must be equally made available to all the customers through the non-cumulative quantity discount i.e. based on size of the single order, which can be legally justified. However, in case of cumulative type of quantity discount, which is extended over an extended time period, the uniformity of its applicability to all the customers can not be justified legally.

Functional Discount

Normally the functional discount structure evolved by the firm, is based on the difference in the distribution functions of each of the channel members such as distributor, wholesaler, retailer, C & F agent, stockiest etc. The distributor may be purchasing the material against payment in bulk and hence may get more discount as firm is getting rid of inventory liability immediately. In case of C & F agents the services availed are product warehousing and delivery, while the inventory ownership is still with manufacturer. In this case he may get less compensation as compared to wholesaler for same volume of sales transaction. The retailer on the other hand will get lesser discount based on his buying capacity and the functions he is performing. Depending on the nature of the service the firm may work out the discount structure for the different channel members. In event both of them are competing with each other in the market, firm legally cannot evolve and enforce the different compensation structure for them. This will amount to distributor enjoying the 'power to control prices' and price disadvantage to retailer resulting into lessening the competition in the market.

Restriction on Minimum Price

In the countries like USA to sell the product below the cost price is an unfair competitive practice as the law of the land views it to driving the competitors out of market. In Indian context, there is no such law regulating the minimum price the seller should charge to the buyer.

Restriction on Maximum Price

Due to the monopolistic situation for certain products particularly for pharmaceutical formulation and drugs, the manufacturer may charge more price and exploit the situation to earn more profit. Hence, for making the product available to the consumer at fair price (particularly the patented products like life saving drugs and medicine), government enforces the maximum price restriction on the manufacturers. The government authority rather than the manufacturers fixes the prices of such products.

Price Fixing

The law prohibits the price fixing in any one of the following forms:

- that any evidence that two or more sellers of similar products have agreed to price their products in a certain way, to sell only a certain quantity of their product, or to sell only to certain customers in certain areas.
- more than one seller of very similar products sold under different brand names make equal and substantial price changes at the same time and
- seller tells the buyer to buy firm's products from his (buyers) competitor (may be wholesaler, distributor or agent) at the higher price putting him at price disadvantage in reselling.

Bid Rigging

In case of the large value tenders for projects, the bidders may form a cartel to win the tender and quote the prices in such away that the purchaser may at the end pay more for the similar contracts being awarded or executed other places. This activity of Bid Rigging is unfair trade practice by the law. The following signs may be evident which may be enough to prove the unfair practice.

- Few fewer bidders than normal submit bids on a project or sale upon which they would normally bid.
- Several bidders submit identical, to the penny, bids on the same project or sale.
- A company, which has previously been awarded contracts for a certain service or in a particular area, is always the low bidder on new projects for that service or area.
- A certain group of bidders seem to be awarded contracts on a regular or rotating basis.
- An unusual and unexplainable large difference between the winning bid and all other bids..
- A certain bidder bids far higher on some projects than others for no apparent logical reason.

However, based on these indicators the conclusive evidence cannot be drawn. The detailed investigations may prove the motives of the bidders to book then under the law of the land.

Dumping

Dumping occurs when the export price of goods imported into India is less than the normal value of 'like articles' sold in the domestic market of the exporter. 'Imports at cheap or low prices do not indicate dumping. The price at which like articles are sold in the domestic market of the exporter is referred to as the "Normal Value" of those articles. Anti-dumping action can be taken only when there is an Indian industry, which produces like articles" when compared to the allegedly dumped imported goods. The article produced in India must either be identical to the dumped goods in all respects or in the absence of such an article, another article that has characteristics closely resembling those goods.

- Anti-Dumping Duties essentially deal with the price behaviour of exporters
- Dumping exists when Normal Value is more than the Export Price
- Injury and causal links are required to be prove

Dumping per se is not actionable cause of action only when dumping causes material injury. The General Agreement on Tariffs and Trade lays down the principles to be followed by the member countries for imposition of anti-dumping duties, countervailing duties and safeguard measures. Pursuant to the GATT, 1994, detailed guidelines have been prescribed under the specific agreements, which have also been incorporated in the national legislation of the member countries of the WTO. Indian laws were amended with effect from 1.1.95 to bring them in line with the provisions of the respective GATT agreements. Dumping is said to have taken place when an exporter sells a product to India at a price less than the price prevailing in its domestic market. However, the phenomenon of dumping is not condemnable because of the following reasons:

- Producers sell their goods at different prices to different market.
- It is also not unusual for prices to vary from time to time in the light of supply and demand conditions.
- Price discrimination in the form of dumping is a common international commercial practice.
- It is also not uncommon that the export prices are lower than the domestic prices.

Therefore, from the point of view of antidumping practices, there is nothing inherently illegal or immoral about the practice of dumping. However, where dumping causes or threatens to cause material injury to the domestic industry of India, the Designated Authority initiates necessary action for investigations and subsequent imposition of anti-dumping duties.

The legal framework for dumping is based on the following:

- Article VI of GATT 1994
- Customs Tariff Act, 1975—Sec 9A, 9B (as amended in 1995)
- Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]
- Investigations and Recommendations by Designated Authority Ministry of Commerce Imposition and Collection by Ministry of Finance.

GATT agreement as well as the Indian laws provide that the injured domestic industry is permitted to file for relief under the anti-dumping as well as countervailing duties. However, no articles shall be subjected to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidization.

7.3 INDIAN LAWS FOR PRICING REGULATIONS

For price regulations the following are the prominent Acts to curb the unfair and restrictive practices. Both Consumer Protection Act and MRTP acts defined identically the unfair trade practices with regards to the pricing of product or services.

Consumer Protection Act, 1986

The Consumer Protection Act, 1986 is one of the benevolent social legislation intended to protect the large body of consumers from exploitation. The Act has come as a panacea for consumers all over the country and has assumed the shape of practically the most important legislation enacted in the country during the last few years. It has become the vehicle for enabling people to secure speedy and in-expensive redressal of their grievances. With the enactment of this law, consumers now feel that they are in a position to declare “sellers be aware” whereas previously the consumers were at the receiving end and generally told “buyers be aware”.

As regards the **pricing**, this acts in **Section 2(r)(1)(ix)** declares certain categories of pricing decisions as ‘unfair trade practices’ such as:

“materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;”

Drug (Price) Control Order, 1995

There is statutory price control for bulk drugs and formulation, operates in India. Certain drugs (known as scheduled drugs, as they are listed in the First Schedule to Drug Price Control Order, 76 in number and accounting for 50 % of Indian retail sales), are under price control. These may locally manufactured or imported are subject to price control under the above act. The non-schedule drugs can be priced freely subject to certain restrictions. The price control regime is administered by National Pharmaceutical Pricing Authority (NPPA). The Government can exempt certain products from price control if they are new drugs discovered in India or bulk drugs produced from the basic stage by a new process discovered in India or drugs manufactured by small scale industry and sold under their own brand name. The control does not apply to formulations under Indian system of medicine or homeopathic medicines or items to which DCA does not apply.

The scheduled drugs have been selected on the basis of combination of criteria including number of manufacturers, market share of a single formulator, and value of the annual turnover. The schedule is not fixed and items can be added or deleted by the government depending on the criteria. Most of the other drugs are antibiotics. Schedule drugs may be bulk drug or formulations. The scheduled formulations are described as formulations containing any bulk drug specified in the First Schedule either individually or in combination with other drugs, including one or more than one drug or drugs not specified in first schedule except single ingredient formulation based on bulk drugs specified in the First Schedule and sold under the generic name.

Scheduled bulk drugs are allowed prices (excluding local tax) that result in a post tax return of 14 % on the net worth (share capital plus reserves less value of investment not related to the bulk drugs) or 22 % return on capital employed (fixed assets plus working capital).

In respect of a new plant, an internal rate of return based on long term marginal costing is allowed. For the bulk drug produced from basic stage, a post tax return of 18 % on net worth or a return of 26 % of capital employed is allowed. The prices have to be applied for to the NPPA before any sales take place, with detailed supporting calculations and thereafter officially sanctioned (NPPA may make changes) and cannot be revised without prior permission.

Scheduled formulations are priced based on the following formula:

$RP = (MC + CC + PM + PC) \times (1 + MAPE/100) + ED$, Where

RP = Retail price

MC = Material cost

CC = Conversion cost

PM = Packing material cost

PC = Packing charges

MAPE = Maximum allowable post manufacturing expenses (This includes all the expenses after packing (transportation, manufacturers profit, channel commission etc)

ED = Excise duty

The local taxes are added on at the wholesaler/ retailers level, and not part of the retail price as above. The price charged to retailer is approved retail price less 16 % (as against usual practice of 20 %). The margin to wholesaler exceed 8 % (as against market practices of 10%)’ This formula is also applicable for imported formulation. No person can sell or dispose of imported formulation unless it has prior approval of NPPA.

Essential Commodity Act, 1955

In its endeavour to ensure availability of essential commodities to the consumers and to protect them from exploitation by unscrupulous traders, the Government of India has armed itself with the following Acts:

- Essential Commodity Act 1955,
- Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act 1980.
- Essential Commodity Order, Feb 15, 2002
- Notifications, Feb 15, 2002

The EC Act, 1955 gives powers to control production, supply, distribution etc. of essential commodities for maintaining or increasing supplies and for securing their equitable distribution and availability **at fair prices**. Using the powers under the Act, various Ministries/ Departments of the Central Government have issued Control Orders for regulating production/distribution/quality aspects/movement etc. pertaining to the commodities which are essential and administered by them.

The Essential Commodities Act is being implemented by the State Governments/UT Administrations by availing of the delegated powers under the Act. The State Governments/UT Administrations have issued various Control Orders to regulate various aspects of trading in Essential Commodities such as foodgrains, edible oils, pulses kerosene, sugar etc. The Central Government regularly monitors the action taken by State Governments/UT Administrations to implement the provisions of the Essential Commodities Act, 1955.

The items declared as essential commodities under the Essential Commodities Act, 1955 are reviewed from time to time in the light of liberalized economic policies in consultation with the Ministries/Departments administering the essential commodities. At present the list of essential commodities contains 18 items, declared under Clause (a) of Section 2 of the Act:

1. Cattle fodder, including oilcakes and other concentrates.
2. Coal, including coke and other derivatives.
3. Component parts and accessories of automobiles.
4. Cotton and woolen textiles.
5. Drugs.
6. Foodstuffs, including edible oilseeds and Oils.
7. Iron and Steel, including manufactured products of Iron & Steel.
8. Paper, including newsprint, paperboard and strawboard.
9. Petroleum and Petroleum products.
10. Raw Cotton, either ginned or unginned and cotton seeds.
11. Raw Jute.

Declared under sub-clause (xi) of clause (a) of Section 2 of the Act

12. Jute textiles.
13. Fertilizers, whether inorganic, organic or mixed.
14. Yarn made wholly from cotton.
15. Exercise Books.
16. Insecticides, Fungicides, Weedicides and the like.
17. (i) seeds of food crops and seeds of fruits and vegetables,
(ii) seeds of cattle fodder and
(iii) jute seeds.
18. Onion.

Prevention of Black Marketing and Maintenance of Supplies of Essential Commodity Act, 1980

In order to prevent unethical trade practices like hoarding and black marketing etc., this act being implemented by the State Governments to detain persons whose activities are found to be prejudicial to the maintenance of supplies of commodities essential to the community.

The government from time to time declares the prices of the essential commodities which has to be meticulously observed in the buying and selling transactions.

Competition Act, 2002

The Competition Act, 2002 repeals the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), which has become obsolete in view of developments in the Indian and

global markets. It endeavors to shift the focus from restricting monopolies to promoting fair competition, so that the Indian market is equipped to compete with the markets worldwide.

The object of the CA 2002 is fourfold, as follows:

- ♦ to promote and sustain competition in markets;
- ♦ to protect the interest of consumers;
- ♦ to ensure the freedom of trade; and
- ♦ to provide for the establishment of the CCI.

Prohibition of Anticompetitive Agreement

Section 3(1) of the CA2002 prohibits enterprises and persons from entering into agreements with respect to production, supply, distribution, storage, acquisition or control of goods, or provision of services, which may have an appreciable adverse effect on competition. An agreement is deemed to hinder competition if it:

1. directly or indirectly determines purchase or sale prices;
2. results in bid rigging or collusive bidding.

Any agreement containing the foregoing restrictions is void under Section 3(2) of the CA 2002. Further, under Section 3(4), agreements relating to tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance between enterprises or persons at different levels of the production chain in different markets, are void if they cause an appreciable adverse effect on competition.

Under Section 19(3), while determining whether an agreement is anti-competitive, the CCI consider the following factors:

1. creation of barriers to new entrants in the market;
2. driving existing competitors out of the market;
3. foreclosure of competition by hindering entry into the market;
4. accrual of benefits to consumers;

Abuse of Dominant Position

The CA 2002 permits an enterprise to enjoy its dominant position, i.e., its position of strength in a relevant market within and outside India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors, consumers or relevant markets in its favor. Section 4 (1) of the CA 2002, however, prohibits any enterprise from abusing its dominant position in pricing.

“directly or indirectly, imposes unfair conditions or pricing stipulations, (including predatory price) in the purchase or sale of goods or services;”

CCI has the power to inquire into any contravention of the Act. The CCI has the power to order the Director General to investigate into any contravention. It can pass various orders, including, but not restricted to, granting interim orders and compensation. Under Chapter VI of the CA2002, the CCI may levy penalty for failure to comply with its orders or directions, submission of false statements, etc. Every order of the CCI can be enforced in the same manner

as an order of the High Court or the principal civil court. Under Section 59 of the CA2002, civil courts do not have the jurisdiction to entertain any suit with respect to any matter that the CCI is empowered to deal with.

Central Excise Rules

For product like liquors & alcoholic drinks (hard drinks and beer) there is a strict control on the MRP (Maximum Retail Price), which should be within 3.5 times of the basic manufacturing cost (exclusive of excise duty) of the product.

7.4 CASES

Case 1: Discount - Misrepresentation

DG(I) vs. Khaitan India Ltd. The complaint was lodged by Jai Engineering works, against Khaitan India Ltd (KIL) regarding the misrepresentation in the advertisement with regards to the discounts offered by them (Khaitan) on the range of ceiling and table fans manufactured and marketed by them. The discounts offered were Rs. 100/- on portable fans and Rs. 30/- on ceiling fans. It was further complaint that the products of Khaitan India Ltd are selling fans below list prices and over and above the discounts are also allowed and this is distorting the competition in the market. Based on the evidences gathered the, court held that the trade practices adopted by Khaitan is not prejudicial to the public or consumer interest. In fact the consumer is benefitting as the Khaitan fans are available at lower prices. Even there were two upward revisions of the prices, there is no evidence that the discount offered are recovered partly or fully because of the product sold at very low price in the market. In addition the discounts offered were for limited period in the off season and even after the seven years of have elapsed, no complaint has been received from the consumer. Hence, court held that the said practices of Khaitan do not fall in purview of unfair trade practices as per Section 36A(1) of the MRTP Act, 1969. {Source: 2003 CTJ 36 (MRTP)}

Case 2: Price Fixing

Fined Indian commercial vehicle component company. Three firms have been fined a total of £33,737 for price fixing in respect of automatic slack adjusters, which are brake safety devices for buses, trailers and trucks. The OFT uncovered price fixing agreements involving John Bruce (UK) Limited of Sheffield (the importer of automatic slack adjusters manufactured by Madras Engineering Industries Limited (MEI) in India and its distributors Fleet Parts Limited of Warrington and EW (Holdings) Limited (trading as Truck and Trailer Components) of Cowley which is part of the Unipart Group:

- * John Bruce and Fleet Parts had an agreement to fix the selling prices to their customers of MEI automatic slack adjusters
- * John Bruce and Truck and Trailer Components had an agreement to maintain fixed prices for MEI automatic slack adjusters.

The agreements were found by the OFT (Office of the Fair Trade) to be anti-competitive, infringing Chapter I of the Competition Act 1998. (UK) OFT regards price fixing as a serious infringement.

Powers under the Competition Act 1998 (UK)

- The Act gives the Director General powers to investigate suspected infringements of the Act's prohibitions:
- Chapter I prohibition, prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have the object or effect of preventing, restricting or distorting competition in the UK (or any part of it) and which may affect trade within the UK (or any part of it); and
- Chapter II prohibition, prohibits conduct by one or more undertakings which amounts to the abuse of a dominant position in a market which may affect trade within the UK (or any part of it).
- The Director General has the power to impose financial penalties under the Act and the approach he adopts is set out in the Director General of Fair Trading Guidance as to the Appropriate Amount of a Penalty, OFT 423 March 2000.

Case 3: Manipulation of Land Prices

Nav Sangam Co-op Hsing Soct vs. Delhi Dev Authority. Nav Sangam Soct made an application for allotment of land to its society as per the size of the membership and deposited Rs. 5 lacs as earnest money deposit as a part consideration of a price of the land to be allotted to it on leasehold basis. DDA confirmed the same indicating the rate of Rs. 975 per square meter and premium was fixed at Rs. 82,876,500/- and asked for 50% of premium to be deposited. Nav Sangam deposited 25% amount i.e. Rs. 9,25,000/- toward the allotment and balance 25% will be paid as a last installment prior to securing possession of land. The earnest money of Rest 5 lacs may then be adjusted as per the correspondence they had. Nav Sangam paid Rs. 20.25 lacs including Rs. 5 lacs EMD. However, to the surprise of the Nav Sangam DDA raised the premium rate from Rs. 975 to Rs. 1650/- and were asked them to pay the deposit as per the new rate. On resentment, Nav Sangam, asked for refund of the money paid. DDA refunded only Rs. 6.21 lacs keeping Rs. 4.04 lacs outstanding. Nav Sangam filed complaint with MRTP against DDA for alleged restrictive practices as per Section 2(o)(ii) and enquiry was initiated as per Section 10(a)/ Sec 37 of MRTP Act, 1969. against DDA. Supreme court held that the practices adopted by DDA are restrictive trade practices and they indulged in manipulation of land prices towards providing real estate services. Therefore DDA were directed to pay the balance amount of Rs. 14.04 lacs with interest rate of @ 12% per annum from the date of request of payment.

{Source: 2003 CTJ 128(MRTP)}

Case 4: Fixation of Price Not Justified

Dugar Electronics v. Collector of Central Excise, Calcutta. Dugar Electronics is the manufacturer of the tape recorder. A third party supplied the mould and the other parts of tape recorder to Dugar Electronics free of cost. The third party sold the assembled tap recorders to a dealer at certain price. For calculating the excise duty, fixation of assessable value at rate (price) at which the third party sold goods to its dealers was done. Court held that above price fixation is not justified and should be done according to Section 4(1)(b) of Central Excises Act (1 of 1944) and in accordance with Central Excise Rules. (Para 5)

(Source: 2003 AIR SCW 12)

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Chapter 8



PRODUCT PROMOTION (ADVERTISING)

—Curbing Misleading & Offensive Advertisement through Legislation

- ◆ Regulatory Measures—Objectives
- ◆ Unfair Trade Practices in Advertising
- ◆ Legal Framework in India
- ◆ Advertising Guidelines by SEBI
- ◆ Self-regulation in Advertising—through ASCI
- ◆ Cases

Due to number of false, misleading and offensive advertisement appearing in the media, there is growing disbelief of advertisement in the consumers. This resulted into growing resentment about the advertisement in the minds of the customers. The misleading and false advertisement constitutes the unfair trade practices and affects the fair competition in the industry. To protect the gullible consumers and curb the false, misleading and of-fensive advertisement the government has taken lot of steps through enactment of various laws from time-to-time.

8.1 REGULATORY MEASURES—OBJECTIVES

The integrated marketing communication of the organizations cover advertising, sales promotion, personal selling and public relation as the means for taking their product, service or corporate message to the consumers. However, advertising through print, audio or visual mass media, which is most commonly used for the mass distributed consumer/white goods products through the various communication programs has positive contribution to make. This is being indirect communication process, the advertisers and their agencies must make sure that they are not crossing the legal and social norms through their 'creative' work. The advertising has immense manipulative power and capacity to harm the consumer and public interest. The unscrupulous and excessive advertising adds to the cost of product, which increases the selling

price of the product and also tempts the buyer to purchase the product, which he does not necessarily needs. However, to control the abuses of the media by the unscrupulous marketers in misguiding the target customer, government has developed a body of regulations and laws. These are under constant change due to dynamic nature of the market, which is influenced by changing economic, social, political and technological environment in the country. For example due to spread of e-commerce (due to evolution in Information and Internet Technology), during nineties the government has enacted new separate laws to control cyber space misuses or frauds leading to the exploitation of gullible customers and the participants in the electronic communication and business transactions thereafter. The main objective behind regulating the misleading messages through advertisement is to protect the gullible consumers from falling the prey of misleading advertisement, which through the false product/service claims tempt the gullible consumer to buy the products or services which he/she has no need.

8.2 UNFAIR TRADE PRACTICES IN ADVERTISING

Normally the following three advertising /promotional activities are specified as unfair trade practices.

- Making false claims and misleading advertisement
- Offering of bargaining or pseudo discounts
- Conducting false sales promotion.

False claims

The representation to the public includes all types of communication through mass media like television, newspaper, hoardings, billboard, posters, brochures, direct mail, exhibition, product demonstration or any communication on packaging, wrappers, container at point of purchase or display window. The false claims in the media are the following:

- Falsely representing that the products or services are of particular standard, quality, quantity, grade, composition and style.
- Representation about sponsorship, approvals, benefits, affiliation or benefits, which do not exist.
- Confirmation on guarantee or warranty without any test or supporting data.
- Making misleading and false statement about need or usefulness of the products or services.

Bait Advertisement

If an advertisement or a communication in mass media or other wise mentions about the bargain price of the goods or services that are not intended to be offered for sale at the advertised price or for a reasonable period or in a reasonable quantity is viewed as unfair trade practice and liable for prosecution.

Sales Promotion Contests

An advertisement shall amount to an unfair trade practice if advertiser offers any pseudo gift or price to those who are participating in the sales context, creating an impression that

something is being given free of charge, when it is fully or partly covered by the amount charged in the transaction as a whole. In addition, conducting any contest, lottery or game in order to promote the product amounts to unfair practices as per law. This is in view of the fact that many times the cost of prizes offered free of charge along with the product or services is included in the price of product itself. Hence, under the following circumstance offering of such prizes or gifts is termed as unfair trade practices.

“When the intention of the seller is not to provide the gift or prize i.e. gift or prize offer is not intended, when the impression is given that something is given free while its cost is fully or partly included in the price of the product or service offered. for sales.”

Under the veil of sales promotional contest the unscrupulous marketers attract the gullible consumes and motivate them to purchase the products or services, which in-fact are not needed.

8.3 LEGAL FRAMEWORK IN INDIA

Indian laws cover both general and product specific restrictions and guidelines on the advertisements. Any advertisement containing false or misleading representation concerning standards, quality, grade, composition, usefulness, warranty, guarantee, efficacy of product life without adequate tests, sales price for seeking to disparage products of another person falls under ‘unfair trade practices’ as per the ‘Consumer Protection Act’. The regulations restrict the advertisements to carry any exaggerated, misleading or inadequate impression regarding quality or product in the package or violate trademark, copyright or intellectual property rights of any person.

Advertisement may also need to comply with requirement of applicable laws and regulations depending on the nature and type of the consumer product. For example the Prevention of Food Adulteration Act restricts advertisement of food products that claims the product as being a substitute for any food, implies that the food product is recommended by a medical practitioner or claim to cure any disease or disorder. The Drugs and Magic Remedies (objectionable Advertisement) Act also prohibits advertisement that claim to cure certain diseases including obesity, arthritis, and epilepsy or to procure miscarriage etc. Further direct or surrogate advertisement of tobacco and alcohol products is prohibited on air and advertisements of these products in the print media should contain statutory warning.

For example, in case of all television commercials, an approval from Doordarshan Controller of Sales is a must. The marketer should forward a storyboard before production of the commercial. Following are the few regulations for communication on TV for product & services.

Exhibit 8.1: Regulations for Product / Service Communication on TV

Beverages / Alcohol	Not permitted in print and outdoor advertisement Indirect advertising allowed Overseas satellite communication allowed.
Cigarettes	Not permitted on air media - including satellite.
Pharmaceuticals/Drugs	Cure, illness, diagnosis and treatment by correspondence, college, clinic, institute, laboratories. Not permitted

Advertising to Children	Restriction of direction /attitude are placed on children's commercials.
Other	No infant food advertising is acceptable. Overseas commercials are accepted. No language restrictions exist.

In addition to product specific advertisements, as a general rule, any advertisement should not deride any religion, race, caste, creed, colour any nationality, present criminality, subvert the government, exploit the national emblem or personality of a national leader or a state dignitary, exploit social evils like dowry and child marriage or depict in any manner the figure or body of a woman that is derogatory to woman or may corrupt the public morality.

In India, the marketer must avoid the false claims, misleading statements, deceptive product cues, which motivate the consumer to buy the product or services. The advertiser must be socially responsible to be careful enough to avoid offending any individual, social, religious or special interest groups. Following are agencies involved policy formulating and regulation of the communication media in India.

- Directorate of Advertising and Visual Policy
- Ministry of Information and Broadcasting
- Press Council of India
- Media Research Users Council of India
- Advertising Council of India
- Indian Institute of Mass Communication

The following are the Indian laws, which controls the advertisements in print, audio, video and digital media.

Exhibit 8.2: Indian Acts for Restrictions and Guidelines of Advertisement

ACT	PURPOSE
Consumer Protection Act, 1985.	Protects the consumers from exploitation form advertisement making false and misleading statement about products and services in any communication media.
Prevention of Food Adulteration Act, 1954.	Prohibits the manufacturer making certain claims particularly about the food products meant for human consumption.
Cigarettes (Prohibition of advertisement and regulation of trade & commerce, production, supply and distribution) Act, 2003.	Prohibits the advertisement of tobacco and other products containing tobacco.
Drugs & Cosmetic Act, 1940.	Restrains manufacturers to make false and misleading claims for the drugs and cosmetics products.

Drugs and Magic Remedies (objectionable advertisement) Act, 1954.	Provides restrictions against advertisement that claims certain deceases.
The Cable Television Networks (Regulation) Act, 1995.	Puts regulation on cable television network to curb lot of undesirable programs and advertisements, which are becoming available to the viewers.
Trade Mark Act, 1940.	Prevents false representation of trademark.
Pre-Natal Diagnostic Techniques (Regulation, Prevention of) Misuse Act, 1994.	Specifies role and responsibilities of advertisers & advertising agencies and prevents the misuse of media.

Consumer Protection Act, 1986 (CPA)

The Consumer Protection Act is an alternative and cheapest remedy already available to the aggrieved persons/consumers by way of civil suit. In the complaint/appeal/petition submitted under the Act, a consumer is not required to pay any court fees or even process fee. This act protects the consumer from exploitation by the unscrupulous manufacturers or marketers who are adopting unfair practices to promote their products or services. The definition of unfair trade practice used in CPA is same as the one used in MRTP. However, the mechanism of enforcing the regulation in two laws is quite different. In CPA the enforcing system is three tier quasi judicial mechanism working at three levels i.e. district, state and national levels, which are called as Consumer Dispute Redressal Forums.

A complaint against any unfair trade practice, which as per CPA includes misleading or deceptive advertisement as well as defective goods, deficiency in service, charging of excessive price or offering a substandard product in the appropriate consumer court by a affected consumer or a recognized consumer association or Central or Central Government as stipulated in Section 2(1)(b) of CPA. Proceedings are summary in nature and endeavour is made to grant relief to the parties in the quickest possible time keeping in mind the spirit of the Act, which provides for disposal of the cases within possible time schedule prescribed under the Act. If a consumer is not satisfied by the decision of the District Forum, he can challenge the same before the State Commission and against the order of the State Commission a consumer can challenge the same before the National Commission.

In case the court findings reveals that the practice(s) is (are) falling under 'Unfair Trade Practices' the court can issue 'cease or desist' order to the erring party and direct the offender to pay compensation for the damage or loss incurred by the affected party under Section 14 of CPA.

Prevention of Food Adulterated Act, 1954

As per Section 2 (ix) (e) of the Act, for any false claim about the product on the label or otherwise, regarding any article of food shall be deemed to be 'misbranded' and shall attract the penal action for the same.

Cigarette and other Tobacco Products

(Prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act, 2003.

The purpose of the Act is to ban the advertisement of cigarette and other tobacco products and to prohibit sponsorship of sports and cultural events, either directly or indirectly.

Section 4(1) of the Act provides that no person engaged in production, supply or distribution of cigarette or any other tobacco product would advertise and no person having control over a medium would cause to be advertised through that medium for the above products.

Section 4(2) of the Act provides that no person, for any direct or indirect pecuniary benefit, shall display, cause to display or permit or authorize to display any advertisement of cigarette or distribute /sell video or leaflet containing cigarette or tobacco product advertisement and the display of cigarette advertisement in any form is prohibited. The exception is packet or the label on the packet containing cigarette.

Section 22 of the Act, stipulates the punishment, which can be extended to three year or fine upto Rs1 Lakhs for the first conviction. However for the further conviction the imprisonment is for three years and fine of Rs. 2 Lakhs. In case of offences by companies the directors will be held liable. This Act does have any provision to control surrogate advertisement on the tobacco products.

Drugs and Cosmetics Act, 1940

As per the Section 17 of the Act the drug or cosmetics shall be deemed to be misbranded

- ♦ if it is so coloured, coated, powdered or polished that damage is concealed or if it is made to appear of better or greater therapeutic value than it really is; or
- ♦ if it is not labelled in the prescribed manner; or
- ♦ if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular.

The above is a cognizable crime and shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to a term of life and with fine which shall not be less than ten thousand rupees for the drugs and for cosmetics the penalty is imprisonment for a term which may extend to three years and with fine.

Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954

The Drug & Magic Remedies Act prohibits a person from taking part in the publication of any advertisement referring to any drug, which suggests the use of the drug for:

- ♦ the procurement of miscarriage in women or prevention of conception in men:
- ♦ the maintenance or improvement of the capacity of the human being for sexual pleasure:
- ♦ the correction of menstrual disorder in women:
- ♦ the diagnosis cure mitigation treatment or prevention of any general disease.

Cable Television Networks (Regulation) Act, 1995

There has been haphazard mushrooming of cable television networks all over the country during the last few years as a result of the availability of signals of foreign television networks via satellites. This has been perceived as a “cultural invasion” in many quarters

since the programmes available on these satellite channels are predominantly western and totally alien to our culture and way of life. Since there is no regulation of these cable television networks, lot of undesirable programmes and advertisements are becoming available to the viewers without any kind of censorship. The law was promulgated to regulate & control this mass communication media. The main features of this ordinance are.

1. No person shall operate a cable television network unless he is registered as a cable operator.
2. No person shall transmit or re-transmit through a cable service any program or advertisement unless such program or advertisements is in conformity with the prescribed program and advertisement code. However, this will not be applicable to foreign satellite channels, which can be received without the use of any specialized gadgets or decoders.
3. Every cable operator using a dish antenna or television receiver only shall re-transmit at least two Doordarshan satellite channels of his choice through the cable service. The Doordarshan channels shall be retransmitted without any deletion or alteration of any program transmitted on such channels.
4. Any program which is likely to create hatred or ill will between different religions, racial, linguistic regional or castes or communities or is prejudicial in maintaining harmony among such groups or which is likely to disturb the public tranquility could be prohibited by the State or Central Government.
5. Each cable operator shall maintain a register for each month in the prescribed form indicating the channels/ programs relayed.

Program Code

No program shall be carried in the cable service which:

- Offends against good taste or decency;
- Contains criticism of friendly countries
- Contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes;
- Contains anything obscene, defamatory, deliberate false and suggestive innuendoes and half truths;
- Is likely to encourage or indicate violence or contain anything amounting to contempt of court;
- Contains aspirations against the integrity of the President and the judiciary
- Contains anything affecting the integrity of the Nation;

Advertising Code

- ♦ Advertising carried in the cable service shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscribers

- ◆ No advertisements shall be permitted which:
 - (i) derides any race, caste, colour, creed or nationality;
 - (ii) is against any provision of the Constitution of India;
 - (iii) tends to incite people to crime, cause disorder or violence, or breach of law or glorifies violence or obscenity in any way;
 - (iv) presents criminality as desirable;
 - (v) exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or a State dignitary.
 - (vi) in its depiction of women violates the Constitutional guarantees to all citizens. In particular no advertisement shall be permitted which projects a derogatory image of women. Women must not be portrayed in a manner that emphasizes passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society. The cable operator shall ensure that the portrayal of the female form in the programs carried in his cable service, is tasteful and aesthetic, and is within established norms of good taste and decency.
 - (vii) exploits social evils like dowry, child marriage.
- ◆ No advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature; advertisements must not be directed towards any religious or political end.
- ◆ The goods or service advertised shall not suffer from any defect or deficiency as mentioned in Consumer Protection Act. 1986.
- ◆ No advertisement shall contain references, which are likely to lead the public to infer that the product advertised, or any of its ingredients has some special or miraculous or super-natural property or quality, which is difficult of being proved.
- ◆ The picture and the audible matter of the advertisement shall not be excessively 'loud'.
- ◆ No advertisement, which endangers the safety of children or creates in them any interest in unhealthy practices or shows them begging or in an undignified or indecent manner shall not be carried in the cable service.
- ◆ Indecent, vulgar, suggestive, repulsive or offensive themes or treatment shall be avoided in all advertisements.
- ◆ No advertisements, which violate the standards or practice for advertising agencies, as approved by the Advertising Agencies Association of India, Bombay, from time to time shall be carried in the cable service.
- ◆ All advertisements should be clearly distinguishable from the program and should not interfere with the program viz, use of lower part of screen to carry captions, static or moving alongside the program.

Trademarks Act, 1999

As per the provisions of Section 103 under this act, the regulatory measures can be initiated against any person or organization that :

- falsifies any trademark
- falsely applies to goods or services any trademark

Under Section 107 of the act the, making false representation of trademark is an offence, which is punishable with fine or imprisonment. This act provides for registration and better protection of trademarks for goods and services and for the prevention of the use of fraudulent marks.

Pre Natal Diagnostic Techniques (Regulation and Prevention of Misuse) ACT, 1994

The PNDT Act. specifies media's role and responsibilities of the advertisers and hold the advertisers and media persons accountable in case of any violation of the provisions in act. According to this act no person, organization, genetic counseling center, genetic laboratory or genetic clinic shall issue or cause to be issued any advertisement in any manner regarding facilities of pre-natal determination of sex available at such center, laboratory, clinic or any other place. No person or organization shall publish or distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any center or any other place. Person contravening the above clauses is punishable with a term of up to three years and a fine up to Rs.Ten Thousand.

8.4 ADVERTISEMENT GUIDELINES BY SEBI

The Securities and Exchange Board of India (SEBI) has issued comprehensive guidelines to protect the investors from unscrupulous companies making offers in public issues for equity shares and debentures. As per the SEBI (Disclosure and Investors Protection) Guidelines, 2000 on advertisement, it is mandatory for the companies offering the equity and debentures to public to make certain disclosures in their offers.

The following are the SEBI guidelines on advertisement (as contained in Section 9 of Chapter IX) and which should to be ensured by Lead Merchant Managers of the offering company.

- An issue advertisement shall be truthful, fair and clear and shall not contain statement, which is untrue and misleading.
- Any advertisement reproducing or purporting to reproduce any information contained in an offer document shall reproduce such information in full and disclose all relevant facts and not be restricted to select extracts relating to that item.
- An issue advertisement shall be considered to be misleading, if it contains
 - Statements made about the performance or activities of the company in absence of necessary explanatory or qualifying statements, which may give an exaggerated picture of the performance or activities, that what it really is.
 - An inaccurate portrayal of past performance or its portrayal in a manner which implies the past gains or income will be reported in the future.
- An advertisement shall be set forth in a clear, concise and understandable language. It should avoid the extensive use of technical, legal terminology or complex language or excessive details, which may distract the investor.

- An issue advertisement should not contain statement which promise or guarantee rapid increase in profits.
- An issue advertisement should not contain any information that is not contained in the offer document.
- No models, celebrities, fictional character, landmarks or caricature or likes shall be displayed on or form part of the offer documents or issuer advertisement.
- Issue advertisement shall not appear in the form of crawlers (the advertisement which run simultaneously with the programme in a narrow strip at the bottom of the television screen) on television.
- No advertisement shall include any issue slogans or brand names for the issue except the normal commercial names of the company or commercial brand names of the products already in use.
- The advertisement or offer document shall not include any slogan, expletives or non-factual and unsubstantiated titles.
- If any advertisement carries any financial data, it shall also contain data for the past three years and shall include particulars relating to sales, gross profits, net profit, share capital, reserve, earnings per share, dividends and book value.
- All issue advertisements in news papers, magazines, brochures, pamphlets containing highlights relating to any issue shall also contain the risk factors given equal importance in all respect including print size. The print size of the highlights should not be less than point (seven) size. The advertisement should contain the names of issuer company, address of registered office, names of main lead merchant bankers and registrar of the issue.
- No corporate advertisement of the issue company shall be issue after 21 days of the filing of the offer document with Board till the closure of the issue unless risk factors as are required to be mentioned in the offer documents are mentioned in such advertisement.
- No product advertisement of such company shall contain any reference directly or indirectly of the issue offer.

As per SEBI the advertisement has very broad meaning, which covers the communication (to the existing shareholder or prospective buyers of the same) through notices, brochures, pamphlets, circulars, showcards, catalogues, hoarding, picture, films, cover pages of offer document, radio, television, press conferences, public meetings etc.

8.5 SELF-REGULATION IN ADVERTISING THROUGH ASCI

Advertising Standards Council of India is a voluntary organization with the membership of **advertisers, advertising agencies and the media**, which includes proprietors or publishers of newspapers, periodicals, TV commercial channels etc. and **allied professions**. ASCI has adopted a Code for Self-Regulation in advertising with a view to achieve the acceptance of fair advertising practices in the interest of the ultimate consumers exposed to advertisements read, heard and viewed in India. ASCI have an important overall goal to maintain and enhance the public's confidence in advertisements.

“Declaration of Fundamental Principles

This Code of self-regulation has been drawn by people in professions and industries in or connected with advertising, in consultation with representatives of people affected by advertising and has been accepted by individuals, corporate embodies and associations engaged in or otherwise concerned with the practice of advertising with the following as basis guidelines :

- (i) To ensure the **truthfulness and honesty** of representation and claims made by advertisement and to safeguard against misleading advertisement.
- (ii) To ensure that advertisements are **not offensives** to generally accepted standards of public decency. Advertisement should contain nothing indecent, vulgar or repulsive, which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence.
- (iii) **To safeguard against the indiscriminate use** of advertising in situations or of the promotion of products, which are regarded as hazardous or harmful to society or to individuals, particularly minors, to a degree or of a type, which is **unacceptable to society** at large.
- (iv) To ensure that advertisement observe **fairness in competition** so that the consumer's need to be informed on choices in the market place and canons of generally accepted competitive behaviour in business are both served. Both the general public and an advertiser's competitors have an equal right to expect the content of advertisement to be presented fairly, intelligently and responsibly. **The code applies to advertisers, advertising agencies and media.**

Responsibility for the Observance of the Code

The responsibility of observance of this code for Self-Regulation in advertising lies with all who commission, create, place or publish any advertisement or assist in creation of or publishing of any advertisement. All advertisers, advertising agencies and media are expected not to commission, create, place or publish any advertisement, which is in contravention of this Code. This is a self-imposed discipline required under this Code of Self-Regulation in Advertising from all involved in the commissioning, creating, placement or publishing of advertisement.

This code applies to advertisements read, heard or viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant number of consumers in India.”

8.6 CASES

Case 1: Promotion Claim Modified

Advertisers : Ceejay Healthcare P. Ltd.

Agency : Multimedia Aquarius

Media : Promotion message on the pack

The complaint against the claim/description saying that :

New Life Good Kha Chewettes'

"Tobacco substitute. Not injurious to health. Each gum contains Nicotine Polacrilex USP, equivalent to 2 mg of Nicotine. Globally safety profile"

The complainant wants the substantiation of the above claims and also the proof of Nicotine safety—an addictive drug. Consumer Complaint Council (CCC) of ASCI reviewed the and given the decision that as per Chapters 1.1 and 1.4 of ASCI self-regulation code on advertising, the descriptor "Good Kha Chewettes", the claims, "not injurious to health" and "globally proven safety profile, were false and directly misleading about the product itself. The advertiser assured appropriate modification of the promotion claims.

(Source: ASCI)

Case 2: TV Commercial withdrawn

Advertiser : Novartis (India) Ltd.

Agency : Euro RSCG Advertising

Media : Fun Time (Sept-Oct 2002) and Sony Max (Nov/2002)

The press Ad ...

"Children need more than 4 cups of milk every day for their daily requirement of calcium".

"Children need more than 25 eggs to meet their daily calcium requirement"

"Children need to eat at least 15 bananas daily to meet their calcium requirement"

Novartis is making leading viewers and readers to believe that it is not possible to meet their daily calcium. Hence, they should stop making these misleading statements, which exploit the natural credulity of children and their lack of experience.

The TV Commercial ...

"A boy is sitting in front of a plate of food. Then voice says, to get his daily requirement of calcium, he will have to eat 186 bananas. The boy then throws away the bananas. The voice then says that two calcium Sandoz tablets will satisfy the requirements of calcium."

The other version of TVC states the same thing about 46 eggs or 4 glasses of milk being insufficient."

As per the complaint the Ad is misleading. A person needs many more nutrients other than calcium, and balanced diet will provide all these. The Ad seeks to create an impression that milk, eggs or fruits that have a pride of place in a balanced diet are to be thrown away, in exchange for two Calcium Sandoz tablets.

CCC reviewed the complaint and the following decision was given "As per Chapters 1.4 and III.2. (b) of the self-regulation code Ad is misleading by ambiguity, there by exploiting the natural credibility of children and their lack of experience. Ad encouraged the children to discard nutritional foods, which provide a wide range of nutritional requirements". Both press and TVC were withdrawn.

(Source: ASCI)

Case 3: Ad Withdrawn**Advertiser : National Dairy Development Board (Cooperative Milk)****Agency : Interface Commercial****Media : Sony TV (3/2002)**

The visual: *“Buffaloes and cows having some chit chat amongst themselves. One animal says “E sasur kallu Doodhwala ke doodh mein dirty water mila-mila-kar dene se hum ho gaye hain pareshan. Tho chalo hum abb doodh cooperative mein denge”.*

The complaint says : “The organized milk marketing agency is trying to claim its over the unorganized sector engaged in direct distribution of the product to the consumers. The unorganized sector milk producers are the backbone of the milk production in the country, and even the cooperative people purchase their milk from the village based unorganized sector milk farmers. Secondly how can the fresh milk be compared with packaged milk ? Further using hurting language for the ‘Doodhwalla’ is highly objectionable”.

Referring to Chapters I.1 and V.1 (e) CCC given the decision that allegation as cited in the complaint, in respect of individual milk suppliers in the unorganized sector, not supported with factual data from a verifiable and reliable source. Ad also unfairly denigrated another product directly. TVC withdraw.

(Source: ASCI)

Case 4: Comparative Advertisements

Rainbow Information Technologies Ltd. and Solution Infotech Ltd. The Monopolies and Restrictive Trade Practices (MRTP) Commission has prevented **Rainbow Information Technologies Ltd. (RITL)** and **Solution Infotech Ltd. (SIL)**, two software companies, selling hardware locks, from publishing comparative advertisement. RITL, which developed “Sentinel Super Pro”, complained to the commission that SIL was producing a similar product under the name HASP and had published advertisements comparing the two softwares. SIL objected to the use of “World No.1 hardware lock” by RITL. The panel ruled that there are no grounds for SIL to compare the product of the rival to its product. Even the advertisement was vague. The panel asked SIL not to issue comparative advertisements but allowed it to issue advertisements giving qualities of its own products.

(Source: WPTN Vol. 4 Issue No. 6)

Case 5: Misleading Representation

MRTP Clears HLL of Charges of Unfair Trade Practices. A complaint had been filed against **Hindustan Lever Limited (HLL)** under the Monopolies & Restrictive Trade Practices Act, 1969, for false or misleading representation regarding the quality, standard or characteristics of one of its products. The complainant’s contention was that: HLL’s claim that Clinic Plus anti-dandruff shampoo was made of “internationally proven formulation that gently lifts out dandruff from the scalp” was not substantiated by any medical tests by any research institute.

- Moreover, there was no such formulation.
- It gave the impression that only Clinic Plus can remove dandruff, whereas, octo pirox, its basic constituent, is being used by other manufacturers as well.

- The Commission observed that: HLL did not use the word 'only' in its advertisement
- The product was being marketed since 1989, but the complaint was filed three years later 1992.
- There was no evidence to show that any consumer has been misled by the aforesaid advertisement.

As the Commission finds no evidence in support of the charges, HLL was cleared of charges of unfair trade practices.

(Source: CIJ 2002)

Case 6: Misleading representation of facts in advertisement

DG Investigation vs. Natural Agro Products Ltd. Natural Agro products issued an advertisement in Hindustan Times on 8.11.1992 inviting the public to invest in its 'Kalpavriksha Yojana', which envisaged plantation of one crore coconut trees over an area of 160 acres of land in Dist Puri, Orissa. Under the aforesaid scheme the investor was required to buy minimum of two coconut trees @ Rs. 300/- per tree and was promised a return of the originally invested amount on completion of six years to be paid through cash credit certificates issued by the Central Bank of India and thereafter, the investor was assured the return of the same amount year after year for 20 years. A scheme was envisaged setting 100 percent export oriented unit for processing coconuts, in technical collaboration at an estimated cost of Rs. 150 crores. Besides the respondent also promised the insurance cover of the trees and guaranteed absolute security of investment as well as facility of holiday resort near the plantation for the use by investors. The advertisement in question was examined by the MRTP Commission. As the growth of coconut trees depends on natural factors and as it appeared that the respondent was per se trying to lure gullible investors by giving them a false and misleading picture of yield from trees and returns on the investment, it was decided to ask DG to investigate the matter further.

The outcome of the investigation revealed that Natural Agro Products Ltd has, made the promises of raising coconut plantation and promised the returns of Rs. 300/- per tree from the 6th year onwards for 20 years, besides refunding the investment made by the investors, through cash certificates on completion of sixth year. The investigation revealed that the respondent is incapable of fulfilling the promises on the basis of the authorized and paid share capital. The company in fact has only 30 acres of land and received deposits from 340 investors and so far planted 3000 trees. Though the company has ambition plan of setting up coconut processing plant, at the estimated cost of Rs. 150 crores, it is impossible to muster financial resources for its implementation. More over there was fighting amongst the directors. Apart from above the coconut plantation has an element of risk and tall promises made by the respondent in the advertisement are not likely to be fulfilled. It appears that at the end the investors will be left high and dry on the returns on their investment and refund of the money. The commission ruled that 'Kalpataru Yojana' of Natural Agro Products Ltd attracts the provision of 36(i)(ii) and (iv) of MRTP Act 1969 and hold the respondent guilty of unfair trade practices and direct the him to close the scheme and refund the so far collected with immediate effect.

{Source: I (2002 CPJ 41(MRTP)}

Case 7: Sales Promotion Scheme—Wagering Transaction

Batra Electronic Stores vs. Vijay Pal. Barta Electronic Stores has introduces a Sales Promotion Scheme entitled 'Kelvinator (Fridge) Sales Promotion Scheme' According to the scheme every member was to pay an amount of Rs. 600/- per month on the basis of which a draw was to be held once in every month. This scheme also laid down that as soon as a draw is opened in the name of a particular member, he would be delivered a Kelvinator refrigerator immediately and that he was not required to pay subsequent installments and in case if any member remains unsuccessful in the draw he would be delivered a fridge or would be refunded amount deposited under the scheme along with the interest.

Mr. Vijay Pal has registered his name with Batra Electronics under the above scheme. As a member he was paying installment of Rs. 600/- per month and deposited Rs. 8400/- between 8.1.1993 and 31.1.1994 and scheme had come to an end. Barta Electronics after the scheme is over neither delivered him the fridge nor paid the deposited amount. The aggrieved consumer registered the complaint in the District Consumer Court under Consumer protection Act 1986 given the judgment in favour of Mr. Vijay Pal and directed Batra Electronics to pay the claims made by respondent.

Batra Electronics not satisfied with the judgment filed the appeal in State Redressal Commission challenging the decision and saying that the matter pertaining to Sales Promotion Scheme does not fall under the purview of Consumer Protection Act. And may be examined again.

The court once again examined the case and given the judgment that in this matter of Sales Promotion Scheme there is no hiring of services by the members and as such the member of sales promotion scheme cannot be a consumer as per Consumer Protection Act, 1986. Under the scheme if member of such promotion scheme is successful in the draw after payment of his installment, he would be entitled for the delivery of a Kelvinator fridge. The commission felt that the transaction, which cropped up by the Batra Electronics fall under the category of wagering transaction and that a person who is the member of the scheme could be a in winner of the lucky draw held every month. Such a scheme is definitely based on luck and gamble. Hence, the member of the scheme cannot be called as consumer there being absence of hiring of services on payment of a monthly installment of Rs. 600/-. Therefore, the order of the district court is not sustainable in the eyes of law and is quashed.

{Source: I(2002)CPJ449}

Case 8: Advertisement: offering free shirt on purchase of and iron

DG Investigation vs. Surya Morphy Richards Ltd. Surya Morphy Richard Ltd who are the manufacturers of Mortphy Richardbrand of iron issued an advertisement in Hindustan Times dated 24.7.1993 for a sales promotional schame. In order to increase the sales of the iron they offered a free shirt to the consumer who paid the price of the iron. This scheme was launched in 1993 and not repeated since. The scheme was running for only 30 days was valid in Haryana and Delhi. As per the complaints of DG the court asked the respondent to stop advertising the scheme and tried to examine the case under the following sub clauses of Section 33(1)(e) and (j) of the CPA 1986 whether the scheme is prejudicial to the public interest:

(e) any agreement to grant or allow concession or benefits, including allowance, discount rebates or credit in concession with, or by reason of dealing.

(j) any agreement to sell goods at such process as would have the effect of eliminating competition or competitor.

In response to the court order Morphy Richard filed the following reply. Denying the charges of adopting the unfair trade practices. They further said the scheme was launched to promote iron. The company purchased the shirt in bulk from Stensil Apperel Brands Ltd, at price of Rs. 82/- per shirt as against the retail price of Rs175/-. The amount of Rs. 82 was shared in following manner by the manufacturer of iron and the channel members.

Rs. 37/- per shirt by the manufacturer of iron

Rs. 20/- per shirt by the distributor

Rs. 25/- per shirt by the retailer

The court found that there was no evidence of any agreement between manufacturer and the channel member regarding any discount, rebate or credit in the said dealing. The sharing of the cost of shirt was to jointly absorb the cost of the shirt and offer a gift to the consumer who purchases the iron. Ultimately the beneficiary of the scheme was the purchaser of the iron. Secondly, there is no evidence that the goods are sold at the price to eliminate the competition or competitors. In fact the selling price of the iron was kept same as earlier appeared in the pricelist of the company issued to the channel members. There is no evidence that the price of the shirt is recovered from the consumer in the sales deal under the said promotional scheme.. Thirdly, the scheme was running for only 30 days in 1993 and thereafter it was never repeated. It was one time promotional scheme to boost up the sales of the irons. Hence the court passed the order to close the case and notice of enquiry is discharged because of lack of evidence of holding the said sales promotional scheme prejudicial to public interest under the Section 33I(e) and (j) of CPA 1986.

{Source: I(2002CPJ71(MRTP)}

Case 9: Impugned Advertisement

Kuoni Travels (I) Ltd (SOTC) & Cox & King vs. Thomas Cook (I) Ltd. Thomas Cook India Ltd with the following headlines “Ever wondered how tour operators pay for those free holidays? They don’t. You do. Beware of incredible offers. Look out for hidden costs.” The advertisement goes on to highlight, in a tabular form, the tour prices charged by the respondent and the two applicants namely Kuoni Travels (India) Ltd (SOTC) and Cox and Kings respectively, for their tours to Europe and USA. The advertisement appeared in the Times of India, in its issue of February 12, 2001. The complainant has a grievance that the advertisement in question contains false statements and misrepresentation regarding the prices at which they are offering the tour packages to Europe and USA. Thomas Cook also makes the false claims in respect of their own tour prices, and thereby, disparages the tours and services of the complainants. The complainant in its application to MRTP commission mentioned that Thomas Cook statements in the advertisement are baseless and creating the wrong impression in the mind of the customer leading to the loss of business. The representations in impugned advertisement are false and misleading and disparage their services and their for constitute an unfair trade practices within the meaning of Section 36A(1) of the MRTP Act 1969.

Thomas Cook in defense said that there is no exaggeration of the facts that both the competitors are charging more to the customer as seen from the following comparative chart. They further mentioned that the extra charges the customer pays is for holidays, which are not actually free.

Service	Thomas Cook	SOTC	Cox & King
Tour cost to Europe	\$ 1599 plus \$ 64 ticket taxes and \$ 85 visa fees Total \$ 1748	\$ 1599 plus \$ 138 ticket taxes \$ 74 visa fees \$ 99 High season surcharge plus \$ 125 Eurostar fare plus \$ 127 Air fare surcharge plus \$ 25 Weekend surcharge plus \$ 40 Air show in paris plus \$150 Holiday club membership Total \$2377	\$ 1599 \$ 138 ticket taxes \$ 60 visa fees \$ 99 High season surcharge plus \$ 125 Eurostar fare plus \$ 127 Air fare surcharge plus \$ 25 Weekend surcharge plus \$ 40 Air show in paris plus \$150 Holiday club membership Total \$2363

Both Cox & King and SOTC explained that the extra charges are actually paid to Airlines, Hotels, Embassies etc and are mentioned in the brochures, which are made available to the customers, when they book the tours. The brochure clearly mentions the additional charges under different heads and to be recovered from the customer. As regards the 'Lets Go Holiday Club' of SOTC and "Free Travel Club Membership" of Cox & King are purely optional and amount of \$ 150 are collected from only those customers, who wish to avail of free holidays and is not a part of tour cost and should have been deducted from the total tour prices indicated in a tabular form. In addition Cox and King also gives to the customer a 'redemption gift voucher' of \$ 250 by way of refund, while SOTC contributes Rs. 1000/- per customer to Gujarat relief Fund, which is an income tax benefit to him, but these special features of the tour misled and are not highlighted in the impugned advertisement as a result the customers are misled into believing that their tours are higher by Rs. 29000/- than that of Thomas Cook. It has also been stated that the tours to Europe operated by Cox and King are of 15 days duration and stay for one more day and night in Europe costs money, but in calculation of the tour price credit is not highlighted and unfair comparison of tour price is shown in the disparaged advertisement. Similarly, it has been pointed out that SOTC provides all three meals (breakfast, lunch and dinner) while Thomas Cook does not provide lunch is not reflected in the calculation shown in the advertisement. Thus no credit has been given to the additional benefits enjoyed by the customers of SOTC and C & K. Similarly for USA tour the prices of Thomas Cook are less by Rs. 34000/- as compared to SOTC. Here again the calculations have been manipulated and the

customers are misled. When Thomas Cook claims to provide top airlines, finest hotels, expensive sight seeing, great Indian food on its tours, it not only projects that standards and quality of its own services are superior, by implication, it also suggests that the tours of the SOTC and C & K are of an inferior quality and standards. The impression, the advertisement conveys is that that tour prices of SOTC and C & K are much higher and the services & facilities provided are of inferior quality and standard. Hence the representation of Thomas Cook is not borne out of the facts and it can therefore be said to be false and misleading and has a great effect of disparaging the tours and services provided by SOTC and C & K. In view of the above the impugned advertisement can be said to use trick language hiding certain facts and it has effect of misleading a consumer into making a wrong choice of tour and hence can be construed to be an unfair trade practices within the meaning of Section 36A(1)(i),(ii), (ix) and (x) of the MRTP Act 1969. and the advertisement is actionable under the above section.

{(Source: I(2002)CPJ 75 (MRTP)}

Case 10: Colgate Trigard Family Good Habit Contest

Colgate Palmolive (India) Ltd versus MRTP Commission. Colgate had inserted an advertisement in several news papers in September 1984 announcing a contest known as “Colgate Trigard Family Good habits Contest”. In this ‘Trigard’ is the name of the tooth brush manufactured by Colgate. This contest was for the purpose of educating the families for inculcating the good habits of taking care of the dental health of the individual.

As indicated in the advertisement, the aspiring participant in the contest was to send two upper portion of the carton in which Trigard Tooth-brush were sold. These are to be sold alongwith the entry forms which was required to bear the dealer’s name and address duly rubber-stamped on the form. This was to confirm purchases of two Trigard Colgate brushes by a prospective participant of the contest. The form contained four questions each with two alternative answers, which the participant had to tick mark for correct answer. In addition to answering the question, each contestant had to write a sentence not exceeding ten words describing as to why the contestant’s family used Colgate Trigard Tooth Brush. The best entry in this regard would win the first price. The other prizes for second, third and forth winners were there. There were total fifty prizes in the contest. In addition there were 825 consolation prizes of Rs. 100/- each and 1200 early bird prizes of Rs. 50/- each to those 100 entries, which were received first every week. The complaint was lodged against the above contest saying that this contest was organized for the purpose of promotion to its products and was in its own interest and prejudicial to the interest of the consumer as result a serious injury or loss to the consumer was caused and such complaint falls within clause (b) of paragraph 3 of Section 36A of MRTP. The preliminary report of the enquiry says the following:

- The contest is launched to promote the sale of tooth brush and also the indirectly promoting the sales of its own tooth paste
- The unfair trade practices are causing loss or injury to the consumers
- The contest is arbitrary in nature and eliminates the competition among the manufacturers of tooth-brushes and amounts to restrictive trade practices.

The commission bench held the view that ‘The contest ceases to be innocent if it is held for the purpose of promoting the sale or the business interest of the organizer of that contest.

Some of the features of the contest needs to be noted. The contest induces the consumer to buy minimum two tooth brushes to enable him to participate in the contest. If he wants to send more entries and he is naturally required to purchase proportionately greater number of tooth brushes. There is no ceiling on number of entries to be sent by the contestant. An obnoxious feature of the contest is about the prizes, which were awarded to the persons whose entries were received early in the week. This aspect of contest has nothing to do with the skill and was based totally on chance. The number of losers in terms of money in this part of contest cannot be insignificant. The early bird aspect of contest is purely in the nature of lottery”.

Learned Senior Council on behalf of the appellant pointed out that “The commission did not find any actual loss or injury to the consumers by reason of the said advertisement and the contest nor any allegation in that behalf has been made. In such case no public interest was involved. For invoking the principles of Section 36A(3)(b) of the MRTP, Act the following five ingredients are necessary to constitute an unfair trade practice:

- The trade practice should be within the meaning of Section 2(a)
- The trade practice should be employed for promoting the sales
- The trade practice should fall within the ambit of clause (1) to (5) of Section 36 A
- The trade practice should cause a loss or injury to the consumers of goods or services.
- The trade practice should involve making ‘statement’ orally or in written form or in visible representation.

In view of this Supreme court held that the MRTP Commission committed a manifest error in holding the actual loss or injury not to be an essential ingredient of expression unfair practices. Hence, impugned order passed by MRTP Commission being unsustainable and set aside.

(Source: 2003 CTJ 12 SC MRTP)

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Chapter 9



PHYSICAL DISTRIBUTION

– Legal Issues in Channel Management

- ◆ Product Distribution Channel
- ◆ Types of Arrangement
- ◆ Legal Issues in Channel Management
- ◆ Laws Influencing Channel Arrangement
- ◆ Franchising—Legal Framework
- ◆ Cases

Physical distribution is one of the strategic variables of the marketing mix. It makes product and services readily available to the customers. This covers the management of channel members and the flow of goods i.e. logistics. The channel of distribution, which is consisting of number of intermediaries, provide the time and place utilities of the product to the customers, while the logistics supports the channel members by way of cost-effective and efficient goods movement. The channel is external agency to the organization and being sometimes exploited for creating monopolistic situation and lessening the competition in the market. This is where the legislation has critical role to curb the unfair practices in channel management.

9.1 PRODUCT DISTRIBUTION CHANNEL

In the managerial view-point marketing channel is defined as the external contractual organization that management operates to achieve the distribution objectives. The parties, which perform the task of buying, reselling, transferring titles, are considered as the members of the marketing channels. Depending on the type of the product and the marketing objectives to be achieved, the marketing manager decides on the length and breadth of the distribution channel, so as to reach products or services to the consumers at right place at right time with minimum cost. The management engages these external agencies called intermediaries to perform the task of distribution. To engage and manage these external agencies the management

requires the use of power. However, the power has to be employed under the prevailing legal environment in the country. The legal environment refers to the set of laws that impact on marketing channels. The marketing manager should have a fair knowledge about these laws, while using the power to design, organize and manage the distribution channel.

Most developed countries have their own domestic agency laws, which differ significantly.

Distribution law tends to be less codified or specifically legislated for than agency law in both civil and common law jurisdictions. In many countries usually, there is no enactment dealing with distribution agreements, and the matter falls to be dealt with by general sale of goods legislation.

There are no international conventions, which relate specifically to agency or distribution agreements. However, the Vienna Convention 1980 and the Hague International Sales Conventions 1984 may be relevant to certain aspects of the international sale of goods pursuant to an agency or distribution contract if the parties are domiciled in countries, which have acceded to any of these conventions.

9.2 TYPES OF ARRANGEMENT

There may be two types of arrangement depending on the authority exercised by the firm and its channel partners. In the first case the channel member may be having the authority to the extent of introducing the prospective business or customer to the principal. The acceptance and conclusion of the contract is left to the principal. The agent is entitled to the commission only after the contract is concluded. The payment of commission is not related to the performance of the contract by the principal. The other arrangement may be by giving authority to the agent to conclude the contracts on behalf of the principal. In this case the agent earns more commission putting more efforts in getting more business. The principal may put restrictions on the value or the quantity of the orders that may be concluded. The arrangement depends on the type of channel member and role he is playing in distribution of the goods.

The marketing channel structure is consisting of the different intermediaries performing distribution task, which differs in terms of financial involvement, relationship with manufacturer (place and time context) and the functions performed.

Wholesalers

The wholesalers are quite common in consumer goods industry. They operate as full-fledged marketing organizations. They purchase the goods from the manufacturers in large quantities. They have network of marketing offices supported by the sales staff to market the products. They also have the network of the warehouses to store the goods at the different market locations. They collect the orders from retailers and also large customers (institutional) and operate on volumes. They are important communication link for manufacturer for the market information. They are the dominant source of supply for the retailers in the mass distributed consumer products. They work on the scale economics and due to higher financial involvement resulting into higher risk, gets more commission.

Retailer

This is last link in the distribution network before consumer. They are quite common in the mass distributed consumer products. They buy the material from the wholesalers in small quantities. They have very limited financial capacity for investment in the business. They purchase the goods from wholesaler on credit or against cash depending on the relationship and the prevailing trends in the industry. They normally have contract with wholesalers or distributors.

Selling agents

They are appointed on the contractual basis for selling the company's products to the clients in lieu of the elaborate sales organization. They are contracted not to sell the competitors products. However, they can sell the complementary products. They are deployed for collecting the outstanding payments from the clients. They extend services like organizing loans and offering credit facilities to the clients. They are compensated for their services by way of commission on the sales. The sales agents are quite common in the textile industry.

Manufacturer's Agents

These intermediaries are appointed on the contractual basis for selling of industrial goods. They represent the manufacturer in creating awareness, technical discussion, commercial negotiation, and the liaison with the clients. The manufacturing agents are ex employees with technical background and know the technical intricacies of the product. They are compensated on case-to-case basis. They do not have any organization for marketing. They are mostly involved in pre sales activities and clicking the sale deals.

Brokers

Their role is to facilitate the sales/purchase deal. They do not permanently represent either the buyer or the seller. They do not involve in handling the products. Their function is to organize the negotiation meetings of the two parties and facilitate the deal. They do not provide services like financial assistance, payment collection, inspection etc. Their relations with buyers and sellers are limited to particular transaction. For their services, both the parties have to pay the brokerage. Generally services of brokers are quite common in stock markets, scrape selling/purchasing and organizing the auctions etc.

Distributor/Dealers / Stockiest

The principal appoints a representative to distribute his goods. They carry the stocks of the company's products on the consignment sales basis or purchase the material from the principal for resale to the customers. The stocks are transferred to (with the time frame to sale) distributors/dealers/stockiest. The payment has to be made to the manufacturer at the end of the agreed credit period. They have the full-fledged marketing set up with backup facilities of warehousing. As the manufacturer realizes the payment of the inventory from dealers/stocks after the stipulated credit period the transaction is reflected in books of accounts of the company. The exclusive dealers do not deal with the products of the competitors. The profit of these channel members is difference between the price at which he purchases the goods and sells in the market to the customers.

Franchise

In this arrangement the principal grants permission to produce and market the goods as per the specifications of the principal and the goods bear principal's trademark. The principal has a strict control on the goods produced by the franchisee to follow the particular process and use specific ingredients and raw material from specific sources or suppliers to maintain the quality.

9.3 LEGAL ISSUES IN CHANNEL MANAGEMENT

To guard the interest of the firm the management may impose the restrictions on the channel members. These restrictions may be in terms of exclusive dealership arrangement, territorial restrictions, price controls, reward and penalties etc. These practices may be strategically beneficial to the firm but may be termed as anti competitive or restrictive trade practices in the eyes of law.

Territorial restriction

The territorial restrictions imposed by the suppliers on its distributors prohibit them to sell the products in the territory other than one allocated to them. The supplier's objectives behind this restrictions are:

- restrict the competition amongst its distributors for the same brand of products.
- distributor to focus and cultivate its own territory.
- distributor to pursue and serve the customers near to its place of business.
- motivate the distributor to get widest and deepest coverage of the allocated territory by protecting him from competition from other dealers.
- motivate the distributors to make his own investment in inventory, systems and infrastructure.

The territorial restrictions may be of two types, i.e. one, which completely eliminates the intrabrand competition and the other one, which allows lesser competition. When the distributor is assured of his territory in all respect, the supplier in return expects the best efforts from the dealer in distribution and meet the performance targets, or otherwise the supplier is free to terminate the contract and assign it to other dealer. In case management goes for open distribution without any territorial restrictions the, the firm may not get firm sales commitments from the channel members.

Territorial restriction is unfair trade practice provided it lessens or eliminates the competition and leads to the monopolistic situation.

Resale or customer restriction

The supplier may put a restriction on the dealer to deal with segment or class of customers and may sell the products directly to this clientele. The channel member may agree not to serve those clientele reserved for the supplier to deal with directly. The agreement of this type becomes illegal, when it can be proved that these contracts tend to reduce the competition. Generally these contracts are orally made with the understanding from both the sides to exclude

certain clients from their service scope. The rationale behind such policy is to extend special service to these clients (large account), which is beyond the capacity and capability of the channel members to be serviced. Moreover, the client may prefer to deal directly with the manufacturer rather than a dealer. The legality of such decisions depends on its effects on lessening the competition. There are no clear guidelines in the Indian Acts, for the supplier to restrict the channel members to whom they may sell the supplier's products.

Refusal to Deal

The suppliers normally have the selection criteria for the channel members. The criteria may be based on the financial strength, past experience, infrastructure, sales organization, products handled, extent of territory coverage, major accounts etc. The selection and appointment may be based on certain conditions, which if not adhered to may result in termination of the contract. The termination may be based on valid reasons like, failure to pay, poor customer service, target not met continuously, failed to act in good faith or damaging the company's image etc. In absence of legitimate valid reason for removal of dealer, becomes a case for unfair trade practice under Indian Act.

Price Discrimination by Buyers

The supplier may sell its products to two different channels at the different prices. Alternatively the strong channel member based on its strength may force the supplier to offer him a discriminatory price. In such case the channel member, who gets the product at higher price is at disadvantage and command less margins during reselling. The strong channel members with their strength of lifting the huge quantity of material, may get favour from supplier by way of large discounts, promotional supports, gifts and special financial incentives, which may put small dealer at competitive disadvantages. However, the quantity discounts are permitted and are not illegal. But discrimination in basic prices of the product may put some dealers at competitive disadvantages resulting into lessening the competition.

Promotional Compensation

The supplier may allow the channel members to advertise the product, participate in promotional campaign, product demonstration programs, which involve financial commitment from both the sides. In such case the supplier should have the uniform compensation policy for all channel members. The discriminatory policy for financial rewards or compensation is illegal. The law stipulates the uniform policy for such compensation.

Dual Distribution

Dual distribution means the firm uses two or more channels to distribute its products to the target markets. This may be done by using the different brand names for the same products to move through the separate channels. The firms having excess manufacturing capacity use this strategy. The product is sold to the retail chain to market it under its own brand name. Under such circumstances the marketer may gain the unfair competitive advantage by way of gaining market share and lessening the competition. This may be viewed as violation of provisions for unfair trade practices in eyes of law.

Full Product Range/Line Forcing

The manufacturing firm in its interest may force the channel members to distribute entire product range rather than picking those products, which are fast moving and having good market and margins. This practice is quite common in all industries to push the slow moving, sub quality or out fashioned products along with the fast moving popular products. This will result into forcing the channel members to use its limited financial capacity, which he cannot use for other competing or allied products he may desire to sell. The forced stocking may result in excess inventory of slow moving items in the channel, which will further reduce the buying capacity of the channel member and may further affect the sales of fast moving item. With full line forcing strategy the channel members may be forced to allocate lesser space in the limited available area in the retail shop resulting into lessening the competition and reduce the customer choice. This may be viewed as violation of provisions in the law provided it is seriously affecting the competition and creating the monopolistic situation.

Tying Contract

This is similar to the full line forcing. However, here the supplier may ask to purchase another product or force him not to purchase the particular product from other suppliers. Under this arrangement the buyer is not free to purchase the products from other suppliers. The supplier here virtually dictates his terms. Many franchise arrangements (food products) go in for tying contract for maintaining the quality of the final product sold by the franchisees and keep their reputation in the markets. For example a fast food chain may force its franchisees to purchase the inputs and ingredients from the particular suppliers to maintain the quality standard and taste of the food items. In case same quality standards and taste can be maintained by using ingredients from other suppliers, the tying contract may be viewed as unfair trade practices.

Forward / Vertical Integration

This means a manufacturing or marketing organization operating its own distribution channel. For example, 'Raymonds' in India is operating its own show rooms to distribute the 'Park Avenue' brand of life style products. Bata for its footwear products distribution is following the same strategy. The vertical integration is outcome of the natural growth and evolution of the organization. The firms, to have the total control on the distribution activities and the channel inventory, adopt this strategy.

In many cases the vertical integration takes place by acquisition and mergers. A manufacturer may acquire the retail chain or wholesale organization to strengthen its distribution activity. The vertical integration is not viewed as restrictive trade practice provided it is not lessening the competition and leading to the monopolistic situation for the firm's products in the market.

Exclusive Dealing Arrangement

This normally imposed by the manufacturer on the channel intermediary to deal with its products only. This is done with the view that the dealer will sell the manufacturer's product

with full enthusiasm, energy and the focus. This arrangement reduces the choice of the dealer to sell the products of other makes. However, the channel member gets better compensation for the exclusive arrangement by way of more percentage commission on sales deals and promotional and merchandising support. As they have to deal with one product, the inventory related cost for multiple products dealing is drastically reduced.

The exclusive dealership arrangement is in violation of anti-competition laws provided it is lessening the competition and creating monopolistic situation in the market. The situation of restrictive trade practice herein is viewed considering the following factors:

- The total volume of the products (all brands) going into the market
- The relative market share of brand (in question) with respect to the competition
- The relative strength of the parties involved.

The other form of exclusive dealership is to allow the intermediaries to deal with related products and not the competing product. For example in white goods markets, a dealer is not allowed to deal with the competing brand of refrigerator. However, he may be allowed to deal with other allied white goods such as washing machines, air conditioner manufactured by the competitors.

The exclusive dealing arrangement is sometimes a key strategic move of the marketing firm. However, it may viewed as restrictive trade practices if :

- The exclusive arrangement is gaining substantial market share and lessening the competition.
- The total volume of business involved is quite substantial to create monopolistic situation and helping the firm to strengthen its financial muscle.
- The supplier's power (financial & economic) is coercive.

In case any one or all above conditions are met the exclusive dealing arrangement may be viewed as anti competitive under law.

Functional Discounts

This means granting the channel member the price concessions to reduce the price based on his market position in the channel structure and the functions he is performing. It is legal if the uniform policy is followed for the members in same class. However, the discount structure may be different for members in different class. For example there may be different discount structures for C & F agents, stockiest, wholesalers and retailers as the nature of their service and the functions they perform differs.

9.4 LAWS INFLUENCING CHANNEL ARRANGEMENT

The legislation affects the legitimate power of the channel members and the organization, which engages or deploys their services. There are many international, central and state laws that can affect marketing channel. The Indian laws that affect the distribution are:

Exhibit 9.1 : Laws Influencing Channel Arrangement

Act	Purpose
Contract Act, 1872	Defined contractual responsibilities and obligation between the principal and the agent.
Competition Act, 2002	Prohibits enterprises and persons from entering into arrangements with respect to production, supply, distribution, storage, acquisition or control of goods, which may have adverse effect on competition.
Consumer Protection Act, 1986	Protects the consumers from influences of the seller's coercive power by way of unfair trade practices to restrict competition.

Contract Act, 1872

The agreement between the firm and its channel members is a contract, which is a promise or set of promises forming the consideration for each other and is enforceable by law. This Act also governs the conditions of the contract between the two contracting parties in marketing distribution channel namely agent and the principal. According to this law the **'agent'** is defined as a person employed to do any act, or represent another in dealing with third persons. The person for whom such act is done or whosoever is represented is called as; **'principal'**. The agent's authority may be expressed or implied. As per Section 188 of the Act, an agent having authority of carrying on the business, has authority to do every lawful thing necessary for the purpose or usually done in course, of conducting such business. An agent cannot lawfully employ another person to perform acts, which he has expressly or impliedly undertaken to perform, unless by ordinary custom of trade a sub-agent may (or from nature or agency) be employed. This act defines the duties to be performed by the agent. An agent is bound to conduct the business of his principal according to the directions given by the principal, or in absence of any such directions according to the customs, which prevails in doing business of same kind at the place agent conducts his business. Normally, the duties of agent to principal are.

- Conduct business with skills and act with reasonable diligence as generally possessed by person engaged in similar business.
- Communication with principal and seeking instruction from him.
- Render proper account of his activities to the principal.
- Not to enter into the transaction on his own account without obtaining the consent of the principal.
- Pay the sums (to the principal), received by him for principal.

The act also stipulates the following duties of principal to his agent.

- Indemnify the agent against consequences of lawful acts in good faith in the conduct of business done on behalf of principal.
- Non-liability of principal of the agent to do a criminal act.
- Compensation to agent for injury caused by principal's neglect.

- Reward the agent as per the terms of the contract to compensate him for the money and efforts agent has put in generating the business.

This law spells out the effect of agency on contract with third person. Such as contracts entered into through an agent, an obligation arising from acts done by an agent, may be enforced in same manner, and will have the same legal consequences as if the contracts had been entered into the acts done by the principal in person. The agreement becomes void if it restrains the other party from exercising a lawful profession, trade or business of any kind. According to this law the agency is terminated by principal revoking authority or by agent renouncing the business of agency or by business of agent being completed or by either the principal or agent dying or becoming of unsound mind, or by the in principal being adjudicated an insolvent under the provision on any act for the time being in force for relief of insolvent debtors.

Competition Act, 2002

The Competition Act 2002 (CA), repeals the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP), which has become obsolete in view of developments in the Indian and global markets. It endeavors to shift the focus from restricting monopolies to promoting fair competition, so that the Indian market is equipped to compete with the markets worldwide. It seeks to dissolve the Monopolies and Restrictive Trade Practices Commission and to transfer the cases pending before the MRTP Commission, other than those relating to unfair trade practices to the Competition Commission of India (CCI), a quasi-judicial body, which will advocate competition and prevent practices having an adverse effect on competition. The object of the CA2002 is fourfold, as follows:

- to promote and sustain competition in markets;
- to protect the interest of consumers;
- to ensure the freedom of trade; and
- to provide for the establishment of the CCI.

The Section 3(1) of the CA2002 prohibits enterprises and persons from entering into agreements with respect to production, supply, distribution, storage, acquisition or control of goods, or provision of services, which may have an appreciable adverse effect on competition. An agreement is deemed to hinder competition if it:

- directly or indirectly determines purchase or sale prices;
- limits or controls the production, supply, markets, technical development, investment or provision of services;
- shares the market, source of production, or provision of services, by allocating the geographical area of the market, the type of goods or services, the number of customers in the market, or in any other similar manner; or
- results in bid rigging or collusive bidding.

Competition Act, 2002 is more comprehensive than MRTP, Act 1969 Act and is provision covers all the restrictive and anti-competitive practices in all aspects of the business.

Consumer Protection Act, 1986

The Consumer Protection Act, 1986 is one of the benevolent social legislation intended to protect the large body of consumers from exploitation by the manufacturers, marketers and members of the distribution channels. The Act has come as a panacea for consumers all over the country and has assumed the shape of practically the most important legislation enacted in the country during the last few years. It has become the vehicle for enabling people to secure speedy and in-expensive redressal of their grievances against the marketers of products and services. With the enactment of this law, consumers now feel that they are in a position to declare “sellers be aware” whereas previously the consumers were at the receiving end and generally told “buyers be aware”.

An Act to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.

As per the Section (20) (nn), the trade practices adopted by the marketers through their channel members, which requires a consume to buy, hire or avail of any goods or services as a condition preceding to buy, hire or avail of are called as restrictive trade practices. The agreement of marketers with their channel partners are restrictive in nature and needs registration for clearance.

9.5 FRANCHISING—LEGAL FRAMEWORK

Lamba A.J, a member of Wal-Mart management team defines 'Franchising' as “ **It is the concept by which the a principal company imparts its technology and the brand name to others for a fee and also consistently help to upgrade their operations. Franchising helps the principal company to gain immediately as in this way it is able to create a larger network without having to get directly involved in its day-to-day management.**”

With the growth in the areas of organized retailing of consumer products, food products & drinks restaurant chains, computer training, the franchising is getting popularity in India in last few years. Many foreign companies trying access to vast Indian virgin markets through the franchising route which ensures lot of controls on the distribution activities as compared to other channel members like wholesaler, agents, stockiest, C & F agents retailers etc.

Franchising is basically a business system, wherein the franchiser grants a license to the franchisee to use the franchiser's diverse intellectual property rights. The intellectual property may be in the form of technical know-how, product or service design, brands, trademarks, patents, and copyrights. These intellectual property rights are used along with franchiser's proven name, reputation and marketing techniques to market the franchiser's products or services in return for a sum of money. In addition the franchiser provides training and continuous assistance to the franchisee for marketing of the products in the way the franchiser feels right. The franchiser has full control on the business activities of the franchisee to guard its image and reputation about the product and service quality in the market.

In the conventional distribution system using through distributors, stockiest, agents, retailers, which do not allow the principal to exert any real control over the their distribution

activities. The major distinguishing feature of a franchise system is the higher degree of control that a franchiser exercises over a franchisee. The franchiser has a say in all important issues such as product branding, operational methodology, tactical decisions, strategic moves, acquisition and mergers. The other route for marketing distribution such as formation of subsidiaries or joint ventures, allow excellent control on the marketing activities. However, these arrangements involve higher degree of financial risk as compared to franchising.

In India there is no separate legislation for franchising. The arrangement between the franchiser and franchisee is viewed as a contract, which is governed by Indian Contract Act, 1872. The other, Indian acts applicable to franchising arrangement are MRTP & Consumer Protection Act.

As the franchising agreements are very restrictive in nature, these were brought within the purview of the Monopolies and Restrictive Trade Practices Act, 1969 and were subject to the scrutiny by the Director General of Investigation & Registration or the MRTP Commission. MRTP defines restrictive trade practices as those, which have direct or indirect effect on the competition so as to prevent, distort or restrict it in market, customer segments or geographical area. {Sec. 2 (o) of the MRTP Act}. The restrictive trade practices such as purchase of certain goods (raw material, ingredients, components, parts) from particular suppliers as forced by the franchiser on franchisee is viewed as restrictive trade practices and these needs to be registered with MRTP Commission as per Section 35 of MRTP Act. Such agreements are legal if after enquiry (Section 37 MRTP) found not prejudicial to public interest. If a party to an agreement, which is liable for registration under Section 35 read with Section 33(1) of the MRTP Act, does not register, each member of that party is penalized for the default {Section 48(1) MRTP}. After an inquiry, if the Commission finds that the agreement is prejudicial to the public's interest, only then does the agreement become void. Now such agreement will be reviewed by competition commission under the Competition Act, 2002.

In the franchise agreement there are invariably two clauses one 'not to compete', preventing the franchisee from undertaking a business similar to the franchise business during the term of the franchise and for a certain number of years after termination and other one is 'not to solicit customers of the franchise business after termination of the franchise agreement'.

As per the Indian Supreme Court's decision in *M/s. Gujarat Bottling Co. Ltd. vs. Coca Cola Company*, AIR 1995 S.C. 2372, where the court observed that, "there is a growing trend to regulate distribution of goods and services through franchise agreements and providing for grant of franchise by the franchiser on certain terms and conditions to the franchisee. Such agreements often incorporate a condition that the franchisee shall not deal with competing goods. Such a condition restricting the right of franchisee to deal with competing goods is for facilitating the distribution of goods of the franchiser and it cannot be regarded as in restraint of trade." However, the foregoing judgment does not analyse franchising agreements vis-à-vis Section 33(1) of the MRTP Act.

Consumer Protection Act 1969, protects consumers from the exploitation by the unscrupulous manufacturers or marketers against their rights. Due to restrictive nature of the franchise agreement the, franchiser may force the franchisee to adopt the certain marketing practices, which will undermine the basic rights of the consumes resulting into unfair practices

as defined in above act regarding the preparation, price, quality, advertisement of the product. The issue is if a defective product sold by a franchisee causes injury to a consumer or causes damage to the consumer's property, then does the consumer have recourse to the franchiser and the franchisee or both.. In such case the factors such as the degree of control exercised by the franchiser, the distance between the franchiser and the franchisee geographically, and the equipment and know-how supplied to the franchisee by the franchiser in relation to the product needs to be taken into consideration.

As the franchiser providing the technical know-how, designs, brand name, trademark, patent, copyrights to franchisee, he is the proprietor of intellectual property rights. Hence it is important for the franchiser to protect his intellectual property rights to any franchiser both international or domestic. In India the franchiser can protect his Intellectual property Rights by registering under prescribe class under particular law.

Trade Marks Act, 1999

Indian Patent Act, 1970

Copyright Act, 1957

In addition, for violating the provision of law, criminal remedies such as imprisonment for a period between six (6) months and three (3) years is also available.

9.6 CASES

Case 1. Change in Distribution Pattern

Madura Coats Ltd vs. Bharat Petroleum Corp Ltd. Madura Coats was drawing the supplies of petroleum products from the Cochin (Kerala) refinery for its Madura (Tamil Nadu) Plant. The supplier Bharat Petroleum has taken policy decision, to supply the product to all dealers/buyer from within the same state. This was approval of the Ministry of Petroleum Government of India. This resulted into restriction on the buyers to draw the supplies of product from within the state. The consequences were the payment of local sales tax @ 8 % as against @ 4 % of Central Sales Tax earlier applicable for supplies from outside the state. Madura Coates appealed against the Bharat Petroleum decision under Sec 38(1)(i) unfair trade practices of MRTP. In this case the restriction to draw the supplies from State in which buyer is located has approval of Petroleum Ministry and the motive behind the change was public interest and the new policy is applicable to all dealers and buyers. In the defense BP has said that the policy decision was taken on the following grounds:

- To ensure the un-interrupted supply of valuable input to customer's product.
- To make optimum use of manufacturing facilities at refineries.
- Change in logistics of supplies to take care of the strategic and big customers like Madura Coats.

As per the judgment the restriction does not distort or restrict the competition and it does not impose any unjustified cost on the consumer. The imposition of sales tax is as per the prevailing tariff rates, as applicable in inter state sales transactions. Just because of CST is lower than ST the applicant can not say that it amounts to composing of unjustified cost as per Section 2(o) of MRTP, which cannot be read in isolation and Sales Tax rates cannot be changed

to the convenience of the applicant on the unsustainable ground. . As per Madras High Court judgment, the restrictive trade practices (unjustified cost or restriction imposed on consumer) cannot be established and hence case is dismissed.

{Source: III (2002) CPJ 13 (MRTP)}

Case 2. Non-supply of goods to dealer

The DG Investigation vs. Carborundum Universal Ltd. M/S Cobarundum Universal is manufacturing and supplying the engineering goods such as abrasives, millstones, and grinding wheels to the dealer during last 30 years under the dealership agreement. The supplier suddenly stopped the supplies in 1999. The dealer filed the complaint under Section 10(a)(i), 33(1)(a), 36A, 36B(a) and (e) of MRTP Act charging the respondent of unfair and restrictive trade practices.

The respondent Carborundum Universal in reply said that the dealership agreement stood terminated on 31.3.1996 and the supplies were discontinued w.e.f. 1-4-1996 on account of poor performance of the dealer and lack of interest on his part to promote the company's products. The commission issued the order stating that the non-supply of goods does not mean refusal to deal with the products and act of Carborundum does not constitute restrictive trade practices. In reply to this the dealer further said that the dealership agreement was renewed for the years 1998 to 2000 and the copy of the same was forwarded to the commission. The company in its letter dated 5.8.1998 also mentioned about the price increase and hoped for the continuous dealership support to market Carborundum products. Based on the above facts the commission passed the order and directed Carborundum to continue supplies to the dealer against the cash payment.

{Source: I(2002) CPJ 36 (MRTP)}

Case 3. Discounts Structure Not Restricting the Competition

DG Investigation vs Indian Oil Corporation. DG investigation charged IOC under Section 10(a)(i) and Section 37 of MRTP Act with adoption of and indulgence in restrictive trade practices by way of offering discounts to their dealers on the sales of the lubricants. The following discounts and the credit structure was announced by IOC.

Discount Type	Condition	Discount Structure
<i>Credit/ Spot Discount</i>	Sales of 1 KL and less than 5 KL at a time	30 Days credit Rs. 600 per KL
	5 KL above at a time	Rs. 250 per KL with 30 days credit or Rs. 850 per KL w/o credit
<i>Volume Discounts</i>	12–24 KL	Rs. 100 per KL
	25–49 KL	Rs. 150 per KL
	50–99 KL	Rs. 200 per KL
	100 KL & above	Rs. 300 per KL

<i>Growth Discount Incentives</i>	For sales more than 5% but upto 10 % growth over last year	Rs. 400 per KL on entire incremental volume
	For sales more than 10% but upto 20 % over last year	Rs. 600 per KL on entire incremental volume
	For sales more than 20% over last yeas	Rs. 800 per KL on entire ³ incremental volumes

The DG investigation charged IOC for the indulging into the restrictive trade practices, which according to DG are prejudicial to the public interest. In defense IOC referred to the trade practices adopted by the lube industry in the country, wherein the leading multinational Castrol offer the various discounts to the channel partners to promote the sales. IOC is doing exactly the same what is practiced in the industry. Secondly IOC in the financial year 1994-95 had total sales turn over of Rs. 39351/- crores inclusive of all the products they are dealing with., whereas the turn-over of lube oil was Rs. 1500 /-crores. In the same financial IOC had disbursed Rs. 40188/- as volume discount and Rs. 79420/- as growth discount, which works out to be 1 % (one percent) of the total turn-over of the lube oil., which by any case is so insignificant and cannot influence in restricting or discouraging the competition in the lube industry to any material degree. In view of this above the trade practices adopted by IOC are not prejudicial to the public interest and do not fall under the restrictive trade practices as defined in Section 38(1)(h) of the MRTP Act, 1969.

{Source I (2002) CPJ 34 (MRTP)}

Case 4 : Restriction to store goods from other manufacturers.

Director General Investigation vs. Boomi Bottling Gas Company Ltd. DG(I) under Section 10(a)(iii) of MRTP Act 1969 lodged a complaint against Boomi Bottling Gas Company for indulging into restrictive trade practices so far as certain clauses of agreement executed with its dealers in business of sale and distribution of LPG under parallel marketing system of Government of India.

Boomi appointed dealers for purpose of marketing liquefied gas and accessories. Boomi entered with the dealers into an agreement, which contains two clauses. The clauses 17 and 21 relating to exclusive dealing and non provision of interest on the deposit of Rs. 50,000/- stated to be covered under Section 33(1) © and 20(o)(ii) of the MRTP Act respectively. DG stated that such clauses adversely affect the competition between suppliers/ manufacturers. This by manipulation of prices of conditions of delivery of goods imposed unjustified cost on dealers. Hence, Boomi Gas Company should delete/amend these clauses.

In reply to the complaint Boomi Gas Co said that Clause 17 of the agreement stipulates that the dealer is not to market LPG cylinders made by other companies from premises where Boomis goods are stored. This is to ensure the safety of respondents as well as to avoid the storage of spurious cylinders of other parties. It is also required in terms of the permission given by the Department for 'Explosives' for storing of cylinder at particular place. Hence, act of respondent to avoid the possible injury or damage to customers can in no manner be dubbed as unreasonable.

As regards clause 21 which relates to deposit of Rs. 50,000/- as a performance guarantee for ensuring that the dealer carries out his obligations under the agreement. This advance is adjusted against the recoveries when contract gets terminated. Hence, the charges of manipulation of prices or condition are not restrictive in nature.

The Commission after hearing the both sides stated that the Clause 17 clearly stipulates the prohibition of storing and marketing of competitor's products from same premises on grounds of safety and also as per the guidelines of Department of Explosives. This clause does not prohibit the dealer to store and sell the competitors LPG cylinders from any other place wherefrom Boomi's goods are not stored and sold. The prohibition if storage and selling from same place and it is for safety requirement. Hence, the reasons given in the clause clearly reflects the intensions of the respondent.

As regards clause 21, the provisions of which are for recovery purpose and to ensure that dealer discharge his obligation under the agreement. It is no way affecting the public interest or interest of the consumers and distorting the competition. Therefore, the prerequisite conditions of Section 2(o) of MRTP Act 1969, are not fulfilled and restrictive trade practices not proved.

{Source: I (2003) CPJ 107 (MRTP)}

Case 5: Territorial Restrictions

DG(I) vs Jai Prakash Industries Ltd. Jai Prakash Industries Ltd (JPI) is a public limited company engaged in the manufacture and marketing of Portland Cement. The MRTP commission undertaken the enquiry under the provision of Section 11(2) to investigate the charges of restrictive trade practices under Section 33(1)(g) and Section 33(1) (c) with regard to impugned agreement entered into by JIL with the company's sales promoters. The clauses of the agreement reads as follows:

Clause 1...

"You shall concentrate all your efforts for promotion of sale of goods /cement under company's brand name trade mark in and throughout the territory in the District of _____ of the State _____. However, you may promote the goods in the other districts with the prior consent and approval of JIL. It will however, be open to the JIL to appoint other Sales Promoter(s) within the said area at any time or reallocate territories at its sole discretion. The company reserves the rights to sell directly to consumers and stockiest for which no commission would be payable to you.

Clause 2...

"You shall not either directly in your own in any other name or either in your account or as agent of any other party, undertake the promotion work in district mentioned in Page 1 for Cement other than the Cement supplied by JIL."

In the judgment the honorable justice said that the 'Sales Promoters' are appointed to assist in promoting and collection of the payment and obviously this agreement is not between the seller and the buyer of the goods and it is the agreement between seller and its agent who has been authorized by the manufacturer to sell cement and collect the payment. Hence, the transaction between the manufacturer and sales promoter is not in the nature of principal to

principal basis by it is in the nature of master and servant. The agreement suggest that the promoter is vested with the power of to only of assisting the company in selling and payment collecting the money, the sales promoter stands only as employee of the manufacturer. In view of the above, the provisions of Section 33(1)(c) of the restrictive trade practices act not applicable. Hence, the notice of the enquiry is discharged.

{Source: 2003 CTJ 26 (MRTP)}

Case 6: Dealership Termination

Agrawal Agencies vs. Godrej-GE Appliances Ltd. Agrawal Agencies was appointed as dealer by Godrej-GE Appliances Ltd as per the agreement dated Sept 03, 1996. The appointed was abruptly terminated by not renewing the agreement. The complainant approached MRTP Commission and lodged a complaint against Godrej-GE about indulgence into restrictive trade practices. The relevant clauses of the agreement referred are as follows:

“Clause-2(a). This agreement shall be deemed to come into force from 03-09-1996 and shall continue to remain in force till 31-03-1997 on which date it shall automatically come to an end. The agreement may however be renewed for a period of one year by the mutual consent of the parties hereto.”

“Clause-2(b). This agreement or any renewal thereof shall also be liable to be terminated earlier before the expiry thereof under any of the applicable Clause of this agreement.”

Clause 22. Either party shall have the right to terminate this agreement (without assigning any reason and without incurring any obligation or liability in that behalf) by giving 3 months notice in writing to the other. Such termination, however, shall not affect any rights and obligations of either party which shall have arisen to termination.”

Godrej –GE did not renew the agreement and issued a communication dated July 05, 1999 which reads as follows:

“In light of your poor performance during the last few years, we are not renewing your dealership agreement for this financial year”. In response Agrawal agencies argued that the Godrej-GE could not terminate the agreement by the above said communication as it was automatically deemed to have been renewed till 31-03-2000 on interpretation of Clause 2(a) of the agreement. The termination could have been effected from 01-04-1999. In view of this the honorable judge concluded “there is no purpose to continue the present proceedings as the agreement has come to an end by efflux of time. Godrej-GE shall, however, in particular fact and circumstances, pay sum of Rs. 5000 to the Agrawl Agencies as cost The appeal is dismissed as having been infructuous.”

{Source: 2003 CTJ 31 (MRTP)}

Case 7: Manipulation of Condition of delivery of Goods

DG(I) vs. Goffery Manners & Co Ltd. Goffery manners Ltd (GML) dispatched the material worth Rs. 5,04,053/- without any order to the company’s authorized dealer. The dealer registered the complaint with GML vide letter dt 01-09-1997. The allegation were made against GML that

- they are dispatching the material to dealer without order being placed by him
- replaced the rejected materials after eight months of communication
- takes unreasonably long time to settle the claims

The charges of unfair trade practices were leveled and enquiry was instituted against GML. In reply GML did not specifically denied the charges and said that it is a industry practice to dispatch the material to dealer on the basis of oral orders. GML is also doing the same for others dealers in Allahabad area, where the dealer, who complained belongs to. However, the consignment in dispute has been accepted by the dealer and making the payment for the unordered consignment. The latest outstanding dues from dealer are Rs. 2,78,671/- against the unordered material, which supplied and delivery taken by him.

As per the affidavit submitted by the GML the replacement of goods is done within 17 to 58 days. This is also a practice in FMCHG/Pharma industry to settle the claims within 60 days.

In spite of all complaint the dealer is still keeping the relationship with GML and the 'Wholesale Dealership Agreement' entered into way back in 1982 has still been kept alive by both sides. The MRTP commission could not show any evidence that afore said practices indulged in by GML led to restriction, distortion or prevention of competition in the market. In view of the absence of any evidence to prove the practices adopted by GML are restrictive, honorable Justice discharged the notice of the enquiry.

{Source: 2003 CTJ 24 (MRTP)}

Case 8: Entitled to Benefits of Gateways

DG (I) vs. Energizer India Pvt Ltd. Eveready Industries (EI) are a leading manufacturers, distributors and marketers of batteries in India. Out of total production of 1500 million batteries in India, Eveready manufactures 700 million batteries. Energizer India Pvt. Ltd (ENIPL) manufactures and distributes 3 million batteries (alkaline) in the Indian market and which is less than 1 percent of the total batteries manufactured and marketed in India.

EI holds around 49% of equity in ENIPL and does not compete with its product. However, both of them have entered into contract, whereby ENIPL has appointed EI as their distributors for selling their products in India, Nepal and Bhutan. There are certain clauses in the agreement, which are restrictive in nature and according to DG (I), these clauses attract the provisions of Section 33(1) of MRTP, Act 1969. Based on the DG's investigation the Commission has served notice to ENIPL & EI. In reply the respondents stated the following:

- ENIPL appointed EI as distributor for India, Nepal and Bhutan. It does not involve any geographical restriction for selling and hence does not attract provisions of clause Section 33(1)(g).
- As regard clause 2(a) of agreement regarding exclusive dealership arrangement the clause 10(a) permits EI deal with the products of other manufacturers like ENIPL with which it has an arrangement.
- Clause 3(b) imposed the restriction on selling price. ENIPL imposed the price restriction on EI to prevent the arbitrary price and thereby to protect the consumers. But it does not prevent the distributor to sell at price lower than the suggested one.
- As per clause 8, ENIPL intends to protect the interest of EI so long as EI holds 49 % equity share in ENIPL.
- ENIPL has imposed obligation on EI of achieving the fixed sales target. However this does not distort or restrict competition. And hence the provisions of Section 2(o)(ii) are not attracted.

- EI is engaged in the manufacture and sale of dry cell batteries and flash light and enjoying the market share of 46% and 65% respectively. EI has a wider dealers network and is having 5,00,000 outlets spread over the country. Unless it has exclusive rights to sell the products (alkaline batteries) of ENIPL, it cannot develop the market for these products.
- The distribution commission agreed is 2%, at which no other party in India will act as a distributor.

Based on the above facts, the honorable judges concluded that the subject dealership agreement does not affect the competition as the products manufactured by ENIPL accounts for less than 1% share of the total batteries manufactured and distributed in India. In this context both respondents have pleaded gateways under Section 38(a), (b), (g) & (h) and particularly provisions of Section 39(1)(h) which are referring to the negligible effect on competition and it is not likely to restrict, discourage or distort the competition to any material depth. Hence, the impugned clauses of the agreement are not prejudicial to the public interest.

{Source: I (2002) CPJ 28 (MRTP)}

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Chapter 10



PHYSICAL DISTRIBUTION

–Legal Issues in Logistics

- ◆ Warehousing
 - Acts
 - Licenses
- ◆ Transportation
 - Carrier and other Acts
 - Documentation
- ◆ Cases

The new laws and growing number of pressure groups like, consumer forums have put more restraints on the businesses than ever. Indian logistical industry is under going a sea change after the liberalization of Indian economy in 1991. The deregulation of transportation, privatization of ports, rationalization of duties & tax structure, enforcement of environmental protection laws are few measures had the effects on this industry. The new policies and regulations are being evolved and enforced, keeping in view the objectives of globalization, privatization and liberalization with the additional regulatory dimension for environmental protection.

10.1 WAREHOUSING

Historically way back in 1928, the Royal Commission on Agriculture formulated the concept of warehousing. In 1945, the Sub-Committee on Agriculture (Gadgil Committee) stressed the need of establishments of licensed warehouses, which will issue the warehouse receipts for the goods received for storage. During fifties Reserve Bank of India circulated the model bill and state governments passed the legislation to regulate the warehouses in the country. In 1950 the Rural Banking Enquiry Committee stressed the need of warehousing system for agricultural produce. This paved the way for enactment of Agricultural Produce (Development and Warehousing) Corporation Act 1956. This was further replaced by Warehousing Corporation Act 1962 for Public Sector Warehousing.

10.1.1 Warehousing Corporation Act, 1962

This act provides for the incorporation and regulation of corporations for purpose of warehousing of agricultural produce and other commodities and for matters connected with it. The objectives of this act are:

- To issue a warehouse receipt to the depositor, which can be used as negotiable document for transaction with producer, depositor, dealer and bank.
- To reduce the wastage and storage losses by establishing, developing and running warehouses on scientific principles.
- To help the depositors in marketing the warehoused goods.
- To train and develop the manpower to manage the warehouses built and run on scientific principles.

The Act is arranged into following five sections:

Chapter I—Preliminary. Covering the definitions, commodities for warehousing and its geographical applicability.

Chapter II—Central Warehousing Corporation. Its capital structure, management, functions, appointment of officers and maintenance of warehousing funds.

Chapter III—State Warehousing Corporations. Formations, capital structure, management and functions.

Chapter IV—Finance, Account and audits. Investment funds, disposal of profits, deposit account, borrowing powers and audit of the accounts of the corporation.

Chapter V—Miscellaneous. Power of corporations, offences, indemnity to directors, declaration of secrecy, voting rights of shareholders etc.

The act specifies the formulation of Central Warehousing Corporation (CWC) and State Warehousing Corporations (SWCs) for storage of the agricultural produce. The CWC and SWCs are empowered to establish and run large size warehouses at the production centers, marketing centers and ports involving huge capital outlay. These corporations can store agricultural produce; seeds, manures, fertilizers and other notified commodities offered by industries, co-operative societies and the government agencies. The Act allows these corporation to act as agent on behalf of government for the purpose of purchase, sale, storage and distribution of the above mentioned goods.

10.1.2 Licensing of Warehouses

For operating a private warehouse, (being an establishment) a promoter has to obtain the license from the appropriate authority. The license issuing authority is local Municipal Corporation under the Bombay Shop and Establishment Act, 1948. However, for warehousing of pharmaceutical products the approval from Food and Drug Authority (FDA) is must for upkeep of proper hygienic condition because of the nature of the product. The licensing of the warehousing governed by the following conditions.

- Maintenance of proper storage conditions depending on the type of the goods to be warehoused.
- Payment of the prescribe fee as stipulated by the authority.
- Issue of warehouse receipt against goods deposited in the warehouse

- Run the warehouse on scientific principles by taking necessary precautions against damage or loss of goods due to water, attack of pests and rats etc.
- Make available proper facilities for inspection, segregation and movement of goods.
- Insure the goods.

In case of bonded warehouses, the licensing authority is Customs Department. The import cargo till it is cleared through customs formalities, is kept in the warehouses called bonded warehouses. These goods are released to the consignee after the duties are paid. These warehouses may be under private or public authority. The commissioner of customs issues the license for the operation of bonded warehouse to the parties who qualify for the requirements stipulated in Indian Customs Act. These licenses are issued against security deposits and under certain term and conditions.

10.2 TRANSPORTATION

The country has entered into de-regulation environment in transportation except rail transportation. Due to globalization and emerging socio-economic trends the customer expectations are increasing so fast that the 'Just-in-time' transportation system, which is not so common in India, will become norm rather than exception. The air of change has in fact has began in the mid 80s when the deregulation was set in road transportation. Air transportation witnessed a change in early 1990s. The ports and highways has already taken up and it is not far when rail transportation will also witness far reaching changes.

10.2.1 Carrier and Other Acts

The logistics in India has to operate under the regulatory environment, which some times hampering the healthy growth of the industry. However the various laws enacted from time to time are for protecting the interest of the common citizen and checking the malpractices. The logistics industry in India is operating in the environment of the following Acts:

- The Motor Vehicle Act, 1988
- The Carriage by Air Act 1972
- The Carriage of Goods by Sea Act, 1925
- The Multi-modal Transportation of Goods Act 1993
- The Central Excise Act, 1944
- The Central Sales Tax Act, 1956
- Environmental Protection Act, 1986
- Consumer Protection Act, 1986

The most important ones are discussed below:

Motor Vehicles Act, 1988

The Motor Vehicle Act, is the principal instrument for regulation of motor vehicular traffic throughout the country which falls under concurrent list of VII Schedule of the Indian Constitution. The implementation of various provisions of Act rests with State Governments. The Act was last amended in the year 1994. Recently, an amendment regarding construction equipment vehicles has been carried in the rules in 2000.

Motor transport in India was first regulated under Motor Vehicle Act, 1914, which has limited functions. However, with the growth of road traffic, the need for regulation on public safety and convenience of public was realized. This resulted into passing of Motor Vehicle Act 1939, which was further amended in 1988, and Motor Vehicle Act 1988 came into prominence. The major provisions of the act, are maintenance of state registers for driving license and vehicle registration, constitution of road safety councils, control of air and noise pollution, liberalization of permits for owners of transport vehicles on the national routes and fixing age limit for different types of vehicles. It prohibits overloading of the truck to ensure safety during transit.

Rule 115 of the Central Motor Vehicle Rule, 1989 provides the emission norms. The emission standards for different categories of vehicle were introduced in 1990 and subsequently amended effective from 1992, 1996, and 2000. Euro I norms have been brought into force w.e.f. 01-04-1990. Euro II norms for emission have been extended to metros by 2001. There are separate emission norms for vehicle operating on CNG (Compressed Natural Gas), agricultural tractors.

Carriage by Air Act, 1972

This covers the conventions relating to rights and liabilities of the carriers, consigner, and the consignee. According to this law for carriage of goods by air, the air carrier must deliver an air consignment note, which will cover, the name and address of consigner and consignee, the goods details (type, quantity, packs freight etc), value of the goods. The carrier is liable for damage or loss of goods sustained during transit and the compensation has to be paid as per terms stipulated.

Carriage of Goods by Sea Act, 1925

A bill of lading was originally a receipt of goods placed on a ship and also a document for transferring, the title of goods to consignee. However, with the trade development, it became a 'negotiable instrument' in which supplier, shipper, bankers, carriers became interested. Concurrently, with this it became customary to show on 'bill of lading' the terms of the contract on which the goods were delivered to and received by the ship. There was lot of difference preparing in bill of lading amongst the shippers and the carriers. Hence, there arose a need of uniformity in preparation of bill of lading among all maritime countries, which are involved in international trade. As a result the Carriage of Goods by Sea 1925 was enacted. According to this act for transport of goods by sea the bill of lading is must. The content of bill of lading serves three purposes.

- It is a receipt of goods shipped containing the terms on which they have been received
- It is evidence of contract for carriage of goods
- It is document of title of goods specified in it.

This act also covers the responsibilities, liabilities and risk involved on the part of consigner, carrier and consignee.

Multi-modal Transportation of Goods Act 1993

The Multi-modal Transportation of Goods Bill was passed by the both the Indian Parliaments on April 2, 1993 and came on the statute of books as Transportation of Goods Act, 1993.

This is an Act to provide for the regulation of multi-modal transportation (Rail, Road, Sea, and Inland Waterways) of goods, from any place in India to a place outside India of a multi-modal transportation contract and matters connected therewith or incidents extends to the whole of India except state of Jammu and Kashmir. The Act provides for registration (with payment of prescribed fees) of multi-modal transportation activities with the proper regulatory authority in the area of operations. The operator has to maintain and issue the prescribed documentation for movement of goods.

As per the Act “multimodal transportation” means carriage of goods by two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India and “goods” include—(i) containers, pallets or similar articles of transport used to consolidate goods; and (ii) animals. The Act further states that “multimodal transport operator” means any person who—

- (i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf;
- (ii) acts as principal, and not as an agent either of the consignor or of the carrier participating in the multimodal transportation, and who assumes responsibility for the performance of the said contract; and
- (iii) is registered under sub-section (3) of Section 4;

Chapter II of the Act comprising of Sections 3,4,5,6 lays down **Regulation of Multimodal Transportation**. Section 3 provides for the essential registration of the multimodal operators. It prohibits any person from carrying on or even commencing the business of multimodal transportation without registration under the Act. Section 4 lays down the procedure and the conditions valid for registration for multimodal transportation. Section 5 is of control nature. It talks about the cancellation of registration of a multimodal operator. Section 6 provides a chance for the multimodal transport operator to appeal.

Chapter III of the Act comprising of Sections 7 to 12 provides for maintaining Multimodal Transport Document. Sections 7, 8, 9, 10, 11, 12 lay down “Issue of Multimodal Transport Document”, “Contents of the document”, “Reservations in the document”, “Evidentiary Effect of the document”, and “Responsibility of the Consignor” respectively.

Chapter IV of the Act provides for the **Responsibilities and Liabilities of the Multimodal Transport Operator**. The Chapter consists of 8 sections (from 13 to 20). Sections 13 and 14 have an in-built check on the delay of goods delivery. The other provisions are related to the liability to be paid by either of the multimodal transport owners or the consignee in case of loss or damage to goods.

Section 21 through 32 in Chapter V of the Act talk of **Miscellaneous** provisions relating to negotiations between the consignee and the owners. The broad categories are “Special Provisions for Dangerous Goods”, “Right of Multimodal Transport Operator”, “General Average”, “Limitation on Action”, “Arbitration”, “Delegation of Power”, “Multimodal Transport Contract”, “Act to Override other Enactments”, “Power to Make Rules”, and “Amendments of Certain Enactments”.

Central Excise Act, 1944

This Act empowers the government to collect the levied tax called Excise Duty imposed on the commodities produced and products manufactured as per the goods classification in 1st and 2nd Schedule of Section 3 of the Act. As per the regulations excisable goods cannot be removed from manufacturing premises unless the excise duty is paid to the Excise Authority. The holder of the goods has to maintain the proper record of inventory of excisable goods in store. The goods dispatch documents, which are sent along with vehicle carrying the goods should include the excise gate pass, duly endorsed by the excise authority. The transporting the goods without excise gate pass is a crime and for evading the tax, the heavy penalties such as fine or imprisonment may be imposed on the parties involved.

As per Central Excise Act the goods are classified for payment of Excise Duty. The primary object of classifying products in fiscal statute like Central Excise Act being for raising revenue, the settled rule of interpretation is that the various headings or sub-headings in the Tariff should be understood not in strict scientific and technical sense but in their popular sense i.e. the meaning assigned to them by those trading in and using the product.

MODVAT, which stands for modified value added tax was subsequently introduced in 1986 to avoid the double charging of excise duty on the item used in the manufacture of the finished products. When the raw material or component is used in manufacture of finished products, the manufacturer gets the credit to the extent of the excise duty paid on these inputs, which is subsequently deducted from the excise duty charged on the finished products being removed from the factory. The MDVAT eliminates the need for pre-payment and future collection of the refund of excise duty.

Government contemplates to introduce **CENVAT** for simplicity and transparency in tax assessment and collection. However, the issue still remains to be resolved about the differential duty for which the manufacturer can avail of the credit against the supplementary invoice.

Central Sales Tax Act, 1956

The CST Act, provides for levy on Inter-State sales. The local state sales authority administers CST collection. Even each state has imposed the levy on sales within the state. For incidence of sales tax two things are necessary i.e. movement of goods and completion of sales as per agreement between the buyer and seller. The sales tax thus collected by seller from the buyer has to be deposited with the sales tax authority. The sales tax rates differ with product and its classification indicated in sales tax manual. The value of the applicable sales tax should be reflected in the sales invoice, which forms a part of documentation accompanying the goods during its movement. As per the regulation the invoice must have CST and ST number of both consignee and consigner. In absence of CST number of consignee, a flat 10 percent ST is applicable and it must appear on the invoice. The consignment should be accompanied with proper ST form or permit. Each of Indian States has the specific requirements for towards Sales Tax formalities to be completed by consigner.

VAT, which stands for value added taxation was introduced in finance bill 2002, (Implementation by April 01, 2003) for assessment and collection of sales tax similar to MODVAT or CENVAT for excise duty. It eliminates the multi point incidence of sales tax in value addition

process of converting the product inputs to finished products. Most states currently levy an entry tax or octroi on select commodities and plan to continue with them in VAT. This levy over and above the local sales tax creates tax cascading and results in higher consumer prices. However, fully vatable entry tax levied at rate equal to the VAT rate on sales within the state will not have any tax cascading. Under this system, registered dealer who pays an entry tax on imports into the state would be entitled to a 100 percent tax credit of entry tax paid on further sale of the goods within or outside the state. VAT will eliminate the disparities in local sales tax applicable in different Indian states. With the uniformity in incidence of sales tax across the country the manufacturers may reduce the distribution centers, which were other wise opened for taking advantage of tax disparities in different sates.

Environmental Protection Act, 1986

This act empowers the government to take all such measures, as it deems necessary or expedient for the purpose of protecting the quality of environment and preventing, controlling and abating the environmental pollution. Under this act the following two rules are regulating the storage, handling and transportation of the hazardous material and chemicals.

- Hazardous Waste (Management & Handling) Rule, 2000
- Manufacture, Storage and transportation of Hazardous Chemicals Rule, 1984

These rules lay down the guidelines for the manufacture, storage, handling and transportation of the hazardous material and waste. The materials and waste covered are as per the schedule 1, 2 and 3 of the above rules. The guidelines are for operational safety in manufacture, storage, handling and transportation of hazardous materials for avoiding contamination, protecting living beings and maintaining clean environment. As per the Act, the carrier to follow the following procedure for transporting the hazardous goods:

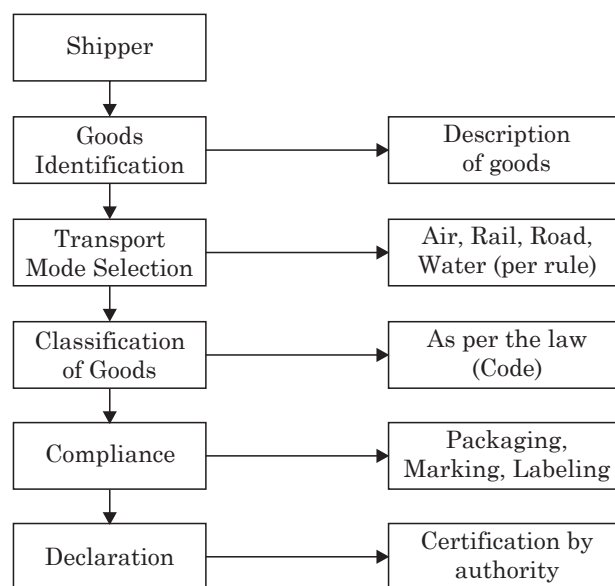


Figure 10.1. Procedure for Transporting Hazardous.

Consumer Protection Act, 1986

The provisions of this Act, provides for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected with logistics including warehousing, storage and transportation. The Act provides the compensation to the affected consumer in case of deficiency in logistics services. It provides the protection to consumers against the unfair and restrictive trade practice in logistics services. (Details–Chapter 3).

10.2.2 Documentations

The importance of the transportation documentation cannot be denied in today's complex business situation. It is binding on the carrier after accepting the goods for moving from one place to other one. The contract between shipper and carrier is documented in the paper duly executed by the carrier. This document has a legal status as it is issued as per the applicable laws of the land and it acts as a proof of acceptance of goods for transportation. For different modes of transportation, the nomenclature of this document differs, but its function and the purpose is the same. The major documents used in transportation business are discussed below:

Airway Bill (AWB)

This is a negotiable document issued by the airlines toward the receipt of the goods consignment. This is a receipt of goods from the consigner, after these are accepted by the airlines. The AWB shall have an endorsement for "Freight Paid" or "Freight to be paid" at Destination" as the case may be. Consignee may collect the goods at the destination, after the surrendering the AWB. It is parts of the import and export documentation for customs clearance.

Railway Receipt (RR)

The Railway authority issues this document, after the consignment has been accepted for booking. The consignment is weighed, marked and the railway receipt is issued to the consigner. This document is prepared in four copies. One copy is given to consigner, second copy is sent to destination station, third copy sent to railway accounts department and the fourth copy is retained with the railway station. It is used as negotiable instrument and changes hands before it is finally presented at the destination station for taking the delivery of the consignment.

Goods Consignment Note (GCN) or Lorry Receipt (LR)

For transporting the goods by road carrier, the shipper or consigner has to inform the carrier operator about the nature of the consignment, pace of loading, destination, quantity of goods, and route to be followed. After receipt of the goods the carrier issues LR or GC to the shipper or consigner as a proof of acceptance of goods for transportation. This is a contract document between the consigner and the carrier. It is used as document for proof of dispatch for bank to make payment to consigner. The LR or GC note includes the following:

- Name of the consigner
- Destination and name the consignee
- Description of goods
- Details of boxes or packages
- Weight of goods
- Nature of freight payment (Freight Paid or Freight to Pay)

The other terms and conditions of the contract between the consigner and the carrier governed by the Carrier Act 1880.

Bill of Lading (BL)

This is an important negotiable document for the sea transportation. The shipper will get this document from the shipping company duly stamped with required number of copies. If the freight is paid on the shipment, BL will contain an endorsement of “Freight Paid” and if it to be paid at destination, it will contain “ Freight payable at destination”.

The following details are incorporated in this document:

- Name of the Shipping Company
- Flag of Nationality
- Name of the consigner or shipper
- Description of goods
- Number of package's/boxes
- Country of origin of goods
- Markings on the packets
- Gross and net weight of the goods.
- Freight rates
- Date of booking

If the negotiation is through bank, BL is forwarded to the bank with invoice copy, LC (Letter of credit) copy, inspection certificate, and certificate of origin etc.

Certificate of Origin

It is a document prepared by the exporter to identify or declare that the goods originated in certain country.

Inspection Certificate

It is a document certifying that the merchandise was in good condition prior to shipment. This may be issued by the inspection agency assigned for the job by the government.

Insurance Certificate

It is a negotiable document issued to provide insurance coverage for a specific shipment.

Export License

An export license is a permit allowing goods to be exported. There are two types of export licenses i.e. general and validated. The General license permits the exporter to export all the commodities listed. However a validated license is required for export of certain restricted commodities.

Commercial Invoice

This document is required for collecting the payment from the purchaser. This document incorporates the details on goods to be exported, their prices, duties taxes etc. There are two kind of invoices. One is pro forma invoice, which is provided by the shipper prior to the shipment. This informs the buyer to know about the shipping quantities and the value of the goods for making payments. Buyer may need pro forma for opening Letter of Credit. The Commercial invoice is regular invoice prepared after the goods are shipped.

Packing list

This document lists the number of pieces, contents, weight and measurement of each item in the consignment.

Dock receipt

It is a proof of delivery of goods received at the dock or warehouse of shipping company.

Government of any country across the world monitors and controls the growth of the industry and commerce in that country through the legislation. The regulatory environment in the country is normally in line with the policies adopted by the government for the economic growth of the nation. The logistical industry in India is no exceptions for the same. The current regulations are in line with the liberalization measures adopted by the Indian Government since 1991. The transportation industry except railways is privatized long back. The private investments are welcome for infrastructure development projects such as roads, airports and seaports, which are necessary for the growth of logistical industry in the country. The various Acts passed by the government are for curbing the mal- practices in the industry and exploitation of gullible customers by the organizations that are having financial muscles. The regulatory environment today is much more conducive for the industry growth in country as compared to the one which existed before liberalization of Indian Economy in 1991. The deregulation of transportation, privatization of ports, rationalization duties & tax structure, enforcement of environmental protection laws are few measures which had positive effects on this industry. The new policies and regulations are being evolved and enforced, keeping in view the objectives of globalization, privatization and liberalization with the additional regulatory dimension for environmental protection.

10.3 CASES**Case 1. Limited Liability of a carrier**

Air India vs. India Ever bright Shipping & Trading. India Everbright Shipping & Trading has forwarded through Air India under Airway Bill dated 20 October, 1992 total of 31

cartons of certain material for the manufacture of undergarments and brassieres to Gaborne, Bostwana. As the Air carrier does not fly to Bostwana, the cartons were therefore carried by air carrier to on 25 October 1992 from Madras to Mumbai and thereafter by its flight on 28 October 1992 from Mumbai to Nairobi. The consignment reached Nairobi within nine days from date of Airway Bill. At Nairobi the cartons were handed over by the Air carrier to Kenyan Airfreight Handling Ltd, being the handling agents for Air Bostwana for onward carriage from Nairobi to Gaborne Bostawana. Air Bostwana delivered 15 out of 31 cartons to consignee at Gabaorne in 11 November 1992 and remaining 16 cartons were delivered on 11 January 1993. The consignee complaint that as each carton contained separate and different items, all together were required for manufacture of undergarments and brassieres and the receipt of part consignment on 11 November did not serve any purpose until the remaining were delivered on 11 January 1993. The consignee then complained that by this time Christmas and new Year season was over and the very objective of order for goods placed by consignee was lost with the result that consignee cancelled the order putting the IESTC at great loss both materially and mentally. The State Consumer Redressal commission held the allegation of complainant proved and awarded him compensation of the amount of value of the goods, the freight charges, interest , damages for loss of business. The award of compensation was made under Clause (d) of Sub Section (1) of Section 14 of Consumer Protection Act 1986.

However the Appellant stated that State Consumer Redressal Commission went wrong in ignoring the provisions of Carriage by Air Act 1972 (CA, Act) which limits the liability of an Air carrier on the assumption that there was negligence on the part of Air carrier in not delivering the goods on time and the complainant suffered any loss on that account. As per the CA Act the liability of the Air carrier does not exceed a sum of \$20 per kg of weight of the goods consigned and the weight of the consignment in the case was only 209 kgs. Carrier Act gives statutory recognition to Warsaw Convention, 1929 as amended by Hague Protocol, 1955, which contains provisions for international carriage of person, luggage or goods by aircraft. Convention balances the imposition of a presumption of liability on carrier of limiting his liability if damaged is caused by the willful misconduct of the carrier or by such default on his part. As both Bostwana and India are parties to Warsaw Convention and Hague Protocol the provisions of CA, Act are applicable here. The rule 22(1) of Warsaw Convention and Hague Protocol indicates the limited liability of the carrier to the extent of sum of 250 francs per kg of the weight of goods carried in the normal case. In case the consigner has made a special declaration of interest of delivery at destination and has paid the supplementary sum if case so require. In such case carrier will be liable to pay a sum not exceeding the declared sum. According to rule 25 of Warsaw Convention and Hague Protocol the limits of liability specified in rule 22 will nor apply if it is proved that the damage resulted from 'willful' misconduct or by such default on his part or an act or omission of carrier , his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result. As per Black Laws dictionary the 'willful' act may be described as one done intentionally, knowingly and purposely, without justifiable excuse as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. The 'willful' act differs essentially from a negligent act.

In application filed by IESTC under CPA, 1986 the, complainant says the loss has occurred to him due to negligence and the lethargic manner of handling of cargo by Air carrier an hence, the Air Carrier should pay the full compensation. While in his application no where it is mentioned about loss due to the 'willful' negligence on the part of Air Carrie.

Based on the above the National Consumer Dispute Redressal Commission viewed that if damaged has to be awarded, it has to be within the four corners of law on the subject. Section 14(1)(d) of Consumer protection Act has to be read with Carrier Act, 1972. In the absence of even allegation in the complaint that there was any willful misconduct or damage resulted from act of omission of the Air carrier done with the intention to cause damage would probably result, it is difficult to hold that that Rule 25 of Warsaw Convention or Hague Protocol would apply.. It is the case, which falls under Rule 22 of First Schedule or Second Schedule of Carrier Act. The complainant IESTC would therefor entitled to relief of \$ 4180 @ \$20 per kg for its weight of cargo.

{Source: I(2002) CPJ 51(NC)}

Case 2: Compensation for Short Delivery

United India Insurance Co Ltd, vs. Citizen Chemical Transport Co. M/S Reliance Industries Ltd, Hazira, had booked consignment containing MEG with Citizen Chemical Transport Company for carriage from Hazira to Gulaothi. The consignment was insured with United India Insurance Company and the consignee of the above consignment was M/S Jindal Polyester Ltd. At the time of taking the delivery consignee noticed a shortage in the consignment and when the said fact was brought to the notice of Citizen Chemical Transport Co, he issued a shortage certificate to the said effect. Jindal Polyester lodged a claim for compensation on account of shortages with Citizen Chemical Transportation Co and Insurance Company. United India Insurance settled the claim of Jindal Polyester, who in tern issued a letter of subrogation and Special power of attorney in favour of United India Insurance Co Ltd authorizing them to recover the said amount from carrier. Hence the Insurance company filed a complaint in respect of the consignment before the District Forum for recovery of paid amount from carrier. The District Forum raised the preliminary objection that United India Insurance Co is not the consumer as per the provision of the Consumer protection Act 1986. They have neither hired not availed of services or was not the beneficiary of services rendered by the Citizen Chemical Transport Co. Hence not being the consumer cannot claim the compensation. Hence complaint not filed by the consumer is not maintainable in the law. Not satisfied with the decision of District court, United Insurance Co. approached to State Consumer Dispute Redressal Commission, which dismissed the appeal on the same ground saying that Insurance company cannot maintain the complaint under CPA, 1986, for compensation from carrier, on the basis of letter of subrogation and Special Power of Attorney issued in favour of consignor or consignee to whom it has paid the money.

{Source: I(2002) CPJ 397}

Case 3: Compensation for Misappropriation by Transporter

Adhunik Yarns Ltd vs. Masters Road Lines. Master Road Lines (MRL) was engaged by Adhunik Yarns Ltd (AYL) for delivering goods to Shriram Textiles Delhi The goods were worth Rs. 1,95,125/- The transporter was engaged on the recommendations of the Indian bank Association. After having promised to render services to AYL for a consideration, the MRL failed to fulfill the obligation. Neither goods were delivered to the party concerned nor these have been returned to AYL since 12-07-1996. The time limit for of hundies concerned with invoices in lieu of L/R (Lorry Receipt) given by MRL against receipt of goods has expired. The Bank accordingly returned the documents, as these were dis-honoured. MRL neither did

nor respond to several reminders made by AYL for delivering the goods or returning the goods not did not allowed Bank Authorities to inspect the goods lying transporters godown. Even notices served by MRTP Commission came back as with postal remarks as "no such firm exists on this address.' The MRL was given one more opportunity to attend the proceeding by publishing the notices in leading dailies. As none on behalf on MRL attended nor filed reply the court given the judgment, that MRL having promised to render the service for a consideration has failed to fulfill that obligation. The goods were neither delivered nor returned but misappropriated by them. Accordingly the charges of unfair trade practices established against them. Inview of the loss AYL on account of misappropriation of goods AYL is directed to pay the value of the goods alongwith the interest of 12% per annum alongwith incidental expenses of Rs.5000/- and comply to this order within four weeks from the date of its receipt.

{Source: 2003 CTJ 36 MRTP}

Case 4: Excise Duty—Classification of Goods

Kedia Agglomerated Marbles Ltd. vs. Collector of Central Excise. The primary object of classifying products in fiscal statute like Central Excise Act being for raising revenue, the settled rule of interpretation is that the various headings or sub-headings in the Tariff should be understood not in strict scientific and technical sense but in their popular sense i.e. the meaning assigned to them by those trading in and using the product.

As per Central Excise Act (1 of 1944), Sec. 5A (1)—Notification No. 59/91-CE Dated 20-3-1990 the Excise Duty exemption is granted to 'Mosaic tiles' in which the word 'mosaic tile' is to be understood in their popular meaning. Kedia Amalgamated Marbles Ltd manufactures the floor tiles and market the product in trade name of "Marbella Agglomerated Marbles" and "Marbella Tiles" which according to Collector Central Excise, Ahmedabad classified and 'Mosaic Tiles' and hence the benefit of exemption be granted.

In the appeal by the Department of Central Excise and Gold (Control) Appellate Tribunal [CEGAT], upset the decision of the lower authorities (Collector Central Excise, Ahmedabad) by holding against the KAML that since it is marketing its manufactured tiles in its different trade names and not as 'Mosaic Tiles', it is not entitled to the benefit of exemption notification.

KAML had produced before the authorities evidence and material to show that both technically and commercially its Tiles are known as 'Mosaic Tiles' or 'Marble Mosaic Tiles'. No negative material was produced in rebuttal by the department. This was supported by the report of Assistant Chemical Examiner, Central Excise, Baroda.

The trade name given to the product is to distinguish it from ordinary Mosaic Tiles in which there is no use of marble chips and marble stones. A typical trade name to the product could be given to distinguish it in the market from ordinary Mosaic Tiles made from stones other than stones or chips of marbles.

It was established through the investigation that the material input and the manufacturing process of the KAML is similar to Mosaic Tiles and hence court held that there cannot be any ground to deny benefit of exemption to KADL. and hence orders of Collector of Central Excise, Ahmedabad for granting of exemption be restored.

{Source: 2003 HR SCW 419}

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Chapter 11



PRODUCT PACKAGING

– Regulatory Aspects

- ◆ Packaging—Basic Functions
- ◆ Unfair Practices
- ◆ Legal Requirements
- ◆ Guidelines for Exports
- ◆ Cases

Most physical products have to be packed. The well-designed packaging creates convenience and performance value for the product. However, unscrupulous marketers to make fast buck, take refuge of deceptive packaging practices to hide their sub quality products and mislead the consumer. To arrest such deceptive practices, through enactment of various laws from time to time, Government has enforced lots of packaging regulations on the manufacturers and marketers.

11.1 PACKAGING—BASIC FUNCTIONS

A packaging is an extension of the product offered for the sale. It is more than the container or wrapper for the product and offers considerable consumer benefits. Packaging performs the promotional function and facilitates the storage, handling and transportation of the product with ease and convenience so as the product is delivered to the consumer in the usable form. In fact, the consumers identify the products by the packaging. The distinctive packaging on the shelves in retail shop may attract the attention of the consumer and hence, it pays major part in promotional strategies of the firm. The other important aspect of the packaging in today's context is its eco-friendliness i.e. causing no or less damage to the environment. Thus the packaging is required to provide following five functions:

- Product containment
- Protection to product in transit
- Usage facilitation to consumer
- Communication for product promotion
- Preservation of ecology

The marketer can create a competitive advantage through packaging, which attracts the buyers through its design and message printed on it to convey to the prospective users. The packaging designers are free to develop the packaging designs. However, to protect the gullible consumers from the unscrupulous marketers who use unfair packaging practices to market their fake or substandard products or misguide consumer, the government has enacted various laws to curb the malpractices in packaging.

11.2 UNFAIR PRACTICES

The unscrupulous marketers use the deceptive packaging to sell the sub quality or counterfeit goods. The packages are intentionally designed to mislead the consumers. The labels on the packaging bears the misleading information or do not provide enough information to assess the quality of the product contained. It also does not give required warning to the consumers on the usage precautions or after effects of the products. The commonly observed unfair practices in packaging are:

- Concealing information on the nature/ type of goods and warnings
- Not providing information on product ingredients
- Not providing instructions on the usage of the product
- Copying the trade names of well known brands
- Printing Trade names or marks similar (with letter changed) to known brand
- Product (in weight & ingredients) not conforming to printed information on the package.
- Product performance not as per information on packaging
- Date of manufacture and prices not printed.

Extensive research in several packaging commodities reveals the deception in the diminutive print. The packaging of some products does not carry the manufacturing date; some do not have expiry date on them and some brands do not convey the warning like “best before” or “use by”. For perishable stuff, such declarations should clearly be conveyed to the consumers.

In reality, if you ask any shopkeeper, you get a curt “It is a fast-moving item. We don’t stock anything stale.” Some manufacturers entertain the buyers by incorporating a treasure hunt for the relevant label. They print the information in colours that merge with the plastics, emboss it so you need to run your fingers on it, or hide it under a decorative flap.

The manufacturing date on a toothpaste tube has to be dug out of the crimped tail. As for the expiry date on a battery cell, the number on medium or large ones are visible under a lens, but the script on the seat of a pencil cell is beyond the power of magnifying glass. A well-known manufacturer gets “20 % off” printed in big bold letters and in mini print it says: “On the recommended retail price. Taxes extra as applicable”. This is another way to dupe consumers in buying the product.

A large number of unidentified consumers do not get what they pay for. Packaging sizes and container shapes for many products deceive and confuse consumers about the amount of product they contain, and some manufacturers have been increasing package size, while decreasing content.

It's a common practice for manufacturers to tactically reduce the weight contained in a package while keeping the size of the box, bottle, or container the same, and misrepresent the quantity of good sold. The quantity of the product inside the packet is not consistent with what is specified on it. It is not just a question of grams or a few rupees but an unjust enrichment to manufacturers and a needless loss to consumers.

Very few buyers check if the packed commodities weigh less than weight marked on the panel. If they do so, they don't try to question the malpractice. Shopkeepers often do not have electronic weighing machines that can detect small discrepancies.

As a matter of fact, the packet should weigh more than the marked weight, because the given weight is actually the net weight of the product inside, which is its weight before packaging. On the contrary, the weight of product inside the packet and that of the packet itself is less than marked weight on the panel of packet. The net result is that consumers are taken for a ride, with erring shopkeepers going scot-free.

11.3 LEGAL REQUIREMENTS

In India product packaging is regulated through Standard Weight & Measures Act. However, bodies like IATA (International Air Transport Association) and IMO (International Maritime Organization) have their own regulations on logistical packaging for air and sea modes of transportation.

Standards of Weight and Measures Act, 1977

The Standards of Weight and Measures Act, 1977, is a major piece of legislation to penalize the manufacturers who blatantly flout the rules and tamper with the packaging of the products and deliberately set out to fleece consumers by using tactics like misleading or deceptive packaging. This Act provides for uniform weights and measure throughout the country and prescribes that every unit of all weights and measures will be in metric system. The Standards of Weights and Measures (packaged commodities) Rules, 1977 safeguards the consumers against such unfair and deceptive practices in respect of packaged commodities.

The Act requires definite and conspicuous declaration of name and address of the commodity inside, the net quantity in standard unit of weight or measure, the date of manufacture and the maximum retail price and the expiry date. It has laid down the standards of weights and measures or the number for different commodities so that the commodities are packaged in a rationalized standard quantity by weight measures or number to facilitate the purchase transaction as also the price comparison.

All manufactures of weights and measures come under the purview of these standards. The Act provides that all measures and weights have to be verified by the concerned authority and can be used only after these have been stamped in the prescribed manner by the authority. The stamping is valid for a limited period and needs to be renewed periodically. The users of unstamped weights are liable for facing the criminal proceeding for penalty or imprisonment.

The penalty for the first offence is imprisonment up to six months and, or fine up to Rs. 1000/-. For the second and subsequent offence the punishment is harsher i.e. imprisonment up to 2 years and fine up to Rs. 5000/-.

Most of the products are packaged because of ease in handling, storing and carrying of the products. Today the use of packaging has become very common. The packaging is used to attract consumer through the attractive designs. It has rather become a means for advertising and promoting the products. Consumers prefer to buy in packages because of attractive presentation, ease in handling and selecting the commodity of desired quality and price. But a packaged commodity has an inherent disadvantage, as a consumer does not know anything about the contents of the package. Some packages have deceptive packing, or the packing is irrational, or defective. However, The Standards of Weights and Measures (packaged commodities) Rules, 1977 safeguards the consumers against such unfair and deceptive practices in respect of packaged commodities. As per the rule all packages commodities or products should bear on the package the following:

- ◆ Name of the product or commodity.
- ◆ Name and address of the manufacturer.
- ◆ Net quantity of the commodity or product.
- ◆ Month and the year of manufacture or package.
- ◆ Sales price of the packaged commodity or product.

With these declarations, the consumers will have all the information before buying the packaged. The violation of rules provides strict punishment to the manufacturer such as fines or imprisonment. However, the consumer before buying the product should insure the following:

- The package contains all the statutory declarations.
- The packing is intact and does not leak.
- That the packing is pilfering proof,
- It has the batch no and code no
- It mentions the ingredients and whether coarser colors, flavors and other food additives are indicated.

If the consumer feels the package does not covers all the information or the quality and quantity indicated do not match with what is printed on the package, he can complain in writing to the concerned authority about the violation of the rules.

Jute Packaging Material Act, 1987, order Oct. 20, 2000, stipulates the use of certain material for the following applications.

Sr. No.	Commodities	Percentage of total commodities or class of commodities to be packed in jute bags
1.	Food grains	Hundred Per cent
2.	Sugar	Hundred Per cent
3.	Urea	Twenty percent

Apart from the legal measures against the unscrupulous marketers, the consumers need to be alert to avoid being duped or deceived by the unscrupulous marketers, the consumers should follow the following guidelines to control malpractices in packaging.

- If you find the product suspicious in case of anomaly in weight, get it weighed at the shop itself and write a short note in the form of complaint to the manufacturer in cooperation with the shopkeeper.
- Bring it to the notice of **weights and measures department**, which is supposed to take the sample and initiate legal proceedings against the manufacturer.
- If manufacturer refuses to fall in line, one can approach the district-or state-level consumer court for redressal, under Consumer Protect Act, 1986.

Edible Oils Packaging Order Promulgated

The centre has promulgated the Edible Oils Packaging (Regulation) Order, 1998, making it mandatory for packers to register themselves with a appropriate registering authority.

All edible oils, including mustard oil will be allowed to be sold only in packed form. The packers will have their own analytical facilities or adequate arrangements for testing the samples of edible oils to the satisfaction of the government. Only oils, which conform to the standards of quality as specified in the Prevention of Food Adulteration Act, 1954 and rules made thereunder will be allowed to be packed.

Each container or pack will have to indicate all relevant particulars so that the consumers are not misled as also the identity of the packer should be made clear. Edible oils shall be packed in conformity with the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 and the Prevention of Food Adulteration Act, 1954 and rules made thereunder.

The powers for implementation of the Edible Oils Packaging [Regulation Order, 1998] has been basically delegated to the state governments. The packers will have to get themselves registered with the concerned state government agencies. The state governments will have the power to relax any requirements of the packaging order for meeting special circumstances.

Environmental Protection Act, 1989

As per the latest amendments to Environmental Protection Act, 1989, the more rules have been framed on 1st July, 2002 on plastic packaging manufacturing recycling and sales by the Ministry of Environment and Forest.

The notification dated 1st July 2002 S.O. 685(E), in exercise of the powers conferred by sections 6, 8 and 25 of the Environment (Protection) Act, 1986 (29 of 1986), the following amendment are made to the 'Recycled Plastics Manufacture and usage Rules, 1999':

- ♦ No person shall manufacture, distribute or sell carry bags made of virgin or recycled plastics of or below the size prescribed;
- ♦ No vendor shall use carry bags of or below the size prescribed made of virgin or recycled plastic for selling any commodity;
- ♦ No vendor shall use carry bags made of recycled plastics for storing, carrying, dispensing or packaging of foodstuffs;

- ♦ No vendor shall use containers made of recycled plastics for storing, carrying, dispensing or packaging of foodstuffs;
- ♦ Carry bags shall not be of or below 8 × 12 inches (20 × 30 cms) in size.”

Every occupier manufacturing carry bags or containers shall make an application in form, along with a sum of Rupees 500.00 (Rupees five hundred only) as processing fee to the State Pollution Control Board/Pollution Control Committee for the grant of Registration and renewal of Registration.

IMO and IATA Regulations for Packaging

For transport of material by air and sea the IATA and IMO have the framework of regulation for dangerous goods.

The International Maritime Organization (IMO) and International Air Transport Association have developed a comprehensive body of international conventions, codes and recommendations for implementation by its member Governments. The possession of the certificates prescribed by the Conventions normally allows ships or aircraft to enter into foreign ports or airports with a minimum degree of control by the entry state. These bodies recommend for certifications from the authorities for the packaging of the consignment for cross boarder movement.

Packages are be certified for shipment under the following International Regulatory Codes:

- ♦ International Maritime Organization (IMO); International Maritime Dangerous Goods Code.
- ♦ International Civil Aviation Organization (ICAO); Technical Instructions For The Safe Transport Of Dangerous Goods By Air.
- ♦ International Air Transport Association (IATA); Dangerous Goods Code.
- ♦ International Air Transport Association (IATA); Dangerous Goods Regulations.

The consignments are also testes for

Simulated Hazards:

- Rough Handling
- Vibration in Transportation
- Static Compression (warehousing)
- Dynamic Compression (distribution)
- High Humidity
- Temperature Extremes in Distribution

Environmental simulation:

- Vibration (random or sine, with or without temperature)
- Shock (halfsine, sawtooth, trapezoidal, and transient)
- Temperature/Humidity (steady state, cycling)
- Altitude (with or without temperature)

- Accelerated Aging
- Salt Fog
- UV Light
- Thermo Shock

Packaging Material Testing:

- Tensile/Compression
- Flexural/Tear
- Pea/Shear
- Impact/Torque
- Strain/Hardness
- Abrasion Resistance
- Flammability
- Density
- Water Absorption
- Coefficient of Friction Gloss
- Dimensional Stability / Thermal Performance

Any product that is regulated by, the International Civil Aviation Organization (ICAO/IATA) or the International Maritime Organization (IMO/IMDG) requires special packaging to ensure safe transport. These products are many and varied; as such, their packaging needs differ significantly. The regulated products are the dangerous goods defined as:

- A dangerous good is any article or substance, which is capable of posing a significant risk to health, safety or property when transported.
- This will include the obvious materials like dangerous chemicals but also items such as magnetic materials or dry ice refrigeration packages.

Hazardous Materials:

- Explosive material
- Corrosive
- Flammable liquid
- Any other extreme hazard
- A household item such as hairspray
- Paint
- Batteries
- Perfume

11.4 GUIDELINES FOR EXPORTS

For exporting the products to **Countries of European Union** the EU council has laid down certain guidelines for packaging stipulated in Council Directive 79/112/EEC of 18-12-1978.

The Article 2 of the Directive stipulates that the labeling must not:

- (a) mislead the purchaser
 - (i) as to the characteristic of the foodstuffs, particularly as to its nature, identity, properties, composition, quantity, durability, origin, method of manufacture or production.
 - (ii) by attributing properties which it does not possess.
 - (iii) by suggesting that foodstuffs possesses special properties when all are similar foodstuffs possess such properties.
- (b) attribute the property of preventing, treating or curing a human disease subject to labeling of foodstuffs for nutritional uses. The council shall draw up an exhaustive list of claims, which are prohibited or restricted in all cases. The above prohibitions or restrictions apply to shape, appearance, packaging material used, their arrangements and selling and advertising.

The Article 3 stipulates that the labeling should be compulsory and should include:

- The name of the product under which it is sold
- List of ingredients
- Net quantity subject to exhaustive provision wherever laid down
- Date of minimum durability
- Storage condition for use
- Name and address of the manufacture/packager/seller
- Place of origin where nondisclosure may mislead the consumer to its true origin. Name of factory/Packaging center may be given if national law so prescribes
- Instruction for use wherever necessary.

Article 4 specifies that Specific foods may provide for other additional requirements or exemption in respect of list of requirements and date of minimum durability for a specified period. However, this should not result in misleading the consumer. Member states may make such provisions, where community provisions do not exist.

Article 5 speaks about the description such as the name should be such that a consumer is not confused and can make sufficient distinction from such foods which can cause confusion. Brand name, trade name or fancy name is no substitute for the name of the product. The treatment if any given should also be given if its omission causes confusion in the minds of purchase, for example deep-frozen, smoked, powdered.

Article 6 is about ingredients such as

- Ingredient shall be listed as per this directives.
- Beverages containing more than 1.2% by volume of alcohol.
- Ingredients shall be in descending order of composition by weight at the time of their manufacture-except added water and volatile substances to be labeled on the basis of finished product, i.e. weight of finished product minus weights of ingredients used (to be ignored if it is less than 5%).

- Additives may be indicated by category with specific name of additives or EEC Number. If an ingredient belongs to more than one category, the category appropriate to principal functions shall be indicated.
- Flavours may be described as per National Law.

Article 8 is about net quantity, which is to be expressed in:

- By volume in case of liquids using litre, centilitre or millilitre.
- By mass in other cases using kilogram, or grams.

The Articles 9 stipulates the date of minimum durability of the foodstuff while Articles 10 speaks about instructions for use.

IPPC Convention Passes New Regulations for the Importation of Solid Wood Products as packaging material. New restrictions for solid wood packaging will require all exporters to conform to new packaging rules to over 118 Countries worldwide. These rules differ from the rules implemented in October of 2001 and will effect the exports into the European Union. These will include a wide variety of pallet and cartoons for exporting into the 118 IPPC Nations.

The IPPC (International Plant Protection Convention) passed new sweeping standards for the importation of Solid Wood Packaging on March 15th, 2002. The IPPC is a United Nations Treaty governing 118 participating nations across the world. India is part of the participating countries.

Solid Wood Packaging includes green and kiln dried hardwoods and softwoods used for pallets, crates, wood boxes and internal packaging. This does not include engineered wood products such as plywood, OSB, fiber board, corrugated, cardboard and laminated wood products.

Participating nations will be required to meet the minimum standards for exporting packaging to other participating nations. There is no timeline for implementation, and Countries are expected to roll out these standards over the next couple of years. Canada and the European Union (consisting of 17 European Countries) are the first to implement these standards by 2002.

Because of these rules, some manufacturers of goods may require to conform to these new standards for exporting to IPPC participating Countries due to concerns over possible customs holdups.

The standard needs to be adhered by the manufacturers in the IPPC participating countries. These Standards in the EU have been in effect since October of 2001. The manufacturers need to have compliances to the standards and IPPC country should provide the certification accordingly.

11.5 CASES

Case 1: Trade Name on Packaging

Vicco Laboratories vs. Ekcco Herbs (India). Supreme Court under, the Monopolies and Restrictive Trade Practices Act, 1969 given the judgment that use of trade name of 'Vicco Laboratories' on the packaging by Ekcco Herbs (India), falls within the ambit of unfair trade practices.

The facts of the case were that an application for interim relief under Section 12-A of the MRTPC Act, 1969 had been filed in addition to the main petition for injuncting the respondent from manufacturing and selling its product 'Primo Vajradanti' and also using the same colour, size shape and printing of bottles and also the trade name 'Primo Vajradanti', the trade name 'Vajradanti' being that of the appellant (Vicco Laboratories).

The argument was that the Eckko had adopted an 'Unfair method' and a 'deceptive trade practice' within the meaning of Section 36A (1) (i) and (iv) of the Act and had used similar characteristics, style and model in packaging and marketing its goods, 'Primo Vajradanti' as that of the Vicco and was causing irreparable damage to the goodwill and reputation of the appellant in addition to eroding its market share. He also submitted that the applicant-complainant had received complaints from its stockiest that due to the similarity in the packaging, colour and size of the respondent's product, retailers and consumers were being deceived. The MRTP Commission passed an injunction order in favour of Vicco Laboratories on the basis of the ruling of the apex court in the case of Lakhanpal National Ltd vs. MRTPC (1989). It was held by the MRTP Commission that the real test of an unfair or deceptive trade practice was whether the trade practice had the effect of misleading and deceiving innocent and gullible consumers. It said that the trade practice, in the present case, misled the consumer into making a wrong choice while buying the product, resulting in damage to the goodwill of the complainant company. The MRTP Commission injuncted the respondent from using the same size, shape, colour and printing on the container of its product.

Case 2: Product prompting kids to imitate harmful behaviour

Candy Cigarette. There are certain examples of the products available in the market that would prompt children to imitate potentially harmful behaviors. For example a candy cigarette, a thin cylinder of chocolate that looks like a cigarette. The children will have lot of fun to have imaginary smoke and blowing invisible smoke rings. This will probably prompt the to think the kid like sophisticated adults. Today this product hardly find any place in the market, where an anti-smoking, cancer-fearing environment that would make marketing candy cigarettes to children a socially unacceptable venture. Even though the candy cigarettes are not available in the market, there are new versions of it still exists. The various fruits drinks are available in the bottles with shape, which look like a 'peg' size wine bottles. The marketers say that bottle is a container and its shape no importance. They say that company is emphasizing on the content and the not the shape of the bottle.

However in case of some firms the bottle shape as a patent marketing ploy designed to pander to kid's desire to imitate adult behaviors. In this case, drinking wine from a bottle.

It can be said that these marketing companies ignore the fact that perception of the product is a reality, which forces the gullible consumers to respond to it positively, irrespective of long term the consequences whether good or bad. This is true particularly for the kids, who find more fun in imitating their elders. Hence the marketers should understand that products are not marketed in a social vacuum, but in an environment that may be positive and accepting, or neutral, or negative and rejecting. The companies should think that consumers are no dummies and they will take an ethical stance on the products they or their kids buy and the marketing approaches that companies take. The companies should be more ethical in designing packaging in transforming the perception of the product into reality in the minds of consumers particularly the kids.

Case 3: False Claim of Refrigerator Capacity

Whirlpool-Godrej vs. LG. The complaint was filed by Whirlpool and Godrej against LG Electronics regarding the overstating of its frost free refrigeration capacity by 11-14 percents, which is far higher than 3 percent allowed by the BIS (Bureau of Indian Standards). The 230 liters Model is having actual 202 liters refrigerator capacity. MRTP commented that in absence of any uniformity of standards on measurement of capacity-gross or net-it cannot be said that there has been misrepresentation of capacity by LG Electronics. MRTP in its interim injunction on April 02, 2003, directed LG and all other refrigerated manufacturers to henceforth specify whether net or gross capacity on the refrigerators.

(Source: CTJ April 2003)

Case 4: Underweight Packets

Nestle India Ltd a multinational company selling the coffee in the packets of 50 grams. National Consumer Dispute Redressal Commission after investigation found that average net weight of 10 packets of Nestle coffee pack were less by over 2 grams than the label claim of 50 gram. Further individual measurement of packets revealed that nine out of 10 packets were consistently under weight. The difference between the labeled and actual weight was greater than permissible 3%. Accordingly National Consumer Dispute Redressal Commission had issued the notice to Nestle under Section 36A of Consumer Protection Act, 1969, for unfair trade practices. (Source: CTJ May 2003)

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Chapter 12



e-MARKETING LEGISLATION

– To Curb Fraudulent Practices in Cyber Space

- e-Marketing Legal Issues
- Legal Frame-work in India
- Cases

The rapid development of information and communication technologies over the past decade has revolutionized business practices. Electronics has added a new dimension to marketing to inform, communicate, promote and sell their products to the customers. Transactions are accomplished through electronic means. However, this has created new legal issues. The shift from paper-based to electronic transactions has raised questions concerning the recognition, authenticity and enforceability of electronic documents and signatures. The challenge for lawmakers has been to balance the conflicting goals of safeguarding customers, business & the society and encouraging technological development.

12.1 e-MARKETING: LEGAL ISSUES

There are certain legal issues, which are related to Intellectual property rights and are critical for web or internet marketing. These issues are:

Trademarks

Copyrights

Advertising Contests in global environment

Domain Names Disputes

Reverse Hijacking of Domain Names

Authentication of Electronic Information

Trademarks

Trademark is defined as a clearly distinguishable symbol, logo, word, design or phrase, which can be identified with the source of goods or services. The domain names are not trademarks. But due to use and duplication of domain name with mal-intentions to dupe or misguide the customers, the firms have started trade marking their domain names to protect it from using it by someone else. The use of (R) is restricted to the trademarks registered with Indian Trade Mark & Patent Office.

Copyrights

All the text and art associated with website, online on the internet is copyrighted. The material labeled, as 'in public domain' is not a copyright. Hence, any online text, image and sound files cannot be used for commercial purpose without the permission of the copyright holder. The Berne Convention copyright treaty extends similar rights to 114 countries who have signed the agreement.

Advertising

All the off-line laws applicable to the advertising are applicable to on-line advertising for product or service sales on the web pages.

Domain Names Disputes

Similar to Trade Names, the Domain Name Systems (DNS) have been the subject of intense debate throughout the world over in the past few years. The main issue of contention is the relationship between domain names and trademarks. Today businesses have started to realize the significant potential of web sites as a primary means of promoting their products and business. By using trade and services marks as their domain names, businesses attract potential customers to their web sites and increase their market visibility, and ultimately their sales and profits. Domain names are now used regularly in advertising for product promotion. With the growth of the Internet, domain names have increasingly come into conflict with trademarks. The possibility of such conflict arises from the lack of connection between the system for registering trademarks, and domain names. The former system (trademarks) is administered by a public (governmental) authority on a territorial (either national or regional) basis, which gives rise to rights on the part of the trademark holder that may be exercised within the territory. However, domain names are usually administered by a non-governmental organization (Netronics) without any functional limitation. The domain names are registered on a first-come, first-served basis and offer a unique, global presence on the Internet. A global study of domain name disputes would show that they could be broadly classified under the following heads:

Infringement. In this the original registrant intentionally trades off the resemblance between the domain name and another famous trademark and the registrant tries to cash on the reputation of the trademark holder by running a business similar to that of the trademark

holder. Hence, the use of the mark (domain name) would be illegal under the existing trademark law, regardless of whether the infringement occurred as Internet domain names or in any other context. The factors, which determine infringement under the traditional trademarks law are (a) the strength of the trademark; (b) the deceptive similarity between the marks (c) the likelihood of confusion in the minds of the public etc, would also apply in cases of infringement of domain names also.

Counter Claims. In this case, there is more than one legitimate user of the domain name. There is no intention to trade off a trademarked name and no potential for confusion between the products of the conflicting claimants. The parties have a particular trademark of their own or a valid reason to use a particular domain name (for e.g. both, Maruti Computers and Maruti Dry Cleaners would be interested in registering the domain name “Maruti.com”).

Cybersquatting. This happens, when persons hoping to sell the registration to the corresponding trademark holder's register domain names bearing a resemblance to famous trademarks. In such cases, persons who have absolutely nothing to do with the name, pirate the name by obtaining a registration with the .com, for a well-known company.

In this connection, the Delhi High Court in its decision of February 19, 1999 held that “In an internet service, a particular internet site could be reached by anyone anywhere in the world who proposes to visit the said internet site. With the advancement and progress in technology, services rendered on the internet has also come to recognized and accepted and are being given protection so as to protect such provider of service from passing off the services rendered by other as that of the plaintiff. As a matter of fact in a matter where services rendered through the domain name in the internet, a very alert vigil is necessary and a strict view is to be taken for its easy access and reach by anyone from any corner of the globe.”

The court held that “due to the nature of Internet use, the defendant's appropriation of the plaintiff's mark as a domain name and home page address cannot adequately be remedied by a disclaimer. Of course, owing to so many factors against the defendant, the court did not go into detailed reasons as to why an appropriate disclaimer would not reduce likelihood of confusion. The court however did observe that owing to the vastness of the internet and its relatively recent availability to the general public, many internet users were not sophisticated enough to distinguish the fine differences in the domain names of the parties. A person who intends to visit the internet site of the plaintiff may reach the defendant's site because of the similarity in the domain names, was a factor sufficient to prohibit the person to use the domain name.”

Similarly the Bombay High Court in the decision of Rediff Communications Ltd. V Cyberbooth. In this case Justice A.P. Shah of the Bombay High Court was faced with a case where the defendant has adopted the domain name www.Radiff.com despite, the existence of the well-known website of the plaintiffs www.Rediff.com. The court found such an adoption by the defendant completely dishonest and held that once the intention to deceive is established the court would not make any further enquiry whether there is any likelihood of confusion or not. The court relied upon the decision in Parker Knoll v Knoll International wherein Lord Devlin had so eloquently held that where the object is to deceive the court will be very much more ready to infer that its object has been achieved. (AIR 2000 Bombay 27).

A trend of increased disputes over Web addresses, are gaining ground in India over the past few years as companies recognize the commercial potential of the Internet. As large companies try to stake their claims in cyberspace, they often find the somebody else is already having it in the same. There are dozens of lawsuits against cyber-squatters - wherein the people who register domain names that are based on company names and trademarks and then offer to sell them at premium prices.

Reverse Hijacking of Domain Names or Cybersquatting

Cybersquatting refers to the process of registration of domain name by one person that legally belongs to another person. Companies were ready to pay millions of dollars in exchange of their domain name and this resulted in trading of domain names.

Reverse domain name hijacking is aimed at depriving a registered domain-name holder of a domain name. In reverse hijacking of domain names the concerned domain names violate the Intellectual Property Rights of corporations and their products and services.

A classic case is that of the domain name maggi.com. Maggi, is the famous brand name of Nestle and there are a variety of Ketchups, Noodles and other products by the name of Maggi. Nestle sought the assistance of the WIPO Arbitration and Mediation Center to plea for the release of the domain maggi.com, which has been the property of another Swiss company, Pro Fiducia Treuhand Ltd, since 1996. On the face of it, it seemed Pro Fiducia Treuhand was involved in a clear case of cybersquatting.

However, it was established that Nestle failed to mention during its case that the chairman of Pro Fiducia Treuhand is named Romeo Maggi, and has been planning—for 5 years no less—to set up a website under the domain in question as a web presence for his family.

This is what provoked WIPO officials to brand the case as an attempt at “reverse hijacking” of the domain name maggi.com. Reverse hijacking of domain names has actually demonstrated as to how big corporations can actually work overtime to abuse the process of law and misuse the protections granted to Intellectual Property Rights of corporations to deprive other bonafide domain name owners of legitimate claims.

Authentication of Electronic Information

For authentication of electronic information, you have to follow and comply with the provisions of law. In Indian context authentication of electronic record can only be done by means of one specific technology namely, asymmetric crypto system and hash function.

This technology must envelop and transform the initial electronic record into another electronic record. This technology is known also as the Public Key Infrastructure technology, which basically consists of a twin key pair—the public key and the private key, which are unique to the subscriber.

One of the salient features of this technology is that any person, by using the public key of the subscriber, can verify the electronic record.

In India, the statutory authorities called Certifying Authorities only issue Digital Signature Certificates. These authorities have to be duly licensed by the Controller of Certifying Authorities. So far, licenses have been issued only to a few legal entities and companies.

They are now entitled to issue Digital Signature Certificates in India. You need to approach any one of these licensed Certifying Authorities for obtaining your Digital Signature Certificate for authenticating your electronic records.

12.2 LEGAL FRAME WORK IN INDIA

During last few years there has been a spontaneous development in e-commerce business due to advancement of IT and Communication technologies across the many countries in the world. To safeguard online commerce through internet, in the many advanced countries, where computer technology has been introduced in the activities in trade, commerce and industry, there has been development of IT laws.

Indian IT law was drafted, keeping in view the UN Model Law of 1997 on Electronic Commerce. The UN Model Law was drafted to assist the states to draw legislation for paperless methods of communication and storage of information and further intended to contribute to development of harmonious international trade and economic relations. UN Model Law is having two parts, Part I deals with e-commerce in general while; Part II deals with e-commerce in specific areas.

Information Technology Act, 2000

Based on UN Draft Law, Indian Government has enacted Information Technology Act 2000. This Cyber Law legislation was enacted to provide legal framework for electronic commerce and governance there of in the country. This act provide for the legal recognition for the transactions carried out by means of electronic data interchange and other means of electronic communication (email, internet, websites), which involves the alternatives to the paper-based methods of communications, storage and retrieval of information. Nothing in this Act shall apply to the following and which cannot be validly transacted electronically:

- 'Power-of-attorney' as defined in section 1A of the Powers-of-Attorney Act, 1882;
- 'Creation of Trust' as defined in section 3 of the Indian Trusts Act, 1882;
- 'Creation of Will' as defined in clause (h) of section 2 of the Indian Succession Act, 1925 including any other testamentary disposition by whatever name called;
- 'Contract for the sale' or conveyance of immovable property or any interest in such property.
- Any class of documents or transactions as may be notified by the Central Government in the Official Gazette.

The preamble of the Act recalls, " A revolution is occurring in the way people transact the business. Business people are increasingly using computers to transmit the information in the electronic form instead through traditional paper documents. The information stated in electronic form is having many advantages. However there is the danger of in unlawful use of information Technology."

Information Technology Act, 2000 has four schedules, which includes the amendments to the following existing Indian Acts,

Indian Penal Code, 1860

Indian Evidence Act, 1872
Reserve Bank of India Act, 1934
Banking Regulation Act, 1949
Indian Companies Act, 1956
Bankers Book Evidence Act, 1934
Indian Telegraph Act

IT Act 2000 is divided into XIII Chapters as follows;

Chapter I—Preliminary
Chapter II—Digital signature
Chapter III—Electronic governance
Chapter IV—Acknowledgement and dispatch of electronic documents
Chapter V—Secure electronic records and digital signature
Chapter VI—Regulation of certifying authority
Chapter VII—Digital signature certificates
Chapter VIII—Duties of subscriber
Chapter IX—Penalties and adjudication
Chapter X—Cyber regulation appellate tribunal
Chapter XI—Offences
Chapter XII—Network Service Providers not to be liable in certain cases.

This Act has been enacted to set up licensing, monitoring and certifying authorities for enactment of Cyber Laws. These authorities will be able to monitor and oversee the issues like jurisdiction, origin, authentication, privacy protection, Intellectual Property, computer crimes committed through cyber space. A controller appointed by the Government shall monitor and regulate cyber activities such as:

- Creation of web pages
- Internet advertising
- Bulleting cards
- E-commerce activities originating from India.

The act proposed to set up of Cyber Regulation Appellate Tribunal, which will hear appeals against decisions of adjudicating officers on the cyber crimes. The Contravention of cyber regulation shall result into imposing of penalty in the form of compensation. The act provides for appeals to High Courts against orders of Cyber Tribunal and the prescribed time frame fixed for the same is 60 days. The following are major offences on the cyber spaces as listed in the act.

⇒ **Tampering with Computer Source Documents**

Knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force.

⇒ **Hacking with Computer System**

Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hack.

⇒ **Publishing of Information, Which is Obscene in Electronic Form**

Whoever publishes or transmits or causes to be published in the electronic form, any material, which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

For the misuse of IT the severe penalty have been imposed, which includes imprisonment upto three years or fine of Rs. 2 lakhs or both.

Clearly, the Indian IT law also gives fairly strong powers to the police to seize and have access to records of cyber crimes like hacking. However, the present IT Act, does not deal with the issue of cybersquatting. The imperative need of the hour is therefore for the legislature to catch up with the technical developments and pass a separate law prohibiting cyber squatting or any other malafide registration of a domain name. Currently the domain name disputes are dealt with Trademark Act 1999, which is inadequate to deal with case of cyberspace.

12.3 CASES

Case 1: Little protection for online buyers

Attracted by a series of advertisements in a leading paper Mr. Rangarajan, logged onto their website on July 21, 2002 and placed an order for two English video titles—one DVD and the other VCD.

The total amount came to Rs.727.00. He chose to use his credit card for payment. The transaction concluded successfully (order no. 164893). The normal shipping time for an order was mentioned as 5 days.

Since Mr. Rangarajan did not get his shipment even after two weeks, he logged onto the site and submitted an online complaint seeking explanation for the delay. The only reply he received was from an automated responder saying that they would contact him within 48 hours.

When that didn't happen, he submitted another complaint after a few days, only to receive an identical auto response. So far he has done this three times, with the same effect.

As the newspaper advertisement carried a phone number, Mr. Rangarajan. contacted the marketer on the phone number only to discover that the number did not exist in Chennai. and found out that the number worked in Bangalore, and so he called the number from Chennai on August 13 and spoke to one of the executives, 'X'.

She took down the details of his order and email ID and promised to get back within 3 or 4 days. Since he did not get any reply from her, he called her again on 21/8. This time he spoke to her as well as one 'Y' both of whom promised to get back to him after checking with their Delhi office.

After wasting four STD calls Mr. Rangarajan, further warned them that if he did not get a proper response, he would initiate legal action against them. They even refused to give him their postal address, email ID or the phone number of the vendor concerned so that he could communicate with the company directly.

Mr. Rangarajan's card has been debited for Rs. 727, but product has not arrived. And there is no way he can interact with the company directly, because it is "almost" anonymous.

The problem here is that there isn't a body in India, which actually regulates such companies. Consequently, Netizens are left completely at the mercy of unscrupulous online companies and individuals. The amount of time, money and energy which litigation is likely to take, will far outstrip this amount that you may want to recover?

Case 2. Domain Name as Trade Mark

ICANN (International Corporation for Assigned Name & Numbers) protects genuine Trade Mark / Service Mark as exhibited in case of Cox & King as follows:

- ♦ "duniya dekho" and "add more to your world" was an integral part of Cox & Kings group package holidays.
- ♦ A Bangalore based resident registered domain names "duniyadekho.com" and "addmoretoyourworld.com" on May 25th 1999. Later on June 6th 1999 she wrote to Cox & Kings offering the above domain names for Rs. 3.5 lakhs.
- ♦ Cox & Kings applied for registration of a composite trademark, comprising a spiral with the words 'Duniya Dekho - Cox & kings' on June 29th 1999 in India under the Trade Marks Act.
- ♦ Cox & Kings filed a complaint with WIPO's (World Intellectual Property Organization) domain name dispute resolution centre.

WIPO's panelist appointed to settle the dispute, observed that though the above said service/trademarks are not registered by Cox & Kings under Indian Trade Marks Act, the above marks/expressions were used by Cox & Kings prior to the registration of the disputed domain names is evident from the evidence submitted. On further evidences submitted, the WIPO ordered a name transfer of duniyadekho.com to Cox & Kings (Travel Agency) since it contained a Trade Mark right-by use and further registration. But addmoretoyourworld.com remained with the original domain registrant since this was a mere advertising expression for lack of evidence otherwise.

Case 3: Transfer of Domain Name

Maruti Udyog vs Siber Squatters. Acting on a petition seeking to quash the ruling of the World Intellectual Property Organisation (WIPO) arbitration panel ordering transfer of the domain name marutionline.com to Maruti Udyog, the Delhi High Court has issued a notice to Maruti Udyog, manufacturers of the Maruti-Suzuki automobiles. The Court has also granted an interim stay to Maruti Software Pvt. Ltd., an alleged cyber squatter who appealed against the WIPO decision evicting him from the Marutisuzuki Web site.

The petitioner had argued that—

- “Maruti” is the name of the mythical Hindu deity Hanuman and no user can claim exclusive proprietary rights to the name.
- Further there was no conflict of business interest, as the business activities of both parties were not connected. Maruti Software was engaged in Web designing and software development whereas Maruti Udyog manufactured cars.

Delhi High Court stays WIPO ruling ordering transfer of domain name marutionline.com to Maruti Udyog.

Case 4: Copyright in Website

Himalaya Drugs vs. Cyber Squatter. Indian drug firm's copyright in Web site content infringed by a sub-site developer based in Italy. Contents of the himalayadrugco.com copied onto ayurveda.virtualave.net. Acting on The Himalaya Drug Company's complaint against the alleged infringement of its copyright in the contents of its Website the himalayadrugco.com by sub-site ayurveda.virtualave.net, the Delhi High Court has granted an injunction directing the US-based Internet Service Provider (ISP), Go2Net, who had registered the sub-site ayurveda.virtualave.net on its Website www.virtualave.net to block access to the impugned site.

The offending sub-site developer had infringed on the copyright of the Indian pharmaceutical company by duplicating the herbal database, word by word, including mistakes in spellings, and had placed his own name at the bottom of the screen with the directive: “If you want more information, contact sumit@democrat.com”. It was eventually discovered that the email address was false and the offending sub-site was traced to US-based ISP, Go2Net who had registered the sub-site under a free virtual domain hosting agreement.

The sub-site belonged to Corsa, Italy-based lucia_ayurveda@yahoo.com, but the address being incomplete the offender goes without punishment or penalty.

Case 5: Domain Name Infringement

Satyam Computer vs. Cyber Squatters. World Intellectual Property Organization (WIPO), has Uniform Domain Name Dispute Policy adopted by Internet Corporation for Assigned Names and Numbers (ICANN), to retrieve some of the domain names registered by alleged cyber squatters. To evict the cyber squatters, Satyam Computer Services Ltd (India), had approached the WIPO, in pursuant to the above policy. The defiant was based in the US and the arbiter in the UK, while the complaint was filed at Geneva via E-mail. The entire process took just about three months to resolve. In this process some of the domain names, which were retrieved are Satyam.net, Satyam.org, Satyaminfoaway.com, Satyamonline.net, Satyamonline.com and Satyamonline.org.

Case 6: Internet Contract Jurisdiction

Dr.B.M.Single vs. Track On Line. Track On-Line issued an advertisement in the news paper on July 05, 2002 with the caption “Welcome to Great Domain. Com. World's No 1 Domain Name Marketplace. Millions of Names available for Sale”. Attracted by the advertisement Dr Single sent a demand draft of Rs. 650/- toward the registration amount by the registered post to Track Online on July 10, 2002 at its address, Bhikaji Cama Place New Delhi. He requested for registering his domain name ‘Unique Trade.com’ The firm sent an email to

Dr Single that they have not received draft, which was sent along with the letter. And the same should be sent within twenty days period failing which the trade name will not be registered. Dr Single sent duplicate DD by registered post on August 2000. The firm acknowledged the receipt, but further communicated that domain name cannot be registered as some other person got the desired name registered. The draft was returned with letter dated August 26, 2000.

Aggrieved by decision of the firm, Dr Single lodged a complaint with District Consumer Dispute Redressal Forum of Gwalior. The District Forum of Gwalior dismissed the complaint on the ground that the complaint does not fall in its jurisdiction, as the firm does not have any office or branch at Gwalior and the business of the firm is carried on from their Delhi office and the offer was accepted at Delhi and payment was made in Delhi. Hence no concluded contract on internet executed at Gwalior. There was no jurisdictional clause in the said online contract and hence it was not concluded.

Hence, the District Forum held that in order to avoid uncertainties the parties to the online contracts are well advised to agree on a jurisdictional clause while finalizing the transaction on internet.

[Source: 2003 (IJ 394 (CP) SCDRC]

Case 8: Dispute on Domain Name

Eurail Group GIE vs. Epasses. A joint venture of 34 European Railways and shipping undertaking is selling tickets and passes to its members under trade name of 'Eurail'. It uses the trade name of, 'Eurailticket' and 'Europass' for the point-to-point journey tickets and passes respectively. The above names are registered as trade names in US and other countries. In 2002, Epasses registered a website at www.eurailpasses.net <<http://www.eurailpasses.net>> for offering Eurail passes and tickets for use on railways in Europe. WIPO held that Epasses uses the domain name, which gives the impression to the customer that it is not only selling complainants passes but it one and same organization. WIPO felt that respondent has registered the domain name in bad faith to attract the Eurail Group customers to its website and hence directed Epasses to transfer the domain name to Eurail Group.

(Source: The Economic Times, August 3, 2003)

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Chapter 13



MARKETING ABUSES

– Some Ethical Question Marks.???

- ◆ Overview of Business Ethics
- ◆ Marketing Actions with Ethical Questions
- ◆ Unethical Marketing Practices

The objective of the marketing is to influence the behaviour of the customers so as to motivate them to buy the goods and services. To accomplish this objective marketers are using various tools, which include product development, pricing, communication, distribution, logistics and packaging. For achieving the marketing objectives under competitive pressure, the marketers while using above tools sometimes faces variety of ethical challenges. The marketing executives face the challenges of balancing of their own interest with that of organization and society. These challenges can be faced with proper ethical guidance from top management or creation of ethical code by the organizations, so that in the situation marketers can distinguish ethical act from unethical act, regardless of the possible consequences.

13.1 OVERVIEW OF BUSINESS ETHICS

According to the 'Unitarian' view, the business and morality cannot be separated. In fact business is a subset of moral structure of the society. Hence, business must play by the rules of morality and ethics of the community, which guides the activities of the community. However, according to the classical economists like Adam Smith and Milton Friedman, the only objective of the business is to maximize the profit and business has no right to meddle with ethics. These two are the extreme views, which were integrated by Talcott Parsons saying that business is neither an extension of morality and ethics nor business can keep itself absolutely aloof from the ethical practices of the society wherein it exists and operates.

Frequently the impression of the most of the people is that ethics and profits are mutually opposed to one another, and that if company is ethical, it can forget about profits. People also frequently seem to believe that a profitable company must necessarily be unethical. This is like saying that a company can make profits only through unethical means. However, there are number of example of ethical companies which discharged social responsibilities, and that have survived competition and dynamic markets changes and these companies continuously flourished and contributed to the welfare of the society.

In fact considering from all the angles, it is unethical not to make profits and it is unethical for the business organization to make losses. This is because a business firm, which cannot make profits misuses the scarce national resources and as a result cannot pay to creditors, shareholders and employees. The loss making company is liability on the society and burden on country's economy and drives the employees to economic insecurity.

The human beings have freedom of choice and means of free will. He can recognize the difference between good and bad, right and wrong, just and proper. He can distinguish between the end he wants to achieve and the means he adopts to pursue the goals. This is true for the business organization also as business organizations are managed by the human beings. Hence, business has also choices of choosing the goals and choosing the means to achieve those goals. Thus business firms have choice to make profits through goods ethical means and do good for the society in which they live and operate.

In marketing activities the most ethical questions could be overt and covert in nature. The overt problems like bribery, theft, sabotage and collusions are very clear for every one to see and are considered unethical and illegal also. These are deplored and marketing people take care not to be so openly doing the same. But the covert unethical problems are most complex and cannot be so easily surfaced. The activities may be legal but these smack of immorality. The covert acts are being not so transparent and defy the ethical principles.

Ethics being abstract in concept and unstructured and hence it does not have universal acceptance because of the many reasons. Ethics depend on the moral standard of the society in which the business operates. The moral standard of the employees depend on the value system of the business organization. The value system depends on background and experience of the people in the organization. The background and experience of the people in the organization vastly differ. And the ethical practices of the people in different organization or country differ. However, generally for the decision to be ethical it should posses the following characteristics:

- ◆ Morally correct and honest
- ◆ Just and equal
- ◆ Imparts good to all concerned
- ◆ Appropriate and acceptable

The ethical decisions just do not end in themselves but have widespread ramification. Similarly the unethical action is not limited to the individual in the organization but spreads within the organization. Hence, the prevention of unethical decision is better than the cure to limits its serious implications and uncontrollable dimensions it occupies afterwards.

13.2 MARKETING ACTIONS WITH ETHICAL QUESTIONS

The deceptive and misleading advertising on the product performance are raising lot of ethical questions about the marketers. Many customers are skeptical of these advertisement making false claims. The products are advertised when they are in development stage. They are launched without proper testing. The pharmaceutical products launched without the testing and ascertaining the consequent side effects, which may create serious health problems to the patients. However, such false claims do not stand to the test of time and damage the value image of the firm and individual in the long run.

Many firms are involved in obtaining the competition information from the market through unethical means. The employees of the organization pose as the customers to the competitors or the management students are sent to conduct the survey (under the guise of academic purpose) to obtain the information. In some cases even the employees are planted in the competitor's organization to collect the information on regular basis.

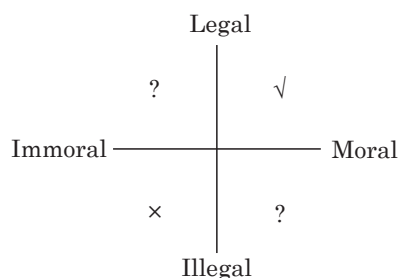
Basically the information available to the public (from public domain) is fair or ethical game in the competition.

Following are some of situation wherein the ethical value system may create lot of discomfort to adopt unethical action to meet the organization goals.

- ♦ Paying the bribes to get the contract.
- ♦ Opportunity pricing—Charging higher product prices at the time of shortages.
- ♦ Create artificial scarcity for your monopoly products to get higher price.
- ♦ Posing as a customer to get competitive information.
- ♦ Discrimination in compensation to your channel members through favours and disfavours.
- ♦ Highlighting the advantages and hiding the disadvantages or side effects of the product.
- ♦ Supplying the sub-quality product with diluted specification than what is agreed.

It is easy to be ethical when no hardships are involved and life is going well. The test comes when going is not well and when the marketers have to work under competitive pressure from outside and performance pressure from within the organization. In light of the above situations, many companies have formal codes that identify specific acts as unethical and describe the standards the employees are expected to live upto that.

Sometimes, situation demonstrate diversified types of dilemmas, which a marketing executive or the organization may face. These dilemmas can be divided into four categories as shown in the following figure:



If the act is both illegal and immoral, it should be avoided. If it is both legal and moral, it should be perceived. But the dilemma arises if it is moral and illegal or immoral and legal. Sometimes the act may be legal such as animal testing for drugs as allowed by the government, but it is immoral through the animal cruelty point of view. However, in normal times being legal is not the only test of the act, it should win the trust of the society at large.

13.3 UNETHICAL MARKETING PRACTICES

In spite of stiff legislation the variety of practices are adopted by the marketers to increase the sale of their products. These practices are some times openly done as sales promotional schemes, which are designed in such a way that they escape the legal trap. However, these schemes are designed and implemented in such a way that these benefit the sellers rather than buyers at large. These are not just and equal and do not impart goods to those (buyers) who supposed to get it.

Attractive Gifts and Lucky Draws

A business magazine announced a promotional scheme to increase its circulation. According to the scheme the subscribers (within specified time frame) were eligible for attractive gifts to all and a prestigious car models to those who were picked from the lucky draw. As a result the company could attract the large number of subscribers and could increase its circulation, but the subscribers had to live with satisfaction of the gifts and lucky draw for car in their dreams only.

Third Party Commission

Third party commission is quite common in sale deals of capital equipment. This is rather incentive to influential buyer to favour the supplier. In many cases the buyer suggests the way to supplier to pass on the benefits to him rather than to the buying organization he is representing. The methodology is that the seller issuing a cheque for the agreed commission amount in favour of wife, friend or relative of the buyer, who is a third party through which sales deal is clicked. The buyer's organization has no record of such commission. In such deal the seller maintains the record only for the audit purpose, which is never re-checked at buyer's organization unless otherwise enquiry is initiated which is done in very rare case. In some cases the pleasures foreign trip of such corrupt executives are financed by way of third party commission.

Direct Marketing

With the consumer data base developed in direct marketing companies, their name, address and personal information many times sold to many other marketing companies. The marketer sometimes knows much more about the customer and they may use the information to take unfair advantage. This is viewed as invasion of the privacy of the customer.

Due to increase in number of direct marketing organizations, there are increases in number of hard-sell direct marketing solicitations. These are contacting them at the odd time through phone-calls, auto dial calls, or sales man etc and this many times creates irritation to the customer.

Many times direct marketers take advantage of less sophisticated customer and motivate him for unfair impulsive buying. Some direct marketers design the mailer with misleading information and exaggerated product claims, which gullible customer fall prey of.

Incentive Schemes for Channel Partners

Incentives to buy large quantities of prescription drugs by the pharmacists have become quite common in India, where thousands of drug manufacturers compete for shelf space and the country's half-million pharmacists wield an unusual amount of clout.

Pharma companies offer to the pharmacists various incentive schemes for the following:

- ◆ Increase the sales
- ◆ Introduce new formulation
- ◆ Liquidate the slow moving stocks
- ◆ Sell prescription drugs of their principals, banned in western countries

These schemes include free gifts of consumer durables, offering profit margins, trips to holiday camps or abroad etc.

Due to poverty in India the poor patients do not visit doctors and mostly rely on the pharmacists. As against this the Pharmacists in developed countries have little influence over the volume of prescription-drug sales. There, they target only doctors for prescription drugs while in India, the powerful drugs are routinely, and illegally, sold over the counter.

To boost prescription-drug sales, pharmaceutical companies try to woo Indian pharmacists with gifts and other incentives. The most popular incentive, often called a "bonus scheme," offers a free foil-and-plastic strip of prescription pills for every, say, 10 strips a druggist orders.

The offers of televisions and other prizes to pharmacists is quite common in India and it would raise ethical questions in Western countries. In U.S. pharmacists are prohibited from accepting any gifts from vendors.

Offering Profit Margins

Mostly all drug manufacturing companies in India involve in discount deals with their dealers frequently. Some of them offer upto 250 percent profit margins to the pharmacists on prescription drugs. The profit incentives are offered for the purposes of introducing a new brand, liquidating a slow-moving batch of drugs, to boost up sales or get the shelf space for competing brand in the shop. These prescription drugs are sold over the counter without doctor's prescription.

Promoting Drugs with Serious Side Effects

Some of the medications, which have been banned in other countries because of potential serious side effects, are promoted through the pharmacist by offering attractive incentive schemes. Many of the more lucrative incentive plans promote a powerful array of antibiotics, anti-inflammatory, sedatives and painkillers, some of which must be injected and as side effect which can increase the risk of stroke. By giving extra profits to the pharmacist instead of reducing the retail price, the manufacturers are keeping medicine prices higher than necessary for Indian patients. In addition, nearly half of all bonus deals feature antibiotics, which are overused and misused in India.

Pharmacist Association—Exercising Power

To increase their leverage over drug companies, pharmacy owners came together to form a trade association. The association launched boycotts against drug companies to win higher profit margins. The associations also began demanding that drug companies obtain a “no-objection letter” from each state trade association before a new drug could be sold there, otherwise it would be excluded from the pharmacists’ stock lists. For each new drug, the trade groups usually solicit a cash donation. In recent press release, All India Organization of Chemists and Druggists, which represents 500,000 Indian pharmacists, boasts of how the association had forced drug companies to sign “memorandum of understanding” in which they agree to increase profit margins to pharmacies.

Unconventional Means to build Customer Relationship

Based on the recent study conducted, a leading pharmaceutical marketing consultant stated that the major factors influencing the prescription habits of the doctors in India are MR visits, product efficacy, samples, product costs, gifts and symposia. Even knowing fully well the factors which influences prescription behaviour of majority of doctors, many companies are resorting to building customer relationship through unconventional means such as:

Taking care of the grocery items and supplying the same.

Supplying the fresh vegetables.

Gifting branded products including shoes, shirts and other lifestyle goods.

How ethical are these practices is a question mark?

Pharmaceutical companies many a time indulge in unethical promotion and marketing of potentially hazardous drug in spite of the awareness of danger. Even all though stringent laws and regulations exist, there is a systematic evasion of these laws. There are many instances where a pharmaceutical company is accused of detailing the product highlighting its benefits and hiding its adverse reactions, hence with intent to maximize sales.

The pharmaceutical companies’ objectives should not be only profit but also concern for the health of people. We find various categories of drugs, which are abused by prescribers, pharmacists and patients. The manufacturer and also the regulators are not paying much attention to control such practices.

There are many abuses of tranquilizers, antibiotics, vitamins, cough syrups etc. The Diphenhydramine hydrochloride syrup is used by college students for psychedelic effects and codeine phosphate syrup as euphoriant. These drugs and formulations are sold in open market under various schemes to boost their sales. What will happen to the students and public who are addicted to these preparations?

It becomes the responsibility of the prescribers and pharmacists to safeguard the health of patient or public. This is because there is no transparency and least accountability by the prescribers or pharmacists who are found to indulge in prescribing and dispensing medicines without giving proper reason for the usage.

Drug safety is one of the high priorities having a bearing on the health of people. Many diseases get aggravated due to over-indulgence of drugs. There is a need for all concerned to address these issues and regularize the usage of the drugs based on therapeutic principles. A

patient's health is more important than a company's sales. This must be understood, practiced by government, manufacturers, prescribers and pharmacists.

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GLOSSARY

Accord

Agreement to a different performance other than what was originally specified in the contract.

Advertisement

A message regarding product or organization, which is identified with the sponsor and that can be verbal or visual.

Affidavit

A statement of fact in the written form and an affirmation by the person who makes it that the facts mentioned are true and are based on his knowledge and belief. An affidavit is to be executed before Notary (a person authorized to do the legal formalities).

Agent

A person who is authorized by principal to make or conclude contract on behalf of the principal.

Agreement

Every promise and every set of promises forming consideration for each other is an agreement.

Air Way Bill (AWB)

A document of title issued to shipper whose goods are being sent via air.

Anticipatory Breach

The repudiation by a promisor of the contract prior to the time that performance is required when such repudiation is accepted by the promisee as a breach of the contract.

Appeal

Taking the case to the higher court to find out whether the judgment by lower court was correct.

Appellant

One who appeals to the higher court.

Appellate Board

Higher hearing authority or court.

Appellate Jurisdiction

The power of the court to hear and decide a particular class of case on appeal from other court.

Arbitration

Settlement of disputed question with the help of some middleman (arbitrator) whose decision the parties agree to be bound.

Attorneys

Counselors at courts, who are officers of courts.

Bailee

A person, who accepts the possession of property.

Bailment

It is delivery of the goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed off according to the directions of the person delivering them. The person delivering the goods is 'bailor'. The person to whom they are delivering is called the bailee. The transaction is called 'bailment'.

Bailor

A person who transfers the possession of the goods.

Bill of Exchange

It is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

Bill of Lading

Document issued by the shipping carrier indicating receipt of goods and terms of the contract.

Breach

Failure to act or perform as per the terms and conditions of the contract.

Buyer

A person who buys or agrees to buy goods.

Cartel

It is an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or prices of, or trade in goods or provision of services.

Caveat Emptor

Let buyer be beware i.e. buyer must take care.

Certification Mark

A mark used to distinguish goods or services dealt with or provided in the course of trade and certified by the trade mark owner (or by another person approved by the owner) in relation to quality, accuracy or some other characteristic including origin, material or mode of manufacture.

Cheque

It is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

Carrier

It means, a person or party who is engaged in the business of transporting the goods by road, rail, inland waterways or sea;

Civil Court

Court with jurisdiction to hear and determine controversies relating to private rights and duties.

Consent Decrees

Informal settlement of enforcement actions brought by the agencies.

Consignee

Person or party to whom the goods are shipped.

Consignment

Goods meant for shipment to buyer.

Consignor

Person who delivers or ships the goods.

Circuit Layout Rights

Circuit layout rights automatically protect original layout designs for integrated circuits, and computer chips. While these rights are based on copyright law principles, they are a separate and unique form of protection.

Comparative Advertisement

A form of selective-demand advertising in which an advertiser either directly or indirectly points out the differences across the multiple brands.

Consideration

Promise for promise in return is consideration. Price for the promise for supply of goods or services in return is consideration.

Consumer

An individual or organization unit that uses or consumes the product.

Consent Decree

A settlement between the court and a party or firm, so that party agrees to stop making the deceptive claims in advertising.

Consumerism

It's consumers' protest against and attempts to remedy the perceived injustice in the relationship between business firms and consumers.

Contingent Contract

It is contract to do or not to do something, if some event, collateral to such contract, does or does not happen. For example, insurance contract, contract of indemnity and guarantee.

Contract

An agreement between the two parties, which can be enforceable by law, and is supported by consideration.

Contract of Indemnity

It is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by conduct of any other person.

Contract of Guarantee

It is a contract to perform or discharge the liability of a third person in case of default.

Copyright

Copyright protects the original expression of ideas, not the ideas themselves. It is free and automatically safeguards your original works of art, literature, music, films, broadcasts and computer programs from copying and certain other uses.

Counterfeiting

To manufacture the product with bad intention to look as the original.

Covenant

Obligations of parties in a lease contract.

Decree

It is authoritative order having the force of law. It's a judicial decision in the court cases.

Defect

Any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods.

Deficiency

Any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Delivery

A voluntary transfer of possession of goods from one person to another.

Deliverable State

When the goods are in such state that the buyer would under the contract be bound to take delivery of them.

Direct Marketing

Direct marketing is the sale of consumer products or services by mail, telephone, any form of telecommunications, message delivery service or like facilities or through, any form of mass media but shall not include general advertising.

Disparagement of Goods

Making the false statement about the quality of the goods, that it is like another.

Document of Title to Goods

Includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfinger's certificate, railway receipt, multi modal transport document, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods.

Domain Name

It is the unique name that corresponds with an Internet Protocol address. It is both easy and intuitive to remember.

Dumping

The selling of goods in another country at the price, which is lower than its fair value.

Estoppel

It is a rule of evidence. When a man has by words, spoken or written or by conduct, induced another to believe that certain state of things exist, he will not be allowed to deny the existence of that state of things.

Ethics

The rules and standards of moral behaviour that are generally accepted by the society.

Exchange

The act of voluntarily providing a person or organization product or services of value in order to acquire something else of value.

Excisable Goods

The goods specified in the schedule to the Central Excise Act, 1944 as being subject to a duty of excise. The basic conditions to be satisfied by any goods to be called excisable goods are:

- The goods must be movable.
- The goods must be marketable i.e. saleable in the market as such goods. Actual sale of goods in the market is not necessary because excise duty is chargeable on manufacture and not on sales.
- The goods must be specified in the Central Excise Act.

Forgery

Altering of an instrument with bad intention that alters the legal liability of another.

Future Goods

Goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.

Franchise

Authorization of a manufacturer to other party of right to sell a product in particular territory for a particular period using manufacturer's brand name.

Fraud

Making a false statement of the facts with the intention so that another party will rely thereon and harmed.

Goods

Every kind of moveable property other than actionable claims and money: and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Lien

It means the right to retain the possession of goods or property until the claim is paid or satisfied. There is no bailment of goods as security. It is mere right of retainer.

Implied Warranty

A warranty, which was not indicated but implied by law.

Indemnity

Security against the loss or damages suffered due to each others faults by the parties entered into the contract.

Industrial design

Design refers to the features of shape, configuration, pattern or ornamentation, which can be judged by the eye in finished products. Design registration is for manufactured products and not artistic designs.

Industrial property

Industrial property is a subset of intellectual property, referring to those types of intellectual property that have an industrial application. Specifically, it refers to patents, trade marks, designs, circuit layout rights and plant breeder's rights.

Infringement

Infringement occurs when someone willingly or unwillingly uses others intellectual property without owner's permission.

Injunction

A judicial process restraining a person from a wrongful act.

Insolvent

A person, who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.

Insurance

A plan of security to cover the risk by charging the loss against a fund created by the payments by the policy holder.

Intellectual Property

Intellectual property represents the property of creator's mind or intellect. Types of intellectual property include patents, trade marks, designs, confidential information/trade secrets, copyright, circuit layout rights, plant breeder's rights etc.

Judgment

The final order or decision by the court.

Jurisdiction

Administration of justice or extent of authority over the territory.

Law

Rules enforceable by the state administration or government to govern the conduct of individuals and the relationships among them.

Leasing

A situation wherein the goods are rented for use by the owner/seller rather than purchased by the user outright.

Mercantile Agent

An agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.

Patent

A patent is a right granted for any device, substance, method or process, which is new, inventive and useful.

Pledge

The bailment (transaction) of goods as a security for payment of debt or performance of a promise is called pledge.

Power of Attorney

A written authorization to an agent by principal.

Price

The money consideration for a sale of goods.

Proposal

When one person signifies to another person his willingness to do or to abstain from doing anything, with a view to obtaining the consent of that other to such act or abstinence, he is said to make a proposal.

Promissory Note

It is an instrument in writing (not being a bank-note or a currency-note) obtaining an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

Property

The general property in goods, and not merely a special property.

Prejudicial

Having a tendency to do harm.

Referral Sales

Referral sale means the sale or lease of a consumer product or service to a buyer referred by another buyer for a consideration, whether for a fee or some other benefit.

Repudiated

Refused to be discharged.

Restrictive trade practice

Any trade practice which:

- (i) requires a consumer to buy, hire or avail of any goods or, as the case may be, services as a condition precedent for buying, hiring or availing of other goods or services.
- (ii) has or may have the effect of preventing, distorting or restricting the competition in any manner.

Restitution

It means restoration. When the agreement is void, the party who has received any benefits must restore or compensate the other party for the value benefits received.

Revocation of Proposal

It is a withdrawal or taking back of proposal or acceptance.

Statutory Law

Legislative acts declaring, commanding or prohibiting something.

Tort

A civil wrong that interferes with one's property or person.

Trademark

A trademark can be a letter, number, word, phrase, sound, smell, shape, logo, picture, aspect of packaging or any combination of these, which is used to distinguish goods and services of one trader from those of another.

Trade Secret

A trade secret is both, a type of intellectual property and a strategy for protecting your intellectual property. It includes proprietary knowledge (know-how) and other confidential information to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

Service

This means service of any description, which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement or the previewing of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Unfair Trade Practice

It means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the practices such as false or misleading representation, bargain price, offering of gifts, prize, contest etc, non compliance of product safety standard, hoarding or destruction of goods.

Verdict

A decision of the court.

Void Agreement

Agreement, which is not enforceable by law.

Wagering Contract

It is an agreement by mutual promises and each of them conditional on happening or not happening of an unknown event. Wagering contract is void.

Waiver

Relinquishment of rights or objections.

Warehouse Receipt

A receipt issued by the warehouser for the goods, which are stored.

Warranty

A promise by the manufacturer for the goods against sub-standard quality, poor workmanship and defective parts of the goods, which will be either rectified or replaced within the specified time period.

State and District Level Consumer Protection Organizations

SOUTH

Consumer Guidance Society of India 3-5-815, Hyderguda Hyderabad-500 029, (AP)	Bezwada Consumers' Council (Consumer Home) D. No.71-1-5, Patameta Vijayawada-520 006, (AP)
Citizens' Welfare Association 23-14-13, Chinnamvari Street Visakhapatnam-530 001, (AP)	District Consumers Council 6-1-76, Opp. Sridevi Theatre, Hanamkonda, Warrangal-506 001, (AP)
Consumers' Association Shri Mavullamma Temple Street (W. Godavari Dist.) Bhimavaram-534 201, (AP)	Consumers' Association Kovvur, 8-4-15, Main Road Kovvur-534 350, (AP)
East Godavari District Consumers' Aid Advice, Saradarama Nivas 4-2-16A, Kilimvari Street, Ramkrishnarao Peta, Kakinada-533 001, (AP)	Consumer Awareness Research Center (CARC), Plot No. 153, B.N. Reddy Nagar, Vanasthali Puram, Hyderabad-500661, (AP)
Consumer Information Center (CIC), 3-5-273, Vithal Wadi, Narainguda, Hyderabad-500029 (AP)	Consumer Awareness Rural Research (CARRC), D. No. 27-4-22, T.V. Street Sreeramapuram, Bhimapuram-534 202 (A.P.)
Visakhapatnam Consumers Council (VCC), Plot No. 20, Door No. 55-43-30, Hill View Doctors Colony, Seethammadhara, Visakhapatnam-530013 (AP)	The Vizianagram Consumers' Council 18-23-26, Gundala Vari Street Vankayala Vari Lane Vizianagram-535 002, (AP)
Mandal Consumers Council, G. B. G. Road Chintalapudi West Godavari Dist.-534 460, (AP)	Warangal Consumers Council 2-5-360, Nakkalagutta Hanamkonda, Warrangal-506 001, (AP)
Citizen Forum, (CF) Hubli (R)No. 2, Ashok Nagar Road, Near Sawai Gandharva Hall, Hubli-580 02	Consumer Protection Association Kadekodi Building Chowki Mutt Road Sirsi-581 401, Karnataka
Consumers' Forum, Upendra Bagh, Nr. Kalpana Theatre Udupi-576 101, Karnataka	Jagrut Mandali J. P. N. Nagarvasigala 947, 12th Cross I Phase J. P. Nagar, Bangalore-540 056, Karnataka
Consumers' Welfare Council Door No. 7 / 471-C, South Extension Kollegal-571 440, Karnataka	Consumers' Forum Mangalore, 'SUMA', 5th Cross Road, Bejai New Road, Bejai, Mangalore-575 004, Karnataka
Consumers Education Trust of Mangalore, Microwave Station Road Mangalore-575 006, Karnataka	Consumer Education Society, 2/27, 47th Cross, 8th Block, Jayanagar Bangalore-560 082, Karnataka

Akhil Bharatiya Grahak Panchayat, 356, 1st Stage Industrial Suburb, Visweshwaranagar Mysore-570 008, Karnataka	Karnataka Consumers' Forum (Regd.), 1138 / 3, Narayana Sastry Road Mysore-570 001, Karnataka
Kerala Consumer Welfare Federation Door No. XXVI / 1211, Thevara, Cochin-682 013 Kerala	Association for Protection of Consumers 19 / 1065, Madhuvan Mugal, 99 / 85, Poojappura P.O., Trivandrum-695 012, Kerala
Kannur District Consumers' Council Near Koyili Hospital, Pallikkunnu P. O. Kannur-670 004, Kerala	Kerala Association for Formal Education & Development , Saksharatha Bhavan Trivandrum-695 014, Kerala
Consumer Guidance & Research Society of India, Vypeen Unit, Cherai-683 514, Kerala	Kerala Consumer Service Society Prathibha, 47 / 1024, Ashok Road Cochin-682 017, Kerala
Kamraj District Consumers Council 37 Railway Feeder Road, Rajapalayam-626 117 Tamil Nadu	Legal Aid Programme Office, St. Antony's Complex, 1st Floor, Nagampadom, Kottayam-686 001, Kerala
Institute for Social Sciences & Research 119, Main Road, Gandhinagar Vellore-632 006, Tamil Nadu	Tamil Nadu Consumer Protection Council 57 / 1 Old Housing Unit, Vallam Road Thanjavur-613 007, Tamil Nadu
Association for Consumer Protection Mahe Jessin Building, Main Road, Mahe-673 310 Pondicherry Kilpauk	Institute of Labour Management & Research, Post Box No. 1054,8 Millers Road, Chennai-600 010, Tamil Nadu
Citizen Consumer and Civic Action Group (CAG), 7, Fourth Street, Venkateswara Nagar, Adayar Chennai-600 020, Tamil Nadu	Cochin Mahila Consumer Vigyan Kendra 47 / 1024, Pratibha Ashoka Road Cochin-682 017, Kerala
Consumers' Forum Near S. T. V. Temple Basrur-576 211, Karnataka	Consumers' Awareness Forum 9 / 160-D East Main Road Mettur Dam-636 401, Tamil Nadu
Citizen Consumer and Civic Action Group, No. 7, 4th Street, Venkateswara Nagar, Adyar, Chennai-600020 2/228,	CONCERT (Centre for Consumer Education Research, Teaching, Training and Testing) Chinnandikuppam, Bethuvankeni, Chennai-600041
SMN Consumer Protection Council, H-1/8 TNHB Flats, Thiruvalluvar Nagar, Thiruvannmiyur, Chennai-600041	FEDCOT (Federation of Consumer Organisations in Tamil Nadu), 32-A, 1st Floor, Daniel Thomas Nagar, Vallam Road, Thanjavur-613007
Consumer Protection Council TN (CPC) 2, Rana Buildings, Thillainagar Main Road, Tiruchirapalli, Tamil Nadu-620 018	All India Consumer Council (AICC) MIG 15, Ayyenkuttipalayam, Pondicherry-605009
Consumer Education (CEC) Plot No. 2/27, 47th Cross, 8th Block, Jayanagar, Bangalore-560082 (Karnataka)	Citizen Consumer & Civic Action Group (CAG), No. 7, 4th Street, Venkateswara Nagar, Adayar, Chennai-600020 (Tamil Nadu)

Federation of Consumers Organization Thanjavur (FEDCOT), 32-A, First Floor, Daniel Thomas Nagar, Vallam Road, Thanjavur, TN-613007	Indian Institute of Consumer Studies (IICS) , 32-A, Benson Cross Road, Bangalore-560046 (Karnataka)
Consumer Protection Society (CPS) , 12, Chetty Street, Mayiladuthurai-609 002 (T.N.)	Kerala Consumer Service Society (KCSS) , 'Pratibha', Ashoka Road, Kochi-682017
South Arcot District Rural Urban Consumer Protection Organization (SADRUCPO) 2/83, Car Street Thiruvahindrapuram Cuddalore District, Tamil Nadu-607 401	Consumer Protection Council 216-B, Main Road, Mettupalayam-641 301, Tamil Nadu

NORTH

Ministry of Consumer Affairs , Krishi Bhavan, New Delhi 110001.	Voluntary Organization in Interest of Consumer Education (VOICE) , F-71, Lajpat Nagar-II, New Delhi-110024
Ashwarya Mahila Pragati Kendra E-3917 Rajajipuram, Lucknow-Uttar Pradesh	Akhil Bharatiya Grahak Panchayat F / 10, TAYO Colony, Dist. Singhbhum Gamharia-832 108, Bihar
Doon Consumers' Action & Protection Society , 151 / 15, Rajpur Road Jakhan, Dehradun-248 001, Uttar Pradesh	The U.P. Youth Consumer Welfare Society 6 / 721, Vikas Nagar Kursi Road, Lucknow, Uttar Pradesh
Indian National Consumers' Federation H. No. 124 / 644, B-Block, Govind Nagar Kanpur-208 006, Uttar Pradesh	Upbhokta Seva Samiti Mani Dweep Baheer Road, Tonk-304 001, Rajasthan
The P. H. & H.P. Consumers Education and Research Centre (Regd.) 2431 Sector 22 C, Chandigarh, Punjab	Consumer Protection and Research Society , QU-285, B-Chitrakoot, Pitampura, New Delhi-110 034
Society for Participatory Research in Asia (PRA) , Popular Documentation & Resource Centre 42, Tughlakhabad Institutional Area New Delhi-110 062	Communication, Research and Action Foundation , TARA Crescent New Mehrauli B-32, Institutional Area New Delhi-110 016
All India Consumer Movement 228, Nai Basthi Narkulaganj Bareilly-243 005, Uttar Pradesh	Mahila Upbhokta Sangathan C-1613 Talkatora Avas, Vikas Colony Lucknow-226 017, Uttar Pradesh
Consumer Federation of India C-177, Mansarovar Garden New Delhi-110 015	Bihar Consumers Federation Chathu Bhavan South Mandiri Patna-800 001, Bihar
Consumers Council of India Shiv Niketan, 183 / B, Shrikrishnapuri Patna-800 001, Bihar	Consumers Forum Chandigarh Kothi No. 99, Sector 8-A Chandigarh-160 008

Consumers' Concern & Protection Agency 93 / 17, Grain Market Ganesh Ganj Lucknow-226 018, Uttar Pradesh	Consumer Council, Hapur 1, Gyanlok, Hapur Ghaziabad-245 101, Uttar Pradesh
Consumers' Welfare Association Weights and Measures Premises Old Secretariat Mandi Mubarak, J & K	CUTS (Consumer Unity of Trust Society), D-210, Bhaskar Marg Bani Park, Jaipur-302016
Ajmer Gramin Upbhokta Sansastan Masooda, (AZGUS) (Dist. Ajmer), Rajasthan	Consumer Voice, D-203, Saket, New Delhi
Consumer Cause House (CCH) 5, Institutional Area, Nelson Mandela Road Vasant Kunj, New Delhi-70	All India Mahila Dakshita Samiti (AIMDS) 19, Fire Brigade Lane, Opp. Campa Cola Factory, Connaught Place, New Delhi-1
Consumer Unity & Trust Society (CUTS), D-217, Bhaskar Marg, Bani Park, Jaipur-302016, India	Consumer Forum Chandigarh Administrative Office, Room No. 3, IIIrd Floor, Karuna Sadan, Sector 11-B, Chandigarh
Consumer Welfare Association of Haryana, Shiv Colony, Railway Road, Palwal-121 102 (Haryana)	Consumer Forum (CF) B-24, Maharani Bagh, New Delhi-110 065
Indian Federation of Consumer Organization (Regd.) (IFCO), 231, Jor Bagh, New Delhi-110003	Consumer Protection Council Hapur, Himadeep Radhapuri Hapur-245 101, Uttar Pradesh
Panchakula Consumer Forum (PCF), 762-A, Sector 8, Panchkula-134109 (Haryana)	Indian National Consumer Federation, E-5/138, Rajaji Puram, Lucknow-226017 (.U.P.)
Sirhind Consumer Protection Forum, (SCPF) Mohalla Modian, Sirhind City-140406 (Dist. Fatehgarh Sahib), Punjab	Pragatisheel Mahila Samiti, (PSMS), Road No. 12, Kothi No. 28, East Punjabi Bagh, New Delhi-26
Citizen Awareness Group (CAG), 2812, Sector 38-C, Chandigarh	U.P. Consumer Welfare Council (UPCWC) 10/215A, Katra Wazir Khan, Jamuna Bridge, Agra-282006
Consumer Unit and Trust Society D-218, Bhaskar Marg, Bani Park Jaipur-302 016, Rajasthan	Upbhokta Sanrakshan Samiti (USS), Bikaner, 38/86, Karamchari Colony, Nokha, Bikaner, Rajasthan

WEST

Consumers Unity & Protection Centre Near Pranami Mandir, Lakhavad Opera P. S. Patel Hospital, Nadiad-387 001, Gujarat	Narivrund 1, Auda Flats (Opp. Godavari Society No. 1) Vasna, Ahmedabad-380 007, Gujarat
Yuva 8, Bhagyalaxmi Society Nava Wadaj, Ahmedabad-380 013, Gujarat	Bharuch Grahak Suraksha Mandal No. B / 342, Nathu Thobhanni Khadki, Nava Dehra, Bharuch-392 001 Gujarat

Bhavnagar Grahak Suraksha Mandal Sardar Smruti, Bhavnagar-364 00, Gujarat	Consumer Guidance Society of India 70, Defence Colony, Alto-de-Porvorim-403 521 Goa
Documentalist , 3, Suleman Chambers, 4, Battery Street (Behind Regal Cinema) Mumbai-400 039, Maharashtra	Consumer Protection Committee-Vijapur C / o Mayur Typewriting Institute Nr. Bank of Baroda, At & P.O. Vijapur Mehsana-382 870, Gujarat
CERC (Consumer Education and Research Centre) , Suraksha Sankool, Thaltej, Ahmedabad, 800054	Akhil Bharatiya Grahak Panchayat Grahak Bhavan Tilak Marg Pune-411 030, Maharashtra
Consumer Service & Education Society Dhruv Falia Mehemdabad Kaira-387 130, Gujarat	Akhil Bharatiya Grahak Panchayat Hirapur Road Vijaywadi, Dube Building Chalisingaon-424 101, Maharashtra
Akhil Bharatiya Grahak Panchayat , Balaji Ward Chandrapur-442 402, Maharashtra	Dhoraji City Consumer Protection Association , Jetpur Road, Dhoraji-360 410, Gujarat
Gandhidham Consumer Protection Council DBZ-N-168 Arya Samaj Road Gandhidham-370 201, Gujarat	Petlad Shaher Grahak Suraksha Mandal C/o, Mahagujarat Karyalaya, Station Road Opp. State Bank, Petlad-388 450
Grahak Sanstha Manch , 12, Sahawas ,(Nr. Kirti College), Kashinath Dhuru Road, Dadar, Mumbai-400 028, Maharashtra	Consumers' Protection & Education Research Centre , Bavan Payga, Opp. Jain Temple Viramgam, Ahmedabad-382 150, Gujarat
Gujarat State Consumer Protection Centre Ashoknagar (Above State Bank of India) Nadiad-387 001, Gujarat	Jagrut Grahak Deepak Chambers, 2nd Floor, Nawabwada Raopura, Vadodara-390 001, Gujarat
Akhil Gujarat Grahak Suraksha Mandal Zalak , Kodyar, Nagar Society, D-Cabin, Sabarmati Ahmedabad-380 019, Gujarat	Institute of Management Development & Research Centre , Fergusson College Campus Pune-411 004, Maharashtra
Jaya Prakash Memorial Centre II / 89, District Bastar, Kirandul, Bastar-494 556, (MP)	Jyoti Sangh Patharkuva Relief Road, Ahmedabad-380 001, Gujarat
Consumer Guidance Society of India (CGSI) , MumbaiJ-Block, Azad Maidan, Mahapalika Marg, Opp. Cama Hospital, Mumbai-400 001	Consumer Protection Council (CPC) 501/B, 5th Floor, Shaily, Opp. Loha Bhavan, B/H Gujarat High Court, Naravangpura, Ahmedabad-380009
Consumer Protection Association Clinical Research Center (CPACR) , Jaisomna, Himmatnagar-383001, (Dist. Sabarkanta), Gujarat	Consumer Guidance Society of India, (CGSI) , John Paul Building, Church Square, Panajim, Goa-403001

Mumbai Grahak Panchayat (MGP) Grahak Bhavan, Sant Dnyaneshwar Marg, Behind Cooper Hospital Ville Parle (West) Mumbai-400 056	Consumer Protection Research Center (CPERC) , Arihant Chambers, Jamadar Street, Post Box No. 137, Bhavnagar-364001 (Gujarat)
National Center for Human Settlement & Environment (NCHSE) , E-5/A, Girish Kunj, Arera Colony, Bhopal-462016 (M.P.)	Upphokta Hitchintika Samiti (UHS) , 8, Gora Kund, Indore, (MP)
Bhavanagar Grahak Suraksha Mandal (BGSM) , Sardar Smruti, Bhavnagar-364001 Gujrat	International Consumer Rights Protection Council B-9/55, Vijay Nagari, P.O. Kasarvadavali, Thane (West) 400601

EAST

World Mothers B-4, Paiaispalli Bhubaneswar, Ashok Nagar Dist. Khurda-751 009, (Orissa)	Education & Action for Social Transformation , At. Ranikiari, P.O. Gallery Dist. Ganjam-761 141, (Orissa)
Consumer & Investors' Guidance Society P-15, New C.I.T. Road, 3rd Floor, Room No. 4C, Calcutta-700 073 (WB)	Bhubaneswar Citizens Forum , 47, VIP ARE, Nayapally, Bhubaneswar-751 015 (Orissa)
Rourkela Consumers' Forum , Ganesh Niwas, Plot No. M-137, Gopabandhu Nagar, Chhend Colony, Rourkela-769 015, (Orissa)	Association for Rural Development S.P.O. Lamsang Lamdeng Imphal-795 146, (Manipur)
Consumer Action Forum 5 / 1 Red Cross Place Calcutta-700 062, (WB)	Gram Sewa Sangathan Muturuda P.O. Pasuda Mayurbhanj-757 102, (Orissa)
Gania Unnayan Committee , At P.O. Gania, Puri-752 085, (Orissa)	State Consumer Protection League (SCPL) , P.P. Jatni, Dist. Khurda-752050, (Orissa)
Consumer Protection Council , Rourkela (CPC), C/66, Sector-2, Rourkela-769 006 (Orissa)	Consumer Protection Association (CPA) , Dhaleswar, Road No. 15, Agartala-799 007, (Tripura)
Federation of Consumer Organization Orissa , (FCO), Plot No. 39, Budha Nagar, Kalpana Square, Bhubaneswar-751014 (Orissa)	Consumer Guidance Society of, (CGSJ) , Main Road, Bistupur, Jamshedpur-831001
Orissa Consumer Research (OCA) , Debajyoti Upphokta Kalyan Bhawan, Biswanath Lane, Cuttack-753002, (Orissa)	Federation of Consumer Association (West Bengal) , (FCAWB) 52-A, Shakespeare Sarani, Calcutta-700 017
Better Business Burueau (BBB) 52-A, Shakespeare Sarani, Calcutta-700 017	Research Academy for Rural (RARE) Sonepur-767 017 (Orissa)

(Source: CERC, Ahmedabad)

Consumer Disputes Redressal Agencies

Under Section 24-B of the Consumer Protection Act, 1986, the National Consumer Disputes Redressal Commission exercises administrative control over State Commissions. There are 34 State Commissions with their Presidents, Members, Registrars and their addresses are as under:

Sl. No.	National Consumer Disputes Redressal Commission	Phone & Fax Nos
1.	National Consumer Disputes Redressal Commission, 7th Floor, 'B' Wing, Janpath Bhawan, Janpath, New Delhi, 100 001	011-23712109, 23712459, 23389248 Fax 23712456

Sl. No.	State Consumer Disputes Redressal Commissions	Phone No. (Office)
1.	Andhra Pradesh State Commission, 'Eruvaka' Building, Kahairatabad, HYDERABAD-500004	(040)23391273 23318456, 23394399 23394399, 23317040 23318456, Fax: 23394399
2.	Arunachal Pradesh State Commission, Near Pawan Hans Office, (Old Secretariat Complex), Naharlagun, ITANAGAR	0361-2540124 2540124, Fax: 2540153
3.	Andaman & Nicobar Islands State Commission, Dte of Civil Supplies, Civil Supplies Complex, PORT BLAIR-744102	(03192)244585 244585, 244585 232321, Fax: 232321
4.	Assam State Commission, Guwahati High Court, GUWAHATI-781001	(0361) 2630386 2540124, 2540124 2540624, Fax: 2540624
5.	Bihar State Commission Biskoman Tower, 3rd Floor, PATNA-800 013	(0612)2260345 2260345, 2260345 2260345
6.	Chandigarh State Commission, Plot No. 5-B, Madhya Margh, Sector-19-B, Chandigarh E-mail: stcom@glide.net.in	(0172) 549198 549198, 549198 549198, Fax: 549198
7.	Chattisgarh State Commission, RAIPUR	
8.	Dadra & Nagar Haveli State Commission Department of Civil Supplies, Collectorate, DAMAN-396220	0260-230689, 02638-56498, 54698, 54207
9.	Daman & Diu State Commission Department of Civil Supplies , Collectorate, DAMAN-396220	0260-230689 02638-56498, 54698 54207

10.	Delhi State Commission, 'A' Block, First Floor, Vikas Bhawan, I.P. Estate, NEW DELHI-2	(011) 23370335 23370258, 23379146 23379146, 3370799
11.	Goa State Commission, Junta House, 4th Floor, Vivekanand Road, PANAJI-403 001, E-mail: gcdrc@goa.nic.in	(0832) 4217922 2222466, 2222466 2222466, Fax: 2227843
12.	Gujrat State Commission, 4, Vijay Park, Near Milan Park, Opp: Municipal Market, AHMEDABAD-380009	(079) 26463699 26469253, Fax: 26442875 26442875, 26442875 26463699, 26469253 Fax: 26442875
13.	Haryana State Commission, Kothi No.548, Sector 8B CHDNADIGARH-160018	(0172) 700937 542944, 777730, 777730, 780937, 542955, Fax: 542872
14.	H.P. State Commission, Block No. 33, 2nd Floor, H.P. Nagar Vikas Pradhikaran Commercial Building, Kusumpati,, SHIMLA-171 009	(0177) 2620854 2622491, 2620855 2620855, 2620026 Fax: 2622491
15.	Jharkhand State Commission, Adre House, Near Administrative Training Institute, Mayorf Road, RANCHI	(0651) 2283978 2284345, 2283978 2283978, 2283978
16.	Karnataka State Commission, Basava Bhavan, Basaveswara Circle, BANGALORE-560001	(080) 2260590 2262865, 2262865 2262865, Fax: 2260590
17.	Kerala State Commission, T.C.14/407, Extra Police Road, THIRUVANANTHA-PURAM-695 033	(0471) 2329451 2329451, 2329451 2329451, Fax: 2329451
18.	Lakshadweep State Commission, U.T. of Lakshadweep, KAVARATTI-682555	(04896) 263298 262087, Fax: 263298 262087, 262087 263298, Fax: 262087
19.	M.P. State Commission Plot No. -76, Arera Hills BHOPAL-462 001 E-mail: scdrbho@mp.nic.in	(0755) 2554270 Fax: 2554270 2760324, 2760324 2763673, 2763673
20.	Maharashtra State Commission, Old Administrative Staff College, Opp. V.T. Station, Hazarimal Somani Marg, MUMBAI-400 00	(022) 22057409 22072097, 22072097 22072097, Fax: 22018539
21.	Manipur State Commission, Deptt of Food & Civil Supplies, Sangaiprou, IMPHAL	(0385) 2220032 222003, 22220032 2220391

22.	Meghalaya State Commission, Horse Shoe Building, Lower Luchumiere, SHILLONG-793 001	(0364) 2226672 2224306, 2224074 2225381, 2222629 Fax: 2222629, Fax: 2227913
23.	Mizoram State Commission, Zodian Square, AIZWAL-796 001	(0389) 2323872 Fax: 225975, 0361-2540125 2327754, 327754 2327754, 2341453
24.	Nagaland State Commission, Guwahati High Court, Kohima Bench, KOHIMA-797 001	(0370) 2221797 2221661, 2221661 2240206, 2221797
25.	Orissa State Commission, Plot No.14-C, Type-C, Bidanasi, Sector VI, (in front of Rotary Eye Hospital), CUTTACK-14	(0671) 2365398 2603604, 2603604 2363604, Fax: 2363604
26.	Pondicherry State Commission, Plot No.3, D.P. Thotam, Behind Hotel Sarguru, Muthialpet, T.V. Nagar, PONDICHERRY-3 E-mail: sedrc@pondy.pon.nic.in	(0413) 2213862 2213864, 2213864
27.	Punjab State Commission, SCO Nos. 3009-3010, Sector-22-D, CHANDIGARH-160 022	(0172) 702962 702962, 702962 702962, Fax: 702962
28.	Rajasthan State Commission, Handloom Haveli, Ashok Marg, C-Scheme 1st Floor, JAIPUR-302 001	2(0141) 371837 2360805, 2360316 2372237, Fax: 2372237
29.	Sikkim State Commission, Balwakhani, GANGTOK-737 101	(03592) 225027 225027, 225027 225027
30.	Tamilnadu State Commission, Slum Clearance Board Building, II Floor, (Southern Wing), No.212, R.K. Mutt Road, Mylapore, CHENNAI-600 004 E-mail:sedrc@tn.nic.in	(044)2 4940687 24940687, 24940687 24940687 Fax: 24618900
31.	Tripura State Commission, Ramangar Road No. 1, AGARTALA-799 002	(0381) 2225997 2323514, 2323514 2323514, Fax: 2326308
32.	Uttar Pradesh State Commission, 2A/1, Rana Partap Marg, Moti Mahal, LUCKNOW-226 001	(0522) 2272983 2219484, 2273419 2272970, Fax: 2272970
33.	Uttaranchal State Commission, 15, Gandhi Road, DEHRADUN	(0135) 2714089 2714966, 2714089 2714089, Fax: 2714089

34.	West Bengal State Commission, Bhabani Bhavan, (Ground Floor), 31, Belvedere Road, Alipore, CALCUTTA-700 027	(033) 24790378 24794916, 24794916 24794916 Fax: 24790378
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Sl. No.	District Consumer Complaint Redressal Forums	
	Located at District Collector's Office of the respective district. DFs are consisting of members and headed by the President. Currently 533 DFs are in operations and are under administrative control of respective State Consumer Disputes Redressal Commissions listed above.	

(Source : <http://www.consumercom.nic.in>)



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