

Consumer protection act

Who is a consumer

Section 2(d) of the Consumer Protection Act says that consumer means any person who—

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

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

Consumer of goods -

The provision reveals that a person claiming himself as a consumer of goods should satisfy that—

THE GOODS ARE BOUGHT FOR CONSIDERATION - *There must be a sale transaction between a seller and a buyer; the sale must be of goods; the buying of goods must be for consideration.* The terms sale, goods, and consideration have not been defined in the Consumer

Protection Act. The meaning of the terms 'sale', and 'goods' is to be construed according to the Sale of Goods Act, and the meaning of the term 'consideration' is to be construed according to the Indian Contract Act.

ANY PERSON WHO USE THE GOODS WITH THE APPROVAL OF THE BUYER IS A CONSUMER - When a person buys goods, they may be used by his family members, relatives and friends. Any person who is making actual use of the goods may come across the defects in goods. Thus the law construe users of the goods as consumers although they may not be buyers at the same time. The words "...with the approval of the buyer" in the definition denotes that the user of the goods should be a rightful user.

Example : A purchased a scooter which was in B's possession from the date of purchase. B was using it and taking it to the seller for repairs and service from time to time. Later on B had a complaint regarding the scooter. He sued the seller. The seller pleaded that since B did not buy the scooter, he was not a consumer under the Act. The Delhi State Commission held that B, the complainant was using it with the approval of A, the buyer, and therefore he was consumer under the Act.

Note : This is an exception to the general rule of law that a stranger to a contract cannot sue

ANY PERSON WHO OBTAINS THE GOODS FOR 'RESALE' OR COMMERCIAL PURPOSES' IS NOT CONSUMER - The term 'for resale' implies that the goods are brought for the purpose of selling them, and the expression 'for commercial purpose' is intended to cover cases other than those of resale of goods. When goods are bought to resell or commercially exploit them, such buyer or user is not a consumer under the Act.

Examples :

1. A jeep was purchased to run it as a taxi. The question was whether the buyer of the jeep was a consumer under the Act. The Rajasthan State Commission held that to use the jeep as a taxi with the object

to earn profits was a commercial purpose, and therefore, the buyer/user was not a consumer within the meaning of the Act.

2. L Ltd. purchased a computer system from Z. The computer system was giving constant trouble and Z was not attending it properly. L Ltd. filed a complaint against Z with the National Commission. Z contended that L Ltd. was not a consumer under the Act because computer system was used for commercial purposes. L Ltd. argued that computer system was not directly used of commercial purposes rather it was used to facilitate the work of the company. The Commission rejected the argument on the grounds that the system made part of the assets of the company, and its expenses were met by it out of business income. Thus the said purchase was a purchase for commercial purposes and L Ltd. was held not to be a consumer under the Act.

One thing is plain and clear from the decided cases that what is important to decide is - Whether a particular good is used for commercial purposes. If it is the buyer/user is not a consumer, and if it is not - the buyer/user is a consumer.

PERSON BUYING GOODS FOR SELF EMPLOYMENT IS A CONSUMER - When goods are bought for commercial purposes and such purchase satisfy the following criteria :

- the goods are used by the buyer himself;
- exclusively for the purpose of earning his livelihood;
- by means of self-employment,

then such use would not be termed as use for commercial purposes under the Act, and the user is recognized as a consumer.

Examples :

1. A buys a truck for plying it as a public carrier by himself, A is a consumer.
2. A buys a truck and hires a driver to ply it, A is not a consumer.
3. A has one cloth shop. He starts another business of a photocopier and buys a photocopy machine therefore. He hasn't bought this

machine exclusively for the purpose of earning livelihood. He is not a consumer under the Act.

Note : That this is an exception to the rule that a buyer of commercial goods is not a consumer under the Act. The intention of the legislature is to exclude big business houses carrying on business with profit motive from the purview of the Act. At the same time it is pertinent to save the interests of small consumers who buy goods for self employment to earn their livelihood, like a rickshaw puller buying rickshaw for self employment, or a farmer purchasing fertilizer for his crops, or a taxi driver buying a car to run it as a taxi, etc.

Example : A was running a small type institute to earn his livelihood. He purchased a photocopier machine-canon NP 150. It proved defective. He sued the seller who contended that A is not a consumer under the Act as he purchased the photocopier for commercial use. The Commission held that by no stretch of imagination it can be said that the photocopier would bring large scale profits to A. It was a part of his small scale enterprise. He was construed as consumer under the Act.

However, if such a buyer takes assistance of two or more persons to help him in operating the vehicle or machine, etc., he does not cease to be a consumer.

Examples :

1. A buys a truck, ply it himself and hires a cleaner who accompany him all the time and at times drives also when A is busy otherwise, A is a consumer.
2. P, an eye surgeon, purchased a machine from R for the hospital run by him. The machine was found to be a defective one. R contended that P was not a consumer under the Act as the machine was bought for commercial purposes. The National Commission rejected this contention and held that P is a medical practitioner, a professional working by way of self employment by using his knowledge and skill to earn his livelihood. It was not proved by any evidence that P is running a huge hospital. Thus the purchase of machinery is in the nature of self employment.

Consumer of services -

A person is a consumer of services if he satisfy the following criteria :

SERVICES ARE HIRED OR AVAILED OF - The term 'hired' has not been defined under the Act. Its Dictionary meaning is - to procure the use of services at a price. Thus the term 'hire' has also been used in the sense of 'avail' or 'use'. Accordingly it may be understood that consumer means any person who avails or uses any service.

Example : A goes to a doctor to get himself treated for a fracture. Here A is hiring the services of the doctor. Thus he is a consumer.

What constitutes hiring has been an issue to be dealt with in many consumer disputes. If it is established that a particular act constitutes hiring of service, the transaction falls within the net of the Consumer Protection Act, and *vice-versa*.

Examples :

1. A passenger getting railway reservation after payment is hiring service for consideration.
2. A landlord neglected and refused to provide the agreed amenities to his tenant. He filed a complaint against the landlord under the Consumer Protection Act.
3. A presented before the Sub-Registrar a document claiming it to be a will for registration who sent it to the Collector of Stamps for action. The matter remain pending for about six years. In the meantime A filed a complaint under the Consumer Protection Act alleging harassment by the Sub-Registrar and Collector and prayed for compensation. The National Commission held the view that A was not a "consumer" under the CPA. Because there was no hiring of services by the complainant for consideration and because a Government official doing his duty as functionary of the State under law could not be said to be rendering a service to the complainant.

CONSIDERATION MUST BE PAID OR PAYABLE - Consideration is regarded necessary for hiring or availing of services. However, its payment need not necessarily be immediate. It can be in installments. For the services provided without charging anything in return, the person availing the services is not a consumer under the Act.

Examples :

1. A hires an advocate to file a suit for recovery of money from his employer. He promises to pay fee to the advocate after settlement of the suit. A is a consumer under the Act.
2. A goes to a Doctor to get himself treated for a fracture. The Doctor being his friend charged him nothing for the treatment. A is not a consumer under the Act.
3. B issued an advertisement that a person could enter the contest by booking a Premier Padmini car. S purchased the car and thus entered the contest. He was declared as winner of the draw and was thus entitled to the two tickets from New Delhi to New York and back. S filed a complaint alleging that the ticket was not delivered to him. The National Commission held that S was not a consumer in this context. He paid for the car and got it. B was not liable so far as the contract of winning a lottery was concerned.

The Direct and Indirect taxes paid to the State by a citizen is not payment for the services rendered.

Example : T was paying property tax for his house to the local corporation. This corporation was responsible for proper water supply to the premises under its work area. T raised a consumer dispute over the inadequacy of water supply by the corporation. The National Commission held that it was not a consumer dispute as water supply was made by the corporation out of its statutory duty and not by virtue of payment of taxes by T.

BENEFICIARY OF SERVICES IS ALSO A CONSUMER -
When a person hires services, he may hire it for himself or for any other person. In such cases the beneficiary (or user) of these services is also a consumer.

Example : A takes his son B to a doctor for his treatment. Here A is hirer of services of the doctor and B is beneficiary of these services. For the purpose of the Act, both A and B are consumers

Complaint

An aggrieved consumer seeks redressal under the Act through the instrumentality of complaint. It does not mean that the consumer can complain against his each and every problem. The Act has provided certain grounds on which complaint can be made. Similarly, relief against these complaints can be granted within the set pattern.

What constitutes a complaint [Section 2(1)(c)] - Complaint is a statement made in writing to the National Commission, the State Commission or the District Forum by a person competent to file it, containing the allegations in detail, and with a view to obtain relief provided under the Act.

Who can file a complaint [Sections 2(b) & 12] - At the outset it is clear that a person who can be termed as a consumer under the Act can make a complaint. To be specific on this account, following are the persons who can file a complaint under the Act :

- (a) a consumer; or
- (b) any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force, or
- (c) the Central Government or any State Government,
- (d) one or more consumers, where there are numerous consumers having the same interest.

In addition to the above following are also considered as a consumer and hence they may file a complaint :

Beneficiary of the goods/services : The definition of consumer itself includes beneficiary of goods and services

Where a young child is taken to the hospital by his parents and the child is treated by the doctor, the parents of such a minor child can file a complaint under the Act - *Spring Meadows Hospital v. Harjot Ahluwalia JT 1998(2) SC 620*.

Legal representative of the deceased consumer : The Act does not expressly indicate that the LR of a consumer are also included in its scope. But by operation of law, the legal representatives get clothed with

the rights, status and personality of the deceased. Thus the expression consumer would include legal representative of the deceased consumer and he can exercise his right for the purpose of enforcing the cause of action which has devolved on him - *Cosmopolitan Hospital v. Smt. Vasantha P. Nair* (1) 1992 CPJ NC 302.

Legal heirs of the deceased consumer : A legal heir of the deceased consumer can well maintain a complaint under the Act

Husband of the consumer : In the Indian conditions, women may be illiterate, educated women may be unaware of their legal rights, thus a husband can file and prosecute complaint under the Consumer Protection Act on behalf of his spouse

A relative of consumer : When a consumer signs the original complaint, it can be initiated by his/her relative

Insurance company : Where Insurance company pays and settles the claim of the insured and the insured person transfers his rights in the insured goods to the company, it can file a complaint for the loss caused to the insured goods by negligence of goods/service providers. For example, when loss is caused to such goods because of negligence of transport company, the insurance company can file a claim against the transport company

What a complaint must contain [Section 2(1)(c)] - A complaint must contain any of the following allegations :

(a) An unfair trade practice or a restrictive trade practice has been adopted by any trader;

Example : A sold a six months old car to B representing it to be a new one. Here B can make a complaint against A for following an unfair trade practice.

(b) The goods bought by him or agreed to be bought by him suffer from one or more defects;

Example : A bought a computer from B. It was not working properly since day one. A can make a complaint against B for supplying him a defective computer.

- (c) The services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.

Example : A hired services of an advocate to defend himself against his landlord. The advocate did not appear every time the case was scheduled. A can make a complaint against the advocate.

- (d) A trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.

Example : A bought a sack of cement from B who charged him Rs. 100 over and above the reserve price of the cement declared by the Government. Here A can make a complaint against

- (e) Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

Example : A bought a tin of disinfectant powder. It had lid which was to be opened in a specific manner. Trader did not inform. A about this. While opening the lid in ordinary way, some powder flew in the eyes of A which affected his vision. Here A can make a complaint against the trader.

Time frame within which a complaint can be filed - Section 24A of the Act provides that a consumer dispute can be filed within two years from the date on which the cause of action arises.

Since this provision was inserted in the Act in 1993, before that the Consumer Forums were following the Limitation Act, 1963, which says that a suit can be filed within three years after the cause of action arises.

The point of time when cause of action arises is an important factor in determining the time period available to file a complaint. There are no set rules to decide such time. It depends on the facts and circumstances of each case.

Examples :

1. A got his eye operated by B in 1989. He got a certificate of blindness on 18th December, 1989. He was still in hope of gaining his sight and went for second operation in 1992 and was discharged on 21-1-1992. He filed a complaint against B on 11-1-1994. B opposed on the ground that more than 2 years were over after 18-12-1989, thus the complaint is not maintainable. The Commission held that here the cause of action for filing the complaint would arise after the second operation when A lost entire hope of recovery.
2. A house was allotted on 1-1-1999. Defects appeared in the house on 10-1-1999. Here the cause of action will arise on 10-1-1999.

It may be noted that these time frames are not absolute limitations. If the Consumer Forum is satisfied that there was sufficient cause for not filing the B.

complaint within the prescribed period, it can entertain a complaint beyond limitation time. However the Forum must record the reasons for condonation of delay.

Example : A deposited some jewellery with a bank. Bank lost it. Bank kept giving her false sense of hope to retrieve the jewellery, and thus A was put in a state of inaction. Later on when A filed a suit on the Bank, it claimed that the suit was not maintainable as the limitation time after the cause of action arose has lapsed.

Relief available against complaint [Sections 14 and 22] - A

complainant can seek any one or more of the following relief under the Act:

- (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;

- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- (d) 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 the negligence of the opposite party;
- (e) to remove the defects or deficiencies in the services in question;
- (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat it;
- (g) not to offer the hazardous goods for sale;
- (h) to withdraw the hazardous goods from being offered for sale;
- (i) to provide for adequate costs to complainant.

When a complaint cannot be filed - A complaint on behalf of the public which consists of unidentifiable consumers cannot be filed under the Act.

Example : A complaint was filed on the basis of a newspaper report that passengers travelling by flight No. 1C-401 from Calcutta to Delhi on May 13, 1989 were made to stay at the airport and the flight was delayed by 90 minutes causing great inconvenience to the passengers. It was held that such a general complaint cannot be entertained. No passenger who boarded that plane came forward or authorized the complainant to make the complaint

An unregistered association cannot file a complaint under the Act.

Example : The complainant was an association formed in the Gulf and was unregistered in India. It was held that since the petitioner was not a voluntary organization registered under any law in force in India, cannot come within clause (d) of section 2(1) of the Act and hence can't file a complaint

A complaint after expiry of limitation period is not permitted. A complaint cannot be filed after the lapse of two years from the date on which the cause of action arise unless the Forum is satisfied about the genuineness of the reason for not filing complaint within the prescribed time.

Example : A supplied defective machinery to B on 12-1-1998. B filed a suit against A on 10-3-2001. It was not admitted before the Forum for the reason that the time available to make complaint lapsed.

Dismissal of frivolous and vexatious complaints - Since the Act provides for an inexpensive procedure (Court fees is not charged in consumer

complaints under the Act) for filing complaints, there is a possibility that the Act is misused by people for filing vexations claims. To discourage frivolous and vexatious claims, the Act has provided that such complaints will be dismissed and the complainant can be charged with the costs not exceeding Rs. 10,000.

Example : A filed a complaint against B to recover compensation of Rs. 55,99,000 with the motive of indulging in speculative litigation taking undue advantage of the fact that no court fee was payable under the Consumer Protection Act. The National Commission held that the complainant has totally failed to make a case against B, and dismissed the complaint as frivolous and vexatious imposing Rs. 10,000 as costs to A

Unfair Trade Practice and Restrictive Trade Practice [Section 2(1)(r) and (nn)].

We have discussed that a consumer can make a complaint when an unfair or a restrictive trade practice is followed by a trader. What can be

termed as an unfair or a restrictive trade practice is another question of law.

What is an Unfair Trade Practice - The Act says that, “unfair trade practice” means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely—

(1) The practice of making any statement, whether orally or in writing or by visible representation which—

- (i) falsely represents that the goods are of particular standard, quality, quantity, grade, composition, style or model;
- (ii) falsely represents that the services are of a particular standard, quality or grade;
- (iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
- (iv) represents that the goods or services have sponsorship, approval performance, characteristics, accessories, uses or benefits which such goods or services do not have;
- (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
- (vi) makes false or misleading statement concerning the need for, or the usefulness of, any goods or services;
- (vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;
- (viii) makes to the public a representation in a form that purports to be a warranty or guarantee of a product or of any goods or services; or a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading

if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) 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 specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf other representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Note : A statement is said to be made to public when it is—

(a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

(b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, by the person who had caused the statement to be so expressed, made or contained.

(2) Permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a *bargain price*, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Note : “Bargain price” means—

- (a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or
 - (b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.
- (3) Permits the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole; or the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;
- (4) Permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;
- (5) Permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

What is a Restrictive Trade Practice –

Section 2(1)(nn) of the Act provides that, “restrictive trade practice” means “any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as a condition precedent for buying, hiring or availing of other goods or services”.

An analysis of above definition reveals that where sale or purchase of a product or service is made conditional on the sale or purchase of one or more other products and services, it amounts to restrictive trade practice.

Technically, this type of arrangement is called 'tie-up sales' or 'tying arrangement'. The effect of such an arrangement is that a purchaser is forced to buy some goods or services which he may not require alongwith the goods or services which he wants to buy. Thus where a buyer agrees to purchase product 'X' upon a condition that he will also purchase product 'Y' from the seller, the sale of product 'Y' (tied product) is tied to the sale of product 'X' (tying product).

The buyer has to forego his free choice between competing products. This results in neutralizing healthy competition in the 'tied' market.

Example : A, a gas distributor instead his customers to buy gas stove as a condition to give gas connection. It was held that it was a restrictive trade practice -

However, where there is no such precondition and the buyer is free to take either product, no tying arrangement could be alleged even though the seller may offer both the products as a single unit at a composite price.

Example : A is a furniture dealer. He is selling Sofa at Rs. 20,000 and Bed at Rs. 15,000. He has an offer that whoever will buy Sofa and Bed both, he will charge Rs. 30,000 only. Here the choice is open to the customer to buy the products single or composite. This is not a restrictive trade practice.

Note : The term 'restrictive trade practice' has a very wide meaning when read in context of the MRTP Act, 1969. However under Consumer Protection Act, 1986, it has been used in a narrower sense.

Goods and Defect [Section 2(1)(i) and (f)]

A consumer can make complaint when he come across defective goods. Here it is required to understand what are the items which can be considered as 'goods' and what constitutes 'defect' under the Act.

Goods - The Consumer Protection Act does not define the term 'Goods' It says that - "goods" means goods as defined in the Sale of Goods Act, 1930.

Section 2(7) of the Sale of Goods Act, 1930, defines 'goods' as - "Goods means every kind of movable 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."

The definition reveals that—

- (a) Goods must be movable;
- (b) Things attached to or forming part of land which can be severed satisfy the movability criteria;
- (c) Actionable claim and Money have been specifically excluded from definition of goods.

Defect –

Section 2(1)(f) of the Act provides that, "defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard *which is required to be maintained* by or under any law of the time being in force under any contract, express or implied or as is claimed by the trader in any manner whatsoever *in relation to any goods*.

This is an exhaustive definition. It means that the Act recognises only those defects which are covered by the definition. Any type of defect not mentioned here will not be entertained by Consumer Forums. Moreover the defect has to be in relation to goods only, *i.e.*, if an item does not fall

within the definition of 'Goods', no defect can be complained therein. However, the coverage of this definition is very wide.

Examples:

1. A Pressure Cooker burst and caused injury to the user. It was held to be a manufacturing defect
2. Failure to handover registration book along with jeep purchased by complainant is a defect. [*Ramesh Chandra v. Commercial Tax Officer* [1993] 3 CPR 182 (Ori.).
3. Where laboratory test report showed that soft drink was not fit for human consumption, it was held defective - *Narayanan Vyankatkrishnan Iyengar v. Shakti Foods* [1994] 2 CPJ 652 (Mah.).
4. Rape seed oil adulterated with toxic substances, which led to paralysis of limbs and other disabilities, has been considered as defective
5. Electric household appliances which are not in accordance with the standards prescribed by ISI, being unsafe are defective
6. Gas Cylinder with excessive gas is defective goods - *Dayanand A Avasare v. Bharat Petroleum Corporation Ltd.* (1993) 1 CPR 278 (Mah.).
7. Development of cracks of half inch to three and a half inch in walls and mosaic floor in a flat after taking possession from a Housing Board - *R. Shanmugasundaram v. Tamil Nadu Housing Board* (1998) 1 CPJ 96 NC.
 8. A supplied white marble to B. Later on the colour of the marble changed. B sued alleging supply of defective marble. It was held that A should have expressly told B that the marble would not retain its colour when polished. In the absence of such assertion, it is deemed that A made B to understand that the marble would retain its white colour and when the colour changed, it comes within the scope of 'defect' in goods under the Act - *Chitranjan Sahu v. N.C. Jain II* (1993) CPJ 1127 (Ori.).
9. A sold a stolen car to B. B wanted to sue A for defect in the title of the car. Here B cannot sue A under the Consumer Protection Act as

the defect in title of goods would not constitute defective goods as defined under the Act.

Service and Deficiency [Section 2(1)(o) and (g)]

When a service is found deficient by a consumer, he can make a complaint under the Act. Thus the prime requirement is that the matter must fall within the definition of service, and it must entail a deficiency as per the norms given by the Act.

What can be termed as a service - Section 2(1)(o) of the Act provides that “service” 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, board or loading or both, housing construction, entertainment, amusement or the purveying of news or other information*, but does not include the rendering of any service free of charge or under a contract of personal service.

The definition provides a list of eleven sectors to which service may pertain in order to come under the purview of the Act. The list of these sectors is not an exhaustive one. Service may be of any description and pertain to any sector if it satisfy the following criteria:

1. service is made *available to the potential users, i.e.*, service not only to the actual users but also to those who are capable of using it.
2. it *should not be free of charge, e.g.*, the medical service rendered free of charge in Government hospital is not a service under the Act;
3. it should not be under a *contract of personal service*.

When we talk about ‘service’ under the Consumer Protection Act, we take it as a regular commercial transaction. Thus the services rendered under the contract of personal service are specifically excluded from the definition.

The expression ‘contract of personal service’ is not defined under the Act. In common parlance, it means - a contract to render service in a private capacity to an individual. For example, where a servant enters

into an agreement with a master for employment, or where a landlord agrees to supply water to his tenant, these are the contracts of personal service. The idea is that under a personal service relationship, a person can discontinue the service at any time according to his will, he need not approach Consumer Forum to complaint about deficiency in service.

There is a difference between ‘contract of personal service’ and ‘contract for personal service’. In case of ‘contract of personal service’, the service seeker can order or require what is to be done and how it should be done. Like a master can tell his servant to bring goods from a particular place.

the service seeker can tell only what is to be done. How the work will be done is at the wish of the performer. Like when a person gives a suit to the tailor for stitching, he does not tell him which method he should use to stitch it.

Note : That it is ‘contract of personal service’ is excluded from the definition of service, ‘contract for personal service’ is recognised as service under the Act.

It does not make a difference whether the service provider is a Government body or a Private body. Thus even if a statutory corporation provides a deficient service, it can be made liable under the Act.

Example : A applied for electricity connection for his flour mill to Rajasthan State Electricity Board. The Board delayed in releasing the connection. It was held deficient in performing service.

Some other sectors/professionals/services which are not specified in the definition of service but which have been considered by the Consumer Forums as service sectors from time to time are listed below:

Advocates, Airlines, Chartered Accountants, Courier, Chit Fund, Education, Gas Cylinder/LPG, Medical services, Postal services, Railways, Investment related services, and Telephone services.

Thus, the test is - whether the person against whom the complaint is made performs a service for consideration which is sought by a potential user.

What is meant by “deficiency” in service –

Section 2(1)(g) of the Act provides that, “deficiency” means 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.

Reading the above definition by breaking it into elements, we get—

(a) “deficiency” means any fault, imperfection, shortcoming or *inadequacy in the quality, nature and manner of performance*

Examples :

1. A boarded a train. The compartment in which he and his wife travelled was in a bad shape-fans not working, shutters of windows were not working, rexin of the upper berth was badly torn and there were rusty nails which caused some injuries to the wife of A. A made a complaint against the railway department. It was held that the complaint constituted ‘deficiency in service’ and the compensation of Rs. 1500 was awarded to A
2. Dr. A treated P under Allopathic system, though he himself was a Homoeopathic practitioner. Later on P alleged A for wrong treatment. The Commission held it as deficiency in service
3. A booked a car for B and promised to deliver it within one month of booking. The car was not delivered even after four months. Here A could be held liable for deficiency in service. One interesting aspect is that deficiency in service should occur during the happening of

performance. Thus it is crucial to determine when the performance of a service commenced.

Example : A contracted with B to supply, erect and commission cold rolling mill. A supplied the mill, but failed to erect and commission the mill. B filed a suit alleging deficiency of service on A's failure to erect and commission the mill. The National Commission observed that the deficiency must pertain to performance of service. Since A never started erecting and commissioning the mill, the question of performance did not arise. Thus the case is not that of deficiency of service

- (b) Such quality and manner of performance of service should have been required to be maintained by or under any law for the time being in force or undertaken to be performed by a person in pursuance of a contract or otherwise.

Example : A, the builder, promised under written agreement to provide a flat to B. Subsequently he expressed his inability to give possession of the flat and entered into a fresh agreement to pay Rs. 9,51,000 to B in place of flat. A didn't even pay this money. B sued A. The Commission held that since A had not even paid the money as per subsequent contract, the rights of earlier contract can be involved by B. And that there was a deficiency of service on the part of builders

- (c) *The deficiency must be in relation to a service* - The words '....in relation to any service' in the definition signifies that the deficiency is always in terms of service. Thus if the grievance pertains to a matter which does not fall in the definition of service, the concept of deficiency would not apply.

Example : A deposited Rs. 100 with B as application fee and executed bond for the purpose of drilling tubewell. B did not drill the tubewell because it was not feasible. A alleged deficiency in service.

It was held that depositing Rs. 100 as application fee and executing a bond does not amount to hiring of services, thus the deficiency of service cannot be complained of in the matter - *Mangilal v. Chairman District Rural Development Agency* [1991] 1 CPJ 474 (Raj.).

Deficiency in service due to circumstances beyond control

In normal course, if the service is found deficient as per the above criteria, it is held deficient and the compensation is awarded. However there may be abnormal circumstances beyond the control of the person performing service. If such circumstances prevent a person from rendering service of the desired quality, nature and the manner, such person should not be penalised for the same.

Example : A undertook to supply water to B for irrigation of crops. Due to power grid failure of the State, A could not get sufficient power to perform the service. Here A cannot be held liable for deficiency in service.

However, negligence on the part of performer may not be excused under the cover of circumstances beyond control.

Example : A agreed to supply water to B for irrigation of crops. He failed to do so because of a power breakdown due to burning of transformer. As a result crops damaged. B sued A for providing deficient service. The National Commission held that it was duty of A to get the transformer repaired immediately. Since he was negligent in doing so, he is liable for the deficiency in service

Trader and Manufacturer [Section 2(1)(q) and (j)]

When a person finds any defect in the goods, be it manufacturing defect, or excessive price, or lack of information about hazardous nature, or restrictive or unfair trade practice, he can make a complaint against

the trader. Thus it is very important to know who can be termed as a trader under the Act.

Trader –

Section 2(1)(q) of the Act says that ‘trader’ means any person who *sells or distributes* any goods for sale and includes the *manufacturer* thereof, and where such goods are sold or distributed in package form, includes the *packer* thereof.

Generally speaking ‘trader’ means any person who carries on a trade. Under the Consumer Protection Act, even a packer has been included in the definition of trader. Packer means one who packs the goods.

Examples :

1. A got an agency of ‘Indana’ products. He sells and distributes these products in North India. He is a trader under the Act.
2. A manufactures combs. He is a trader under the Act.
3. A provide bottles to pack the perfume manufactured by B. Here A is also a trader under the Act.

Note : “Trader” is a wider term which includes a manufacturer also.

Manufacturer - In terms if clause (j) of section 2(1) of the Act, “manufacturer” means a person who—

- (i) makes or *manufactures* any goods or parts thereof; or
- (ii) does not make or manufacture any goods but *assembles* parts thereof made or manufactured by others and claims the end-product to be goods manufactured by himself; or
- (iii) puts or causes to be *put his own mark* on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself.

Thus manufacturer is a person who either himself manufactures goods, or assemble any goods manufactured by others, or puts his own mark or trade mark on the goods manufactured by others.

Examples :

1. A Ltd. were into manufacturing of Pressure Cookers. B bought a Cooker which burst out while using. B sued A Ltd. for compensation. Here A Ltd. being manufacturer of the Cooker is liable for the loss.

2. A Ltd. used to buy components and assemble computers therefrom. They were selling them under the brand name 'Rotal'. B bought a Rotal computer which turned out to be defective. Here B can hold A Ltd. Liable for the loss as they will be considered manufacturer of Rotal computer under the Act.

3. N bought H-4 Cotton seeds from the market which were labelled as produced and marketed by the Hindustan Levers Ltd. N established that the seeds were defective. He sued HLL. HLL contended that it did not manufactured the seeds but had only marketed them, and that some company based in Gujarat produced the same. The Commission held that in this case HLL comes under the third limb of the definition of manufacturer under the Act. Thus it is liable for the loss suffered by N - *Namdeo Baijrao Raut v. Hindustan Lever Ltd.* [1993] 3 CPR 346 (Mah. CDRC).

It may be noted that where a manufacturer despatches any goods or part thereof to any branch office maintained by him, such branch office shall not be deemed to be the manufacturer even though the parts so despatched to it are assembled at such branch office and are sold or distributed from such branch office.

Example : A Ltd. based in Delhi was having a branch office in Chennai. It used to sent components of computers to its Chennai branch which

was assembling and selling them. B purchased a computer from Chennai branch which turned out to be defective. Here A Ltd. is responsible for the loss, and not the Chennai branch.

Who should be sued by a consumer - manufacturer or seller -

Generally when a consumer finds defect in the goods, he sues the person from whom he bought the goods. Reason being privity of contract.

If the defect is a manufacturing defect, the consumer may sue the manufacturer also along with the seller. This is an option with the consumer. Thus the manufacturer is a possible party, and not a necessary party.

Example : A was manufacturer of “X” brand cars and B was a dealer for them. C bought a car from B and found it defective. Here he may sue B alone, or A and B both.

Charging Excessive Price

A complaint may be made against a trader who has charged a price in excess of the price :

- (a) fixed by or under any law for the time being in force, or
- (b) displayed on the goods, or
- (c) displayed on any package containing the goods.

Examples :

1. Government fixed control rate of milk at Rs. 15 per litre in the month of June 2001. A sold it at the rate of Rs. 18 per litre in the same period. Price charged by A are excessive.
2. The price displayed on a one Kg. packet of salt was Rs. 4. Suddenly there was paucity of salt in the market. A started selling the same @ Rs. 6 per kg. The price charged by A is excessive.

It may be noted that when price of an article is not fixed by law, or when the same is not displayed on goods or on the package containing goods, no complaint can be made under the Act for excess pricing.

Example : Mahaboobnagar Milk Chilling Centre charged 15 paise extra per half litre of milk supplied in sachets in comparison to the other varieties of milk. The National Commission held that in the absence of any law requiring an article to be sold at or below a particular price fixed thereunder, and when there was no declaration of the price on the packet containing the goods, a case for excessive pricing may not be construed.

Hazardous Goods

The term “Hazardous goods’ has not been defined in the Act. The dictionary meaning of the term is - dangerous or risky. However, the term is used in context of ‘goods’ only, *i.e.*, a person can make a complaint if he is not informed about the hazardous nature of the goods but the same is not true in case of hazardous services.

The rationale behind this provision is to ensure physical safety of the consumers. The law seeks to ensure that those responsible for bringing goods to the market, in particular, suppliers, exporters, importers, retailers and the like should ensure that while in their care these goods are not rendered unsafe through improper handling or storage.

Consumers should be instructed in the proper use of goods and should be informed of the risks involved in intended or normally foreseeable use. Vital safety information should be conveyed to consumers.

Example : A bought an insecticide from B. B did not inform A that touching this insecticide with bare hands can create skin problem. A, while using the insecticide came in contact with it and suffered from skin problem consequently. Here B can be held liable under the Act.

Consumer Protection Councils.

Ram, an engineer by profession shifted to Delhi. He bought a computer from Shyam, a dealer who gave him all guarantees and warranties. The moment he plugged in the computer, some noise came and the computer was shut down. He called up Shyam, but got no response from him. After making many calls to him, he understood that he was cheated of his money.

Ram could have gone to courts, but knowing the lengthy and expensive procedures involved, he preferred not to initiate any action against Shyam. One day while watching television he came across a programme on consumer protection. Ram got interested in it and noted the address of consumer council which was sponsoring the programme. Thereafter he contacted the Council and talked about his computer affair. The Council made him aware that there is a speedy and inexpensive way to assert his right as a consumer, and that where and how a complaint can be filed for that, and that he need not hire an advocate for the suit, and assured him of any assistance he may need for the same.

The Consumer Councils are created to advise and assist the consumers in seeking and enforcing their rights. We have Consumer Protection Councils both at Centre level and State level, that is one Central Council and many State Councils.

These councils work towards the promotion and protection of consumers. They make investigations and give publicity to the matters concerning consumer interests, take steps towards furthering consumer education and protecting consumer from exploitation, advice the Government in the matter of policy formulation keeping consumer interest as pivotal concern, etc. Although their suggestions are

recommendatory in nature, but they have significant impact in policy making.

While deciding about the composition of these councils, the State keeps in mind that it should have proper representation from all the possible areas affecting consumer interests. Again the rules as to when should these councils meet, what should they aim at, how they conduct their business are framed by the Government with a view to balance the efficacy and practicability of its business.

Objects of the Councils [Sections 6 and 8]

There is one basic thought that ‘consumer need to be protected’. Another thought is - how he can be protected ? Definitely, there has to be some agency to work towards this protection. The Act has provided for constitution of Consumer Councils for this purpose.

Now, when we say that these councils are there to protect the consumers, a question arises - consumers are protected against what ? Thus the Act has detailed some rights of consumers which need to be protected by the councils. These are :

Right to safety - It is right to be protected against the marketing of goods and services which are hazardous to life and property.

Unsafe goods may cause death or serious injury to the user due to defective ingredients, defective design, poor workmanship, or any other reason. At times safety hazards are found due to absence of proper instructions to use the product. Thus it is to be ensured that—

Manufacturers and traders ensure that the goods are safe for the users, in case of hazardous goods, they give clear instructions as to mode of use, consumer is informed of the risk involved in improper use of goods, vital safety information is conveyed to consumers.

Manufacturers or distributors who become aware of the unforeseen hazards after the goods are supplied must inform the authorities and the public in order to forewarn consumers about such hazards.

Where a product is found such as is likely to be hazardous even when properly used, traders should either recall it and modify the same, or replace it with a new product, or adequately compensate for it.

Right to information - It is right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, with a view to protect the consumer against unfair trade practices.

Adequate information is very important in order to make a right choice. In our country, however, consumers do not get adequate comparative information about the quality, quantity, potency, purity, standard and price of different kinds of goods or services which are available. As a result buying decisions become difficult. Therefore consumers need to be given maximum information about the wide variety of competing goods available in the market.

Right to choose - The right to choose can be made meaningful by ensuring access to a variety of goods and services at competitive prices. Fair and effective competition must be encouraged so as to provide consumers with the widest range of products and services at the lowest cost.

Right to represent - It is right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums.

The Consumer Protection Act, 1986 has well taken care of this right by making available the instrumentality of Redressal Forums. Every consumer has a right to file complaint and be heard in that context.

Right to redressal - It is a right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers.

When consumers are wronged in a market place transaction, appropriate and adequate redress must be available. The Act has ensured this right by establishing Consumer Forums and recognizing restrictive and unfair trade practices as a ground to make a complaint.

Right to education - The right to consumer education is a right which ensures that consumers are informed about the practices prevalent in the market and the remedies available to them.

For spreading this education, media, or school curriculum, or cultural activities, etc. may be used as a medium.

Note that the Central Council's object is to ensure these rights of the consumers throughout the country while the State Councils look to ensure these rights to consumers within their territories.

Central Council

Composition [Section 2 and rule 3] Members of the councils are selected from various areas of consumer interest, who are, when possible, leading members of statewide organisations representing segments of the consumer public so as to establish a broadly based and representative consumer council.

The Consumer Protection Act has authorised the Central Government to make rules as to the composition of the Central Council. Accordingly, the Central Government has provided that the Central Council shall consist of the following members not exceeding 150, namely :—

1. the Minister in-charge of Consumer Affairs in the Central Government who shall be the Chairman of the Central Council;

2. the Minister of State (where he is not holding independent charge) or Deputy Minister in-charge of Consumer Affairs in the Central Government who shall be the Vice-Chairman of the Central Council;
3. The Secretary in-charge of Consumer Affairs in the Central Government who shall be the member-secretary of the Central Council;
4. The Minister in-charge of Consumer Affairs in States;
5. Eight Members of Parliament—five from the Lok Sabha and three from the Rajya Sabha;
6. The Secretary of the National Commission for Scheduled Castes and Scheduled Tribes;
7. Representatives of the Central Government Departments and autonomous organisations concerned with consumer interests—not exceeding twenty;
8. Representatives of the Consumer Organisations or consumers—not less than thirty-five;
9. Representatives of women—not less than ten;
10. Representatives of farmers, trade and industries—not exceeding twenty;
11. Persons capable of representing consumer interest not specified above—not exceeding fifteen;

Vacancy - Any member may, by writing under his hand to the Chairman of the Central Council, resign from the Council. The vacancies, so caused or otherwise, are filled from the same category by the Central Government and such person shall hold office so long as the member whose place he fills would have been entitled to hold office, if the vacancy had not occurred.

Term - The term of the Council is three years.

Meetings of the Central Council [Section 5 and rule 4] - Central Council is required to organise at least one meeting every year. In addition, it may meet as and when necessary. Time and place of the meeting is decided by the Chairman of the council.

Each meeting of the Central Council shall be called by giving, not less than ten days from the date of issue, notice in writing to every member.

Every notice of a meeting of the Central Council shall specify the place and the day and hour of the meeting and shall contain statement of business to be transacted thereat.

The meeting of the Central Council shall be presided over by the Chairman. In the absence of the Chairman, the Vice-Chairman shall preside over the meeting of the Central Council. In the absence of the Chairman and the Vice-Chairman, the Central Council shall elect a member to preside over that meeting of the Council.

The resolutions passed by the Central Council are recommendatory in nature.

No proceedings of the Central Council shall be invalid merely by reasons of existence of any vacancy in or any defect in the constitution of the Council.

State Consumer Protection Councils (State Councils) **[Section 7]**

Composition - The power to establish State Councils is with the States. The Act provides that the Minister incharge of consumer affairs in the State Government shall be the Chairman of the State Council. About the number and qualifications of the rest of the members, State is the deciding authority.

Meetings - The State Council meet at least twice a year. In addition, it may meet as and when necessary. The council may meet at such time and place as the Chairman may think fit.

Procedure in regard to the transaction of its business is prescribed by the State Government.

Working Groups [Rule 3]

For the purpose of monitoring the implementation of the recommendations of the Central Council and to suggest the working of the Council, the Central Government may constitute from amongst the members of the Council, a Standing Working Group, under the chairmanship of the Member Secretary of the Council. The Standing Working Group shall consist of not exceeding 30 members and shall meet as and when considered necessary by the Central Government.

Consumer Forums.

Ram, a resident of Panipat district, took his son Shyam to a doctor for eye treatment. Due to negligence of the doctor, Shyam lost sight of his left eye. Ram filed a suit against the doctor in District Forum claiming Rs. 4 lakh as compensation. The District Forum dismissed his complaint on the ground that negligence of the doctor could not be proved.

Ram appealed to Haryana State Commission against this order. State Commission also upheld the decision of District Forum. Now Ram approached the National Commission and made an appeal therein. Ram knew that after National Commission also, he is still left with an option to approach the Supreme Court against the order of the Commission. However, the National Commission decided in favour of Ram.

The Consumer Protection Act provides for a 3 tier approach in resolving consumer disputes. There are three levels of consumer courts —

First, there is the district court, called District Consumer Disputes Redressal Forum (*District Forum*),

Next comes the State Consumer Disputes Redressal Commission (*State Commission*),

At the national level, there is National Consumer Disputes Redressal Commission (National Commission).

District Forum and State Commission are formed by States with the permission of the Central Government while the National Commission is formed by the Central Government. These forums have not taken away the jurisdiction of the civil courts but have provided an alternative remedy.

The Consumer Protection Act, 1986 has given powers to the Central and State Governments to make rules with regard to various aspects of the consumer protection machinery. In our discussion, we have included the Consumer Protection Rules, 1987 made by the Central Government, wherever required.

Constitution of the Forums.

The composition of the District Forum and the State Commission has been detailed out by the Consumer Protection Act, 1986. As for the National Commission, the Consumer Protection Rules, 1987, elaborates upon its composition.

District Forum [Section 10]

COMPOSITION - District Forum consist of one president and two other members (one of whom is to be a woman).

The president of the Forum is a person who is, or has been qualified to be a District Judge, and other members are persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

The object underlying the inclusion of non-judicial members appears to be to impart a balance to the functioning of the District Forum by ensuring that the members are able to understand the economic and

social impact of the matters. Further inclusion of one female members ensures that the matters are viewed from a woman's angle also.

APPOINTING AUTHORITY - Every appointment of the president and members of the District Forum is made by the State Government on the recommendation of a selection committee consisting of the following,

namely—

- (i) the President of the State Commission — Chairman.
- (ii) Secretary, Law Department of the State — Member.
- (iii) Secretary incharge of the Department dealing with consumer affairs in the State — Member.

TERM OF OFFICE [SECTION 10(2)] - Every member of the District Forum is to hold office for a term of five years or up to the age of 65 years, whichever is earlier. However, he/she shall not be eligible for re-appointment.

VACANCY - A vacancy in the office of president or a member may occur after the expiry of his term, or by his death, resignation, or removal.

In terms of proviso to section 10(2), a member may resign his office in writing under his hand addressed to the State Government and on such resignation being accepted, his office shall become vacant and may be filled by the appointment of a person possessing the requisite qualifications in relation to the category of the member who has resigned.

The Consumer Protection Act does not have any specific provision for removal of the president and members of the District Forum. But the consumer protection rules made by various States provide for such removal. Accordingly, a president or member of a District Forum may be removed by

the State Government, who—

(a) has been adjudged an insolvent, or

(b) has been convicted of an offence involving moral turpitude, or

(c) has become physically or mentally incapable of performing his duties, or

(d) has acquired such financial interest in the matter as would prejudicially affect his functions as president or member, or

(e) has abused his position so as to render his continuance to office prejudicial to public interest.

TERMS AND CONDITIONS OF SERVICE [SECTION 10(3)] -

The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be such as may be prescribed by the State Government. Different States have made different rules in this regard.

State Commission [Section 16]

After the District Forum, State Commission is next in the hierarchy of Consumer Redressal Forums under the Act.

COMPOSITION - State Commission consists of a president and two members one of whom is to be a woman.

President is a person who is or has been a Judge of a High Court, and the members, are persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

APPOINTING AUTHORITY - President of a State Commission is appointed by the State Government after consultation with the Chief Justice of the High Court.

Other members of the Commission are made by the State Government on the recommendation of a selection committee consisting of the following,

namely—

- (i) President of the State Commission — Chairman.
- (ii) Secretary of the Law Department of the State — Member.
- (iii) Secretary, incharge of Department dealing with consumer affairs in the State — Member.

TERM OF OFFICE [SECTION 16(3)] - Every member of the State Commission shall hold office for five years or upto the age of 67 years whichever is earlier and he shall not be eligible for re-appointment.

VACANCY - Rules as to the vacancy related in the office of the president or any member are similar to those discussed in context of the members of the District Forum.

TERMS AND CONDITIONS OF SERVICE [SECTION 16(2)] - The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government.

National Commission [Section 20] –

The National Commission is the top most layer in the three level hierarchy of the Consumer Forums.

COMPOSITION - The National Commission consists of a president, and four other members (one of whom is to be a woman).

The president should be the one who is or has been a Judge of the Supreme Court, and the members should be the persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

APPOINTING AUTHORITY - The President is appointed by the Central Government after consultation with the Chief Justice of India;

The appointment of other members of the Commission is made by the Central Government on the recommendation of a *selection committee*.

This selection committee consists of, namely:—

- (a) a person who is a Judge of the Supreme Court, to be nominated by the Chief Justice of India—Chairman.
- (b) the Secretary in the Department of Legal Affairs in the Government of India—Member.
- (c) Secretary of the Department dealing with consumer affairs in the Government of India — Member.

Note that before appointment, the president and member(s) of the National Commission have to take an undertaking that he does not and will not have any such financial or other interest as is likely to affect prejudicially his functions as such member.

TERM OF OFFICE [SECTION 20(3)] - Every member of the National Commission is to hold office for a term of five years or upto the age of seventy years, whichever is earlier and is not eligible for re-appointment.

VACANCY - A vacancy in the office of president or a member may occur after the expiry of his term, or by his death, resignation, or removal.

In terms of proviso to rule 12(3), the president or a member may resign his office in writing under his hand addressed to the Central Government, or he can be removed from his office in accordance with the provisions of rule 13.

Removal of the president and members in certain circumstances: In terms of Rule 13 of the Consumer Protection Rules, 1987, the Central Government may remove from office, the President or any member, who —

- (a) has been adjudged as an insolvent; or
- (b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
- (c) has become physically or mentally incapable of acting as the President or the member; or
- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as the President or a member; or
- (e) has so abused his position as to render his continuance in office prejudicial to the public interest; or
- (f) remain absent in three consecutive sittings except for reasons beyond his control.

Note that the President or any member shall not be removed from his office on the grounds specified in clauses (d), (e) and (f) above except on an inquiry held by Central Government in accordance with such procedure as it may specify in this behalf and finds the President or a member to be guilty of such ground.

Note : 1. A casual vacancy caused by resignation or removal of the President or any other member of the National Commission is filled by fresh appointment.

2. When the President of the National Commission is unable to discharge the functions owing to absence, illness or any other cause, the senior most member of the National Commission with judicial background, if authorised so to do by the President in writing, shall discharge the functions of the President until the day on which the President resumes the charge of his functions.

TERMS AND CONDITIONS OF SERVICE [SECTION 20(2)] - In terms of the rules 11 and 12 made by the Central Government in pursuance of the powers given under the Act, the terms and conditions of service of the president and the members of the Commission are as follows:

- (a) The President of the National Commission is entitled to salary, allowances and other perquisites as are available to a sitting Judge of the Supreme Court.
- (b) The members, if sitting on whole-time basis, are entitled to a consolidated honorarium of ten thousand rupees per month or if sitting on part-time basis, a consolidated honorarium of five hundred rupees per day of sitting.
- (c) The President and the members are entitled to travelling and daily allowances on official tours at the same rates as are admissible to group 'A' Officers of the Central Government.
- (d) The President and the members of the National Commission are entitled to conveyance allowance of one hundred fifty rupees per day of its sitting or a sum of one thousand and five hundred rupees per month, as may be opted by them.

Notes : 1. The terms and conditions of service of the President and the members should not be varied to their disadvantage during their tenure of office.

2. The money payable to these members and the president shall be defrayed out of the Consolidated Fund of India.

Further it is w District Forum, or State Commission or National Commission, or any vacancy remains therein while proceedings are made for any dispute, such defect or vacancy shall not affect the validity of the order of the Forum. [Section 29A].

Jurisdiction.

The term jurisdiction may be defined as authority or legal power to hear and decide the cases. Thus a court may adjudicate only those matters which fall under its jurisdiction. The question of jurisdiction has to be considered with reference to the value, place, and nature of the subject matter.

Example : A and B reside in Bombay. They have some dispute. Here the dispute may be subjected to the jurisdiction of the Bombay courts (except matters pertaining to Supreme Court). Courts of Delhi, or Chennai, or any other place for that matter cannot adjudicate the issue.orth noting that in case any defect lies in the constitution of theThe general rule is that if the court rendering the judgment suffers from want of jurisdiction, its judgment is nullity and may be ignored.

Jurisdiction of Consumer Forums (*i.e.*, consumer courts) differ in terms of monetary value of claims, geographical area, and appellate powers.

District Forum

PECUNIARY JURISDICTION - District Forum entertains the cases where the value of claim is upto Rs. 20 Lakh. Where a claim exceed this limit, the matter is beyond the jurisdiction of the Forum.

This limit of Rs. 20 lakh is as to the value of claim filed by the party. Value of goods or services in question or value of relief granted is not relevant for this purpose.

sExample : A purchased machinery for Rs. 7 lakhs. After working for some time, the machine broke down due to some manufacturing defect. A filed a claim for compensation worth Rs. 4.5 lakh. Since the value of claim is less than Rs. 5 Lakh, it will fall under the jurisdiction of District Forum.

The complainant has a right to reduce value of his claim in order to bring his claim within the jurisdiction of a junior forum.

Example : A filed a complaint with a District Forum claiming Rs. 6,00,000 as against a supplier of machinery. The complaint was rejected on the ground that it was beyond the jurisdiction of the District Forum. A revised his claim to Rs. 4,99,999 and filed the plaint again with the same District Forum. The plaint was accepted and tried.

TERRITORIAL JURISDICTION - Every District Forum has definite geographical limits within which it can exercise its jurisdiction. A case is supposed to fall within such territory when at the time of the institution of the complaint—

- (a) The party against whom the claim is made actually and voluntarily resides or carries on business or has a branch office or personally works for gain in that area, or
- (b) Where there are more than one opposite party, each such party actually and voluntarily resides or carries on business or has a branch office or personally works for gain in that area, or
- (c) Where there are more than one opposite party, and any such party actually and voluntarily resides or carries on business or has a branch office or personally works for gain in that area, provided the other parties not so residing or working agrees, or the District Forum gives permission in this regard,
- (d) The cause of action, wholly or in part, arises in that area.

APPELLATE JURISDICTION - District Forum is the lowest rung of the ladder of the consumer courts. Thus this is not an appellate court, *i.e.*, no appeal lies in this court.

State Commission

PECUNIARY JURISDICTION - State Commission entertains the cases where the value of claim exceeds Rs. 20 lakh. But where value of a claim exceed Rs. 1 crore, the matter is beyond the jurisdiction of the Commission. *Example* : A of Delhi bought a house from housing board for Rs. 4 lakh. Due to defect in the house, its wall fell down on the daughter of A and she dies. A sue the Housing Board claiming Rs. 15 lakh as compensation. This matter will lie with the State Commission of Delhi.

Note : That although the value of house is less than 20 lakh, the decisive factor regarding jurisdiction is the value of claim.

TERRITORIAL JURISDICTION - The Consumer Protection Act does not specifically provides for the territorial jurisdiction of the State Commission. Thus it is governed by the general principle of the law which are contained in section 20 of the Civil Procedure Code.

Broadly these principles are on the similar lines on which the territorial jurisdiction of District Forum is based. Thus a suit can be instituted in the State Commission *within whose local limits*—

- (a) the party against whom the claim is made actually and voluntarily resides or carries on business or personally works for gain, or
- (b) where there are more than one opposite party, each such party actually and voluntarily resides or carries on business or personally works for gain, or
- (c) where there are more than one opposite party, and any such party actually and voluntarily resides or carries on business or has a branch office or personally works for gain, provided the other parties not so

residing or working agrees, or the State Commission gives permission in this regard, or

(d) the cause of action, wholly or in part, arises.

APPELLATE JURISDICTION [SECTION 17(a)(ii)] - State Commission has power to adjudicate upon the appeals made against the order of the District Forums. Any person aggrieved by an order made by the District Forum may prefer an appeal against such order within 30 days from the date of order. However, the State Commission may entertain an appeal after the expiry of 30 days if it is satisfied that there was sufficient cause for delay.

Note : 30 days are counted not from the date of order but from the date when the order is communicated to the appellant.

REVISIONAL JURISDICTION [SECTION 17(b)] - State Commission may call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where State Commission is of the view that the District Forum—

- has exercised jurisdiction which it was not entitled to, or
- has failed to exercise such jurisdiction which it was entitled to, or
- has exercised its jurisdiction illegally or with material irregularity.

Such revisional jurisdiction may be exercised by the Commission on its own or on the application of a party.

National Commission

PECUNIARY JURISDICTION - Since National Commission is the highest level of Consumer Forums, it may entertain all the matters where the value of claim exceeds Rs. 1 Crore. **TERRITORIAL JURISDICTION** - The territorial jurisdiction of the National Commission is whole of India except the State of Jammu & Kashmir.

However, the Consumer Protection Act is applicable only if the cause of action arise in India. If the cause of action arises out of India, National Commission has no jurisdiction over the matter as it cannot be tried in India under the Act.

Example: The complainant alleged that they were not properly treated by the Egyptian Airlines authorities at Barcelona. It was held that the cause of action arose at Barcelona, so the complaint under the Act is not maintainable in India -

APPELLATE JURISDICTION - The National Commission has jurisdiction to entertain appeals against the order of any State Commission. The appeal may be made within 30 days from the date of the order of the State Commission. However the National Commission may entertain an appeal filed after the expiry of 30 days if it is satisfied that there was sufficient cause for not filing the appeal within the given time.

REVISIONAL JURISDICTION [SECTION 21(b)] - National Commission can call for the records and pass the appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission it is of the view that the State Commission—

- has exercised jurisdiction which it was not entitled to, or
- has failed to exercise such jurisdiction which it was entitled to, or
- has exercised its jurisdiction illegally or with material irregularity.

Note that the revisional jurisdiction is available to the National Commission only in the cases where there has been wrongful, illegal, and improper exercise of jurisdiction or failure to exercise jurisdiction on the part of State Commission.

Example: K made an appeal to the National Commission against the order of the State Commission whereby the State Commission had made an order against him although he was not a made a party to the dispute

by the complainant. The National Commission observed that the order of the State Commission was vitiated by illegal exercise of jurisdiction resulting immaterial irregularity and accordingly, the same was liable to be set aside

Procedures

We understand that the Consumer Forums are the bodies who function like courts in order to settle the consumer disputes. Their composition is so made as to best represent the interests of the consumers, and they have specified jurisdictions. The next question is - what procedure these Forums adopt in order to deal with the consumer disputes.

Section 13 of the Act has detailed the procedure in context of District Forum only. For State Commission, section 18 says that it will follow the same procedure as followed by District Forum with such modifications as necessary, and for the National Commission, section 22 gives power to the Central Government to make rules in this regard. These rules in turn have included There in the procedure given by section 13. In addition, these rules have prescribed some procedures to be followed by the parties to the complaint.

A complaint may be made with respect to the goods or services. When complaint relates to goods, the criteria for the decision is - whether the goods are defective or not. Now the question is - how to hold that the goods are defective. The most logical way is to get the goods tested to determine the defect. However, in certain cases defect can be determined without technical support or it may happen that the test is not feasible. These are—

- The opposite party admits the defect.
- The defect is obvious and is visible to naked eyes, like in a complaint about contamination of water, the sample of water given

was so dirty that the Forum did not consider it necessary to send it for test.

- When the complainant is not in possession of the subject matter of the complaint, *e.g.*, in a matter the complainant had given to the dealer the tyre and tube which had burst, the dealer sent the same to the manufacturer. Thus the complainant was not in possession of the same.
- When subject matter of the complaint gets destroyed, like in case a pressure cooker burst, its remains can't be send to the laboratory for testing.
- In case of complaint regarding deficiency in service there is no question of testing or analysis.

Thus the procedure to be followed by the Forums can be discussed under the two heads—

1. where laboratory test is required to determine the defect in goods.
2. where no laboratory test is required to determine the defect in goods or the complaint relates to services.

Procedure to be followed by the District Forum [Section 13] - The following procedure is equally applicable to the District Forum, State Commission with required modifications, and National Commission with additional procedures required by the rules.

WHERE LABORATORY TEST IS REQUIRED TO DETERMINE THE DEFECT IN GOODS - A consumer is supposed to file as many copies of the complaint as there are number of judges, with all essential information, supporting papers like correspondence, and specifying the compensation demanded.

On receipt of such complaint—

- (a) The District Forum should refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of thirty days which can be extended to forty five days.

Where the opposite party on receipt of a complaint referred to him denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum would take the following steps to settle the dispute : (b) The District Forum may require the complainant to deposit specified fees for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question.

- (c) The District Forum will obtain a sample of the goods, seal it, authenticate it and refer the sample so sealed to the **appropriate laboratory* for an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect.

The District Forum will remit the fees to the appropriate laboratory to enable it to carry out required analysis or test.

The laboratories supposed to report its findings to the District Forum within a period of fifty-five days. This period is extendible by the District Forum.

- (d) Upon receiving laboratory's report, its copy will be forwarded by the District Forum to the opposite party alongwith its own remarks.
- (e) In the event of any party disputing the correctness of the findings, or the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the objecting party to submit his objections in writing.
- (f) The District Forum will give an opportunity of hearing to the objecting party.

(g) The District Forum shall issue appropriate order after hearing the parties.

WHERE NO LABORATORY TEST IS REQUIRED TO DETERMINE THE DEFECT IN GOODS OR THE COMPLAINT RELATES TO SERVICES

(a) On receiving the complaint, the District Forum should refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of thirty days which can be extended to forty five days.

(b) The opposite party on receipt of a complaint referred to him may—(i) admit the complaint

(ii) deny or dispute the allegations contained in the complaint, or

(iii) omits or fails to respond within the time given by the District Forum.

(c) Where the opposite party admits the allegation, the District Forum should decide the matter on the basis of the merits of the case and the documents before it.

Where the opposite party denies or disputes the allegations made in the complaint, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by both the parties.

Where the opposite party omits or fails to respond within the time given by the Forum, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by the complainant.

(d) The District Forum shall issue an appropriate order after hearing the parties

(i) admit the complaint

(ii) deny or dispute the allegations contained in the complaint, or

(iii) omits or fails to respond within the time given by the District Forum.

(c) Where the opposite party admits the allegation, the District Forum should decide the matter on the basis of the merits of the case and the documents before it.

Where the opposite party denies or disputes the allegations made in the complaint, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by both the parties.

Where the opposite party omits or fails to respond within the time given by the Forum, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by the complainant.

(d) The District Forum shall issue an appropriate order after hearing the parties and taking into account available evidence. **Note** : Although this procedure may be followed by all - the District Forum, State Commission, and National Commission, we have used the name of 'District Forum' while describing the procedure.

***What is an appropriate laboratory under the Act**

Section 2(1)(a) of the Act defines an “appropriate laboratory” as a laboratory or organization—

- (i) recognized by the Central Government;
- (ii) recognized by a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf; or
- (iii) any such laboratory or organization established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect.

Note : Rule 2A of the Consumer Protection Rules, 1987 provides the procedure to be followed by the laboratories in order to get recognition from the States. We have not discussed this procedure here since it is beyond purview of our study.

Procedure to be followed by the National Commission [Section 22] - Section 22 of the Act provides that the National Commission shall follow such procedure as prescribed by the Central Government. The Consumer Protection Rules, 1987 framed by the Central Government lay down the procedure which is as follows :

(1) A complaint containing the following particulars shall be presented by the complainant in person or by his agent to the National Commission or be sent by registered post, addressed to the National Commission :

- (a) the name, description and the address of the complainant;
- (b) the name, description and address of the opposite party or parties, as the case may be, so far as they can be ascertained;
- (c) the facts relating to the complaint and when and where it arose;
- (d) documents in support of the allegations contained in the complaint;
- (e) the relief which the complainant claims.

(2) The National Commission shall, in disposal of any complaint before it, as far as possible, follow the procedures laid down section 13 of the Act.

(3) On the date of hearing, it shall be obligatory on the parties or their agents to appear before the National Commission. Where the complainant or his agent fails to appear, the National Commission may either dismiss the complaint for default or decide it on merits. Where the opposite party or its agent fails to appear on the date of hearing the National Commission may decide the complaint *ex parte*.

(4) The complaint shall be decided as far as possible within a period of three months from the date of notice received by opposite party where complaint

does not require analysis or testing of commodities and within five months if it requires analysis or testing of commodities.

(5) After the proceedings, the National Commission shall issue the orders accordingly.

Powers of the Consumer Forums [Sections 13(4), 14(1) and Rule 10]

For the purpose of adjudicating a consumer dispute, section 13(4) has vested the Consumer Forums with certain powers of a civil court. Apart from these powers, the Central Government has provided some additional powers to them under Rule 10 of the Consumer Protection Rules, 1987. Finally section 14 of the Act has provided them with the power to issues orders.

Powers akin to those of civil court [Section 13(4)] - The Forums are vested with the Civil Court powers with respect to the following :

- (a) summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
- (b) discovery and production of any document or other material object producible as evidence;
- (c) receiving of evidence on affidavits;
- (d) requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
- (e) issuing of any commission for the examination of any witness; and
- (f) any other matter which may be prescribed.

Additional powers of the consumer forums [Rule 10] - The National Commission, the State Commission and the District Forum have following additional powers :

- (a) Requiring production of any books, accounts, documents, or commodities from any person, examining and retaining them.
- (b) Obtaining information required for the purpose of the proceedings from any person.
- (c) enter and search any premises and seize from such premises books, papers, documents, commodities required for the purpose of proceedings under the Act.

Power to issue order [Section 14(1)] - If, after the proceedings, the Forum is satisfied that the complainant suffer from any defect in goods or deficiency in service, it may issue an order to the opposite party directing him to do one or more of the following things, namely :—

- (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- (d) 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 the negligence of the opposite party;
- (e) to remove the defects or deficiencies in the services in question;
- (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat it;
- (g) not to offer the hazardous goods for sale;
- (h) to withdraw the hazardous goods from being offered for sale;
- (i) to provide for adequate costs to complainant.

Sitting of the Forums

The law has provided certain norms as to the number of judges who will handle a dispute. The rationale must have been to make the decisive body as broad as possible.

Sitting of the District Forum - For conducting any proceedings to resolve a consumer dispute, at least two members of the Forum must be there one of whom should be the president.

Where the member, for any reason, is unable to conduct the proceeding till it is completed, the President and the other member shall conduct such proceeding *de novo i.e.* from the beginning.

Example - A District Forum has three members, P the president, and X and Y, the other two members. P and X started dealing with a particular case. In the meantime, X fell ill and dropped out. Now the proceedings in the given case will be started afresh by P and Y (or any other member appointed in place of X).

Sitting of the State Commission - Every proceeding is required to be conducted by the president of the State Commission and at least one member thereof sitting together.

However, if for any reason the member is unable to conduct the proceeding till it is completed, the president and the other member shall conduct such proceeding afresh.

Sitting of the National Commission - The disputes must be disposed of by at least three members of the National Commission, one of whom must be the president (or the senior most member authorized to work as president).

Where the member(s) for any reason are unable to conduct the proceeding till it is completed, the president (or the senior most member acting as president) shall conduct the proceeding afresh.

Note that the rules regarding sitting are mandatory. Any failure to comply with the same may invalidate the order.

Orders of the Forums

The orders of the Consumers Forums are like orders of the Civil Court and are enforceable like a decree of the court. The order of a junior Forum is appealable with the senior Forum, and when no appeal is instituted, the order is final. However, the law has prescribed certain norms as to the signing of orders without complying which the orders cannot be made.

District Forum - Signing requirement - Section 14(2A) provides that every order made by the District Forum shall be signed by its President and the member or members who conducted the proceeding.

Example : A complaint was dismissed by the President of a District Forum where other members of the Forum were not parties to it. On appeal, the State Commission held that section 14(2) of the Act makes it abundantly clear that for the decision on a complaint, one member of the Forum is must besides the President. Thus in the present case, the President of the Forum alone is not competent to dismiss the claim - *Pankaj v. Chairman Central Secondary Education Board* [1991] 1 CPR 711 Delhi (CDRC).

If there is difference of opinion between any two members, matter should be referred to the third member for a decision. And the decision of the majority would be final. Thus any order passed by a single member of the District Forum is not warranted.

State Commission - Signing requirement - Every order made by the State Commission shall be signed by its President and the member or members who conducted the proceeding.

If there is difference of opinion between any two members, matter should be referred to the third member for a decision. And the decision of the majority would be final.

National Commission - Signing requirement - Every order made by the National Commission must be signed by the president (or the senior most member acting as president), and at least two members who conducted the proceeding, and in case of any difference of opinion, the opinion of the majority shall be the order of the Commission.

Appeals against orders - 'Appeal' is a legal instrumentality whereby a person not satisfied with the findings of a court has an option to go to a higher court to present his case and seek justice. In the context of Consumer Forums -

1. An appeal can be made with the State Commission against the order of the District Forum within 30 days of the order which is extendable for further 15 days. [Section 15]
2. An appeal can be made with the National Commission against the order of the State Commission within 30 days of the order or within such time as the National Commission allows. [Section 19]
3. An appeal can be made with the Supreme Court against the order of the National Commission within 30 days of the order or within such time as the Supreme Court allows. [Section 23]

Finality of orders - Where no appeal has been preferred against the order made by the District Forum, or State Commission, or the National Commission, such order shall be final. [Section 24]

Penalties for non-compliance - Every order made by the District Forum or State Commission, or the National Commission may be enforced in the same manner as if it were a decree of the court. [Section 25]

All the persons - the trader, or complainant, or the opposite party, are supposed to comply with the orders. When any such person fails or omits to comply with the order, the District Forum, or State

Commission, or the National Commission, as the case may be, may punish him with—

- imprisonment for a term ranging between one month and three years, or
- with fine ranging between Rs. 2,000 and Rs. 10,000, or
- with both.

Leading case:

(1) Ashish Handa, Advocate

Vs

Hon'ble The Chief Justice Of PB. &HR. HIGH COURT

(15 March, 1996)

The petitioner is an Advocate and a member of the Bar Association of the High Court of Punjab & Haryana. He filed a Writ Petition in the High Court of Punjab & Haryana challenging the appointment of Shri M.R.Agnihotri, a former Judge of the Punjab & Haryana High Court as the President of the Haryana State Consumer Disputes Redressal Commission on completion of the term of Shri S,S.Sandhewalia, a former

Chief Justice of the High Court, with effect from June 30, 1994. The challenge was made on the ground that the appointment of Shri M.R.Agnihotri was not in accordance with [Section 16](#) of the Consumer Protection Act, 1986 and in consonance with the principles applicable or making such an appointment. That writ petition (C.W.P.No.7067 of 1994) was transferred to this Court for decision, in view of the importance of the question involved.

[The Consumer Protection Act](#), 1986 prescribes in [Section 16](#) for the composition of the State Commission as under :

"Composition of the State Commission -(1) Each State Commission shall consist of-

(a) a person who is or has been a Judge of a High Court, appointed by the State Government who shall be its President:

1[Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;]

(b) two other members, who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman:

2[Provided that every appointment made under this clause shall be made by the State Government on the recommendation of a selection committee consisting of the following, namely-

(i) President of the State Commission Chairman.

(ii) Secretary of the Law Department of the State - Member.

(iii) Secretary, incharge of Department dealing with consumer affairs in the State - Member.] (2) The salary or honorarium and other allowances payable to, and the other terms and conditions of service 1[***] of, the members of the State Commission shall be such as may be prescribed by the State Government.

2[3] Every member of the State Commission shall hold Office for a term of five years or up to the age of sixty-seven years, whichever is earlier and shall not be eligible for re-appointment.

(4) Notwithstanding anything contained in sub-section (3), a person appointed as a President or as a member before the commencement of the [Consumer Protection \(Amendment\) Act](#), 1993, shall continue to hold such office as President or member, as the case may be, till the completion of his term.]

We are, in this matter concerned, primarily with the requirement of [Section 16\(1\)\(a\)](#) which prescribes the mode of appointment of the President of the State Commission.

[The Consumer Protection Act](#), 1986 is 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'. The National Commission, the State Commission and the District Forum are established as the agencies for the redressal of consumer disputes by [Section 9](#) of the Act. [Section 10](#) of the Act provides for composition of the District Forum, [Section 16](#) for the State Commission and [Section 20](#) for the National Commission. The scheme is that these three agencies constituted for redressal of consumer disputes at different levels have as its President a person who is, or has been a Judge at the corresponding level. This is so because the function of these agencies is primarily the adjudication of consumer disputes and, therefore, a person from the judicial branch is considered to be suitable for the office of the President. The appointment to the office of the President of the State Commission is to be made only after consultation with the Chief Justice of the High Court' and to the office of the President of the National Commission after consultation with the Chief Justice of India'. Such a provision requiring prior consultation with the Chief Justice is obviously for the reason that he is the most suitable person to know about the suitability of the person to be appointed as the President of the Commission. The provisions in [Section 16\(1\)\(a\)](#) for appointment of the President of the State Commission and in [Section 20\(1\)\(a\)](#) for appointment of the President of the National Commission are in Pari materia and have to be similarly construed. The construction of the proviso in [Section 16\(1\)\(a\)](#) and that

in [Section 20\(1\)\(a\)](#) must be the same because of the identity of the language. The expression after consultation with the Chief Justice of the High Court and after consultation with the Chief Justice of India must be construed in the same manner as the expression after consultation with the Chief Justice of India, the Chief Justice of the High Court in [Article 217](#) of the Constitution of India made in Supreme Court Advocates-on-Record Association and Ors. Vs. Union of India. (1993(4)SCC 441). Accordingly, the opinion of the Chief Justice of the High Court and the requirement of consultation with him according to the proviso in [Section 16\(1\)\(a\)](#) must have the same status as that of the Chief Justice of the High Court in the appointment of a High Court Judge under [Article 217](#) of the Constitution of India; and the process of appointment to the office of the President of the State Commission must also be similar. It is unnecessary to restate the same which is summarized in the majority opinion in the Judges-II case (supra). This is necessary to maintain independence of the judiciary and to avoid any possibility of a sitting or a retired Judge depending on the executive for such an appointment. Our attention was drawn to certain observations in Sarwan Singh Lamba & Ors. Vs. Union of India & Ors., ((1995)4 SCC 546), to suggest that the name for appointment to the Administrative Tribunal may be suggested even by the executive which may have the effect of initiating the proposal. In the facts of that case, substantial compliance of the requirement of approval by the Chief Justice of India was found proved and, therefore, the appointments were upheld. The requirement of consultation with the Chief Justice in the proviso to [Section 16\(1\)\(a\)](#) and [Section 20\(1\)\(a\)](#) of the Consumer Protection Act being similar to that in [Article 217](#), the principles enunciated in the majority opinion in the Judges-II case must apply, as indicated earlier, even for initiating the proposal. The executive is expected to approach the Chief Justice when the appointment is to be made for taking the steps to initiate the proposal, and the procedure followed should be the same as for appointment of a High Court Judge. That would give greater credibility to the appointment made.

The question now is : whether there has been due compliance of the proviso to [Section 16\(1\)\(a\)](#) of the Consumer Protection Act in the present case? The affidavit dated 9th July, 1994 of Shri B.L. Gulati, Registrar of the High Court of Punjab & Haryana mentions the procedure adopted in making the appointment of Shri M.R.Agnihotri, a retired Judge of the High Court as the President of the Haryana State Commission. It is stated that the Chief Justice of the High Court of Punjab & Haryana considered the names of certain retired Judges of that High Court and ultimately gave his consent for

the appointment of Shri M.R.Agnihotri as the President of the State Commission which was communicated by the Registrar to the Haryana Government on 10th June, 1994, after which the appointment of Shri M.R. Agnihotri was made. In the facts of the present case, we find that there was substantial compliance of the proviso to **Section 16(1)(a)** of the Act and the appointment of Shri M.R.Agnihotri was made after consultation with the Chief Justice of the High Court. However, we may add that the appropriate course to adopt, as indicated in the Judges-II case, is for the Chief Justice of the High Court to initiate the proposal and to mention the name approved by him for appointment instead of the Chief Justice only approving the name suggested by the State Government. It appears from the affidavit of the Registrar that the Chief Justice had indicated to the State Government the proper procedure relating to initiation of the proposal for filling up the post and he has accorded his approval to the appointment of Shri M,R.Agnihotri only after considering several names, including that of Shri M.R.Agnihotri. The appointment made in the present case does not, therefore, call for any interference.

Consequently, the transferred case is dismissed.

**(2) Case:- Spring Meadows Hospital
v.**

Harjot Ahluwalia,

AIR 1998 SC 1801; (1998) I CPJ 1 (SC)

These two appeals arise out of the order dated 16th June, 1997 passed by the National Consumer Disputes Redressal Commission, New Delhi (hereinafter referred to as 'the Commission') in Original Petition No. 292 of 1994. The Hospital is the appellant in Civil Appeal No. 7708 of 1997 while the insurance company is the appellant in the other appeal. When the special leave applications out of which the two aforesaid appeals arise were listed for preliminary hearing, the court had issued notice limited to the award of

Rs. 5 lacs as compensation to the parents of the child even though the insurance company has raised the question of its liability to pay the compensation in question.

A Complaint Petition was filed by minor Harjot Ahluwalia through his parents Mrs. Harpreet Ahluwalia and Mr. Kamaljit Singh Ahluwalia before the Commission alleging that the minor was being treated at a Nursing Home in Noida in December, 1993. As there was no improvement in his health the said minor was brought to M/s. Spring Meadows Hospital, appellant in Civil Appeal No. 7708 of 1997 on 24th of December, 1993. In the hospital the patient was examined by the Senior Consultant Paediatrician, dr. Promila Bhutani and on the advice of the said doctor the patient was admitted as an in-patient in the hospital. The doctor made the diagnosis that the patient was suffering from typhoid and intimated the parents that medicines have been prescribed for the treatment of the typhoid fever. On the 30th of December, 1993 at 9.00 a.m. Miss Bina Matthew, nurse of the hospital asked the father of the minor patient to get the injection - In Lariago - to be administered intravenously to the minor patient. The father of the minor child purchased the medicine which was written down by the nurse and gave it, whereupon the nurse injected the same to the minor patient. The patient, immediately on being injected collapsed while still in the lap of his mother. it was further alleged that before administering the injection the nurse had not made any sensitive test to find out whether there would be any adverse reaction on the patient. Seeing the minor child collapse the parents immediately called for help and the Resident Doctor Dr. Dhananjay attended the patient. Said Dr. Dhananjay told the parents that the child had suffered a cardiac arrest and then by manually pumping the chest the Doctor attempted to revive the heartbeat. The hospital authorities then summoned an Anaesthetist, Dr. Anil Mehta who arrived within half an hour and then started a procedure of manual respiration by applying the oxygen cylinder and manual Respirator. In the meantime Dr. Promila Bhutani also reached the hospital and the minor child was kept on a device called manual Respirator. Though the child was kept alive on the manual ventilator but the condition of the child did not show any improvement. In course of treatment as the minor's platelets count fell, a blood transfusion was given but still no improvement could be seen. Dr. mehta, therefore, intimated the parents that the hospital does not have the necessary facilities to manage the minor child and the should be shifted to an intensive Care Unit equipped with an Auto Respirator. On the advice of Dr. Mehta the parents brought the child and admitted him in the Paediatric Intensive Care Unit of the All India Institute of Medical Science on the 3rd January, 1994. In the Institute the

doctors examined the minor child thoroughly and informed the parents that the child is critical and even if he would survive, he would live only in a vegetative state as irreparable damage had been caused to his brain and there was no chance of revival of the damaged parts. The minor was then kept in the Paediatric Intensive Care Unit of the AIIMS till 24th of January, 1994 and was thereafter discharged after informing the parents that no useful purpose would be served by keeping the minor child there. Dr. Anil Mehta as well as Dr. Naresh Juneja, Chief Administrator of Spring Meadows Hospital, however, offered to admit the minor child at their hospital and to do whatever was possible to stabilise the condition of the child and accordingly the minor child was again admitted to the hospital. The complainant alleged that the child on account of negligence and deficiency on the part of the hospital authorities suffered irreparable damages and could survive only as a mere vegetative and accordingly claimed compensation to the tune of Rs. 28 lacs.

On behalf of the appellants objection was filed before the commission taking the stand that no payment having been made it cannot be said that the services of the hospital having been availed for consideration and as such the complainant is not a consumer within the definition of 'Consumer' in the [Consumer Protection Act, 1986](#). It was further stated that there has been no deficiency or negligence in service on the part of the doctors of the hospital and the negligence, if any, is on the part of the nurse who misread the prescription. It was also contended that immediate steps have been taken by Dr. Dhananjay as well as Dr. Mehta and the hospital authorities had summoned three specialists to examine the patient. It was further stated that the patient was taken to the All India Institute of Medical Sciences by the parents for better treatment but on being discharged from the Institute the hospital authorities on sympathetic consideration readmitted the child and are taking all possible steps and giving all possible treatment without any payment and at no point of time there has been any negligence on the part of the doctors attending the minor child in the hospital. It was also urged that in any event the liability to pay compensation would be that of the insurer.

Miss Bina Matthew the nurse who injected the Lariago injection to the child, who was opposite party No.2 before the Commission filed her objections stating therein that she is a qualified nurse and had exercised all diligence and care in discharging her duties. It was further stated that the patient was under the treatment of Dr. Bhutani who had the

duty to decide the course treatment and as nurse she was only working under her control and direction. She also stated that as the patient was already taking lariam syrup and when the doctor advised that injection should be given she thought that the same lariam injection to be given and it was the duty of the doctor to give the injection and take all care.

The insurer-opposite no. 3- which is appellant in Civil Appeal No. 7858 of 1997 contested the claim and took the defence that there has been no deficiency in service on the part of the reinsurance company and the provisions of the [Consumer Protection Act](#) could not be invoked against the insurer. According to the insurer the insurance company issued medical establishment professional negligence errors and omissions insurance policy and the terms and conditions of the policy would indicate that the liability of the insurer, if any, is to the extent of 12,50,000/- and not beyond the same and further the insurer cannot be made liable when the liability in question has arisen on account of negligence or deliberate non-compliance of any statutory provisions or intentional disregard of the insured's administrative management of the need to take all reasonable steps to prevent the claim. According to the insurer the nurse Miss Bina Matthew was not a qualified nurse at all and she was not authorised to take up the employment as a nurse not having been registered with any Nursing Council of any State. It was also stated that the present state of affairs of the minor child is on account of negligence of an unqualified nurse and therefore the insurer cannot be made liable to pay for any loss or damage sustained. In course of the proceedings before the Commission to assess the minor's condition and rehabilitation requirement the Commission referred the matter to the medical Superintendent, Safdarjung Hospital by order dated 28th January, 1997, and in pursuance to such order the said minor was examined and a report was received by the Commission from the Medical Superintendent, Safdarjung Hospital, New Delhi. The Commission also examined witnesses including Dr. J.S. Nanra and Dr. A.S. Ahluwalia who testified that on account of a medicine having been injected the minor suffered from cardiac arrest on account of which the brain has been damaged. On the basis of the oral and documentary evidence on record the Commission came to the conclusion that the child had suffered from cardiac arrest and cause of such cardiac arrest was intravenous injection of lariam of high dose. The Commission also came to the conclusion that there has been considerable delay in reviving the heart of the minor child and on account of such delay the brain of the minor child got damaged. On the question of the negligence of services

the Commission came to the conclusion that there was a clear dereliction of duty on the part of the nurse who was not even a qualified nurse and the hospital is negligent having employed such unqualified people as nurse and having entrusted a minor child to her care. The Commission also came to the conclusion that Dr. Dhananjay was negligent in the performances of his duties inasmuch as while Dr. Bhutani had advised that the injection should be given by the doctor but he permitted the nurse to give the injection. The Commission, ultimately came to the finding that the minor patient had suffered on account of negligence, error and omission on the part of nurse as well as Dr. Dhananjay in rendering their professional services and both of them were negligent in performing their duties in consequence of which the minor child suffered and since the doctor and the nurse were employees of the hospital the hospital is responsible for the negligence of the employees and the hospital is liable for the consequences. The Commission then determined the quantum of compensation and awarded 12.5 lacs as compensation to the minor patient. In addition to the aforesaid sum of Rs. 12.5 lacs, the Commission also awarded Rs. 5 lacs as compensation to be paid to the parents of the minor child for the acute mental agony that has been caused to the parents by reason of their only son having been reduced to a vegetative state requiring life long care and attention. On the question of the liability of the reinsurance company the Commission came to hold that the said insurance company is liable to indemnify the amount of Rs. 12,37,500/- in terms of the policy on account of the liability of the hospital as the case is fully covered under the indemnity clause. The Commission then considered the question as to how the amount of compensation should be disbursed for being spent for the welfare of the child and then issued certain directions with which we are not concerned in this appeal.

The learned counsel for the appellant appearing for the hospital contended that the complaint having been filed by the minor child who was the in-patient in the hospital through his parents the said minor child can only be the consumer and the parents cannot claim any compensation under the [Consumer Protection Act](#) for the mental agony they have suffered and as such the award of compensation to the tune of Rs. 5 lacs in favour of the parents is beyond the competence of the Commission. The learned counsel then urged that under the [Consumer Protection Act](#) the consumer to whom services has been provided can make a complaint and in the case in hand the services having been provided to the minor patient, he becomes the consumer and consequently no compensation can be awarded in favour of the parents of the consumer and according to the learned counsel it is apparent from the provisions of [Section 12\(1\)\(a\)](#) of

the Consumer Protection Act. The learned counsel lastly contended that under [Section 14\(1\)](#) (d) of the Act the Commission would be entitled to pay such amount as compensation to the consumer for any loss or damage suffered by such consumer and in the case in hand the minor child being the consumer the Commission was not competent to award compensation to the parents for the mental agony they have suffered. The learned counsel for the insurer - appellant in the other appeal vehemently contended that insurer cannot be held liable to indemnify the hospital who is the insured as the said hospital had employed unqualified people to treat the patients and the direction of the Commission that the insurer would indemnify the insured is unsustainable in law. But we are not in a position to examine this contention advanced on behalf of the learned counsel appearing for the insurer in view of the limited notice issued by this Court. It would not be open for us to entertain this question for consideration as the notice issued by this Court indicates that only the award of compensation to the parents of the minor child and the legality of the same can only be considered. We are, therefore, unable to examine the contention raised by the learned counsel appearing for the insurer.

In view of the submissions made by the learned counsel appearing for the hospital the following questions arise for our consideration:

1. The minor child being the patient who was admitted into the hospital for treatment can the parents of the child be held to be consumers so as to claim compensation under the provisions of the [Consumer Protection Act](#)?
2. Is the commission under the Act entitled to award compensation to the parents for mental agony in view of the powers of the commission under [Section 14](#) of the Act?
3. Even if the child as well as the parents of the child would come under definition of the 'consumer' under [Section 2\(1\)](#) (d) of the Act whether compensation can be awarded in favour of both the consumers or compensation can be awarded only to the beneficiary of the services rendered, who in the present case would be child who was admitted into the hospital?

Before we examine the aforesaid questions it would be appropriate to notice the scenario in which the parliament enacted the [Consumer Protection Act](#) (hereinafter referred to as 'the Act'). The United Nations had passed a resolution in April, 1985

indicating certain guidelines under which the Government could make law for better protection of the interest of the consumers. Such laws were necessary more in the developing countries to protect the consumers from hazards to their health and safety and make them available speedier and cheaper redress. Consumerism has been a movement in which the trader and the consumer find each other as adversaries. Till last two decades in many developed and developing countries powerful consumer organisations have come into existence and such organisations have instrumental in dealing with the consumer protection laws and in expansion of the horizon of such laws. In our country the legislation is of recent origin and its efficacy has not been critically evaluated which has to be done on the basis of experience. Undoubtedly the Act creates a framework for speedy disposal of consumer disputes and an attempt has been made to remove the existing evils of the ordinary court system. [The Act](#) gives a comprehensive definition of consumer who is the principal beneficiary of the legislation but at the same time in view of the comprehensive definition of the term 'consumer' even a member of the family cannot be denied the status of consumer under the Act and in an action by any such member of the family for any deficiency of service, it will not be open for a trader to take a stand that there is no privity of contract. [The Consumer Protection Act](#) confers jurisdiction on the Commission in respect of matters where either there is defect in goods or there is deficiency in service or there has been an unfair and restrictive trade practice or in the matter of charging of excessive price. [The Act](#) being a beneficial legislation intended to confer some speedier remedy on a consumer from being exploited by unscrupulous traders, the provisions thereof should receive a liberal construction.

In the case in hand we are dealing with a problem which centres round the medical ethics and as such it may be appropriate to notice the broad responsibilities of such organisations who in the garb of doing service to the humanity have continued commercial activities and have been mercilessly extracting money from helpless patients and their family members and yet do not provide the necessary services. The influence exerted by a doctor is unique. The relationship between the doctor and the patient is not always equally balanced. The attitude of a patient is poised between trust in the learning of another and the general distress of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and it is, therefore, the function of medical ethics to ensure that the superiority of the doctor is not abused in any manner. It is a great mistake to think that doctors and hospitals are easy targets for the

dissatisfied patient. it is indeed very difficult to raise an action of negligence. Not only there are practical difficulties in linking the injury sustained with the medical treatment but also it is still more difficult to establish the standard of care in medical negligence of which a complaint can be made. All these factors together with the sheer expense of bringing a legal action and the denial of legal aid to all but the poorest operate to limit medical litigation in this country. With the emergence of the [Consumer Protection Act](#) no doubt in some cases patients have been able to establish the negligence of the doctors rendering service and in taking compensation thereof but the same is very few in number. In recent days there has been increasing pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever increasing complexity of therapeutic and diagnostic methods and all this together are responsible for the medical negligence. That apart there has been a growing awareness in the public mind to bring the negligence of such professional doctors to light. Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonably skill of a competent doctor. In the case of *Whitehouse v Jordan and another*, [1981] 1 ALL ER 267, an obstetrician had pulled too hard in a trial of forceps delivery and had thereby caused the plaintiff's head to become wedged with consequent asphyxia and brain damage. The trial judge had held the action of the defendant to be negligent but this judgment had been reversed by Lord Denning, in the Court of Appeal, emphasising that an error of judgment would not tantamount to negligence. When the said matter came before the House of Lords, the views of Lord Denning on the error of judgment was rejected and it was held that an error of judgment could be negligence if it is an error which would not have been made by a reasonably competent professional man acting with ordinary care. Lord Fraser pointed out thus;

"The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man profession to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of Res ipsa loquitur can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly. We are indicating these principles since in the case in hand certain arguments had been advanced in this regard, which will be dealt with while answering the question posed by us.

Question Nos. 1 and 3 are inter-linked, and therefore, they are discussed together. The answer to both these questions would depend upon an interpretation of the expression 'consumer' in [Section 2\(1\)\(d\)](#) of the Act. [Section 2\(1\)\(d\)](#) is extracted hereinbelow in extenso:

2(1)(d) : " Consumer" means any person who -

(i) buys any goods for a consideration which has been paid or promised or partly paid or partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services of a consideration which has been paid or promised or partly paid and paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed or with the approval of the first mentioned person;

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

In the present case, we are concerned with clause (ii) of [Section 2\(1\)\(d\)](#). In the said clause a consumer would mean a person who hires or avails of the services and includes

any beneficiary of such services other than the person who hires or avails of the services. When a young child is taken to a hospital by his parents and the child is treated by the doctor, the parents would come within the definition of consumer having hired the services and the young child would also become a consumer under the inclusive definition being a beneficiary of such services. The definition clause being wide enough to include not only the person who hires the services but also the beneficiary of such services which beneficiary is other than the person who hires the services, the conclusion is irresistible that both the parents of the child as well as the child would be consumer within the meaning of [Section 2\(1\)\(d\)\(ii\)](#) of the Act and as such can claim compensation under the Act.

So far as the second question is concerned, the contention of the learned counsel for the appellant is that [Section 14](#) being the provision authorising the Commission to pass appropriate orders under one or more of the clauses (a) to (i) and clause (d) alone being the provision for award of compensation, the Commission is entitled to award compensation, the Commission is entitled to award compensation for any loss or injury suffered by the consumer due to the negligence of the person whose services had been hired and that being the position it would be open for the Commission to award compensation to the minor child who has suffered injury and not the parents. In other words, the learned counsel urged that clause (d) of [Section 14](#) may not be interpreted enabling the Commission to award compensation both to the minor child and his parents. We see absolutely no force in the aforesaid contention inasmuch as the Commission would be entitled to award compensation under clause (d) to a consumer for any loss or injury suffered by such consumer due to the negligence of the opposite party. If the parents of the child having hired the services of the hospital are consumer within the meaning of [Section 2\(1\)\(d\)\(ii\)](#) and the child also is consumer being a beneficiary of such services hired by his parents in the inclusive definition in [Section 2\(1\)\(d\)](#) of the Act, the Commission will be fully justified in awarding compensation to both of them for the injury each one of them has sustained. In the case in hand the Commission has awarded compensation in favour of the minor child taking into account the cost of equipments and the recurring expenses that would be necessary for the said minor child who is merely having a vegetative life. The compensation awarded in favour of the parents of the minor child is for their acute mental agony and the life long care and attention which the parents would have to bestow on the minor child. The award of compensation in respect of respective consumers are on different head. We see no

infirmity with the order of the Commission awarding different amount of compensation on different head, both being consumers under the Act. Accordingly, the Commission in our considered opinion rightly awarded compensation in favour of the parents in addition to the compensation in favour of the parents in addition to the compensation in favour of the minor child.

The learned counsel for the appellants in course of his argument has contended that not only the hospital authorities had immediately on their own taken the assistance of several specialists to treat the child but also even after the child was discharged from the All India Institute of Medical Sciences, humanitarian approach has been taken by the hospital authorities and child has been taken care of by the hospital even without charging any money for the services rendered and consequently in such a situation the award of damages for mental agony to the parents is wholly unjustified. We, however, fail to appreciate this argument advanced on behalf of the learned counsel for the appellants inasmuch as the mental agony of the parent will not be dismissed in any manner merely seeing the only child living a vegetative state on account of negligence of the hospital authorities on a hospital bed. The agony of the parents would remain so long as they remain alive and the so-called humanitarian approach of the hospital authorities in no way can be considered to be a factor in denying the compensation for mental agony suffered by the parents.

In the premises as aforesaid, the contentions raised by the learned counsel appearing for the appellants having failed, the appeal fails and is dismissed.

Accordingly both the appeals are dismissed with costs of Rs. 5,000/-.

**(3) Case:- Lucknow Development Authority
v.
M.K. Gupta**

AIR 1994 SC 787; (1993) III CPJ 7 (SC)

The Judgment of the Court was delivered by R.M. SAHAI, J.- The question of law that arises for consideration in these appeals, directed against orders passed by the National Consumer Disputes Redressal Commission (referred hereinafter as National

Commission), New Delhi is if the statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority constituted under [State Acts](#) to carry on planned development of the cities in the State are amenable to [Consumer Protection Act](#), 1986 (hereinafter referred to as 'the Act') for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flat within the stipulated time, or defective and faulty construction etc. Another aspect of this issue is if the housing activity carried on by the statutory authority or private builder or contractor came within the purview of the Act only after its amendment by the Ordinance No. 24 in 1993 or the Commission could entertain a complaint for such violations even before.

2. How the dispute arose in different appeals is not of any consequence except for two appeals which shall be adverted to later, for determining right and power of the Commission to award exemplary damages and accountability of the statutory authorities. We therefore come straight away to the legal issue involved in these appeals. But before doing so and examining the question of jurisdiction of the District Forum or State or National Commission to entertain a complaint under the Act, it appears appropriate to ascertain the purpose of the Act, the objective it seeks to achieve and the nature of social purpose it seeks to promote as it shall facilitate in comprehending the issue involved and assist in construing various provisions of the Act effectively. To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power'

to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such things which otherwise would have been beyond its natural import. Manner of construing an inclusive clause and its widening effect has been explained in *Dilworth v. Commissioner of Stamps*' as under:

" 'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural, import, but also those things which the definition clause declares that they shall include."

It has been approved by this Court in [Regional Director, Employees' State Insurance Corpn. v. High Land Coffee Works of P. F.X. Saldanha and Sons](#)²; [CIT v. Taj Mahal Hotel, Secunderabad](#)³ and [State of Bombay v. Hospital Mazdoor Sabha](#)⁴. The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to the attempted objective of the enactment.

3. Although the legislation is a milestone in the history of socioeconomic legislation and is directed towards achieving public benefit we shall first examine if on a plain reading of the provisions unaided by any external aid of interpretation it applies to building or construction activity carried on by the statutory authority or private builder or contractor and extends even to such bodies whose ancillary function is to allot a plot or construct a flat. In other words could the authorities constituted under the Act entertain

a complaint by a consumer for any defect or deficiency in relation to construction activity against a private builder or statutory authority. That shall depend on ascertaining the jurisdiction of the Commission. How extensive it is? A National or a State Commission under [Sections 21](#) and [16](#) and a Consumer Forum under [Section 11](#) of the Act is entitled to entertain a complaint depending on valuation of goods or services and compensation claimed. The nature of 'complaint' which can be filed, according to clause (c) of [Section 2](#) of the Act is for unfair trade practice or 1 1899 AC 99: 15 TLR 61 2 (1991) 3 SCC 617 3 (1971) 3 SCC 550 4 AIR 1960 SC 610: (1960) 2 SCR 866: (1960) 1 LLJ 251 restrictive trade practice adopted by any trader or for the defects suffered for the goods bought or agreed to be bought and for deficiency in the service hired or availed of or agreed to be hired or availed of, by a 'complainant' who under clause (b) of the definition clause means a consumer or any voluntary consumer association registered under the [Companies Act](#), 1956 or under any law for the time being in force or the Central Government or any State Government or where there are one or more consumers having the same interest, then a complaint by such consumers. The right thus to approach the Commission or the Forum vests in consumer for unfair trade practice or defect in supply of goods or deficiency in service. The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In Oxford Dictionary a consumer is defined as, "a purchaser of goods or services". In Black's Law Dictionary it is explained to mean, "one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted." [The Act](#) opts for no less wider definition. It reads as under:

consumer' means any person who,-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

[Explanation.- For the purposes of sub-clause (i), 'commercial purpose' does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]" It is in two parts. The first deals with goods and the other with services. Both arts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause. For stance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included in it. The legislature has taken precaution not only to define 'complaint', complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (r) and even to define 'defect' and 'deficiency' by clauses (f) and (g) for which a consumer can approach the Commission. [The Act](#) thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. 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. 'Goods' have been defined by clause (i) and have been assigned the same meaning as in [Sale of Goods Act, 1930](#) which reads as under:

" goods' means every kind of movable 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;"

It was therefore urged that the applicability of the Act having been confined to moveable goods only a complaint filed for any defect in relation to immovable goods such as a house or building or allotment of site could not have been entertained by the

Commission. The submission does not appear to be well founded. The respondents were aggrieved either by delay in delivery of possession of house or use of substandard material etc. and therefore they claimed deficiency in service rendered by the appellants. Whether they were justified in their complaint and if such act or omission could be held to be denial of service in the Act shall be examined presently but the jurisdiction of the Commission could not be ousted (sic merely) because even though it was service it related to immovable property.

4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause

(o) of the definition section defines it as under:

" 'service' 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, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionaryally means 'one or some or all'. In Black's Law Dictionary it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word 'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in act. Naturally and

probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future installments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility.

5. This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function, therefore, they could not be subjected to the provisions of the Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect the functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking. It is still more so in public services. When private undertakings are taken over by the Government or corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the

Act and the spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even political pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act. The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire argument found on being statutory bodies does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the Act and let their acts and omissions be scrutinised as public accountability is necessary for healthy growth of society.

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within the meaning of clause (o) of [Section 2](#) of the Act as it stood prior to inclusion of the expression 'housing construction' in the definition of "service" by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and other statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immovable property as

argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (ii) of clause (r) of [Section 2](#) as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit of which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it, while performing statutory duty renders service to the society in general and individual in particular. The entire approach of the learned counsel for the development authority in emphasising that power exercised under a statute could not be stretched to mean service proceeded on misconception. It is incorrect understanding of the statutory functions under a social legislation. A development authority while developing the land or framing a scheme for housing discharges statutory duty the purpose and objective of which is service to the citizens. As pointed out earlier the entire purpose of widening the definitions is to include in it not only day to day buying of goods by a common man but even such activities which are otherwise not commercial but professional or service-oriented in nature. The provisions in the Acts, namely, Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land, and framing of scheme etc. Therefore if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit then it amounts to rendering of service and will be covered in the expression 'service made available to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993.

7. In Civil Appeal No. 2954 filed by a builder it was urged that inclusion of 'housing construction' in clause (o) and 'avail' in clause (d) in 1993 would indicate that the Act as

it stood prior to the amendment did not apply to hiring of services in respect of housing construction. Learned counsel submitted that in absence of any expression making the amendment retrospective it should be held to be prospective as it is settled that any law including amendments which materially affect the vested rights or duties or obligations in respect of past transactions should remain untouched. Reliance was placed on [Jose Da Costa v. Bascora Sadasiva Sinai Narcornim](#)⁵; [State of M.P. v. Rameshwar Rathod](#)⁶ and [Pulborough School Board Election](#) case, Re7. It was also argued that when definition of 'service' in Monopolies and Restrictive Trade Practices Act was amended in 1991 it was made retrospective. Therefore, in absence of use of similar expression in this Act it should be deemed to be prospective. True, the ordinance does not make the definition retrospective in operation. But it was not necessary. In fact it appears to have been added by way of abundant caution as housing construction being service was included even earlier. Apart from that what was the vested right of the contractor under the agreement to construct the defective house or to render deficient service? A legislation which is enacted to protect public interest from undesirable activities cannot be construed in such narrow manner as to frustrate its objective. Nor is there any merit in the submission that in absence of the word 'avail of' in the definition of consumer' such activity could not be included in service. A perusal of the definition of 'service' as it stood prior to 1993 would indicate that the word 'facility' was already there. Therefore the legislature while amending the law in 1993 added the word in clause (d) to dispel any doubt that consumer in the Act would mean a person who not only hires but avails of any facility for consideration. It in fact indicates that these words were added more to clarify than to add something new.

8. Having examined the wide reach of the Act and jurisdiction of the Commission to entertain a complaint not only against business or trading activity but even against service rendered by statutory and public authorities the stage is now set for determining if the Commission in exercise of its jurisdiction under the Act could award compensation and if such compensation could be for harassment and agony to a consumer. Both these aspects specially the latter are of vital significance in the present day context. Still more important issue is the liability of payment. That is, should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it. The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable

to compensate for loss or in' jury suffered by a citizen due to arbitrary actions of its employees. [In State of Gujarat v. Memon Mahomed Haji Hasam](#)⁸ the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's 'legal obligation to preserve the property intact and also the obligation to take reasonable care of it ... to return it in the same condition in 5 (1976) 2 SCC 917 6 (1990) 4 SCC 21 : 1990 SCC (Cri) 522: AIR 1990 SC 1849 7 Pulborough School Board Election v. Nutt, (1891-94) All ER 8 AIR 1967 SC 1885 : (1967) 3 SCR 938 which it was seized' and also because the Government was, 'bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants'. It was extended further even to bona fide action of the authorities if it was contrary to law in [Lala Bishambar Nath v. Agra Nagar Mahapalika, Agra](#)⁹. It was held that where the authorities could not have taken any action against the dealer and their order was invalid, 'it is immaterial that the respondents had acted bona fide and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The First Law Commission constituted after coming into force of the Constitution on liability of the State in tort, observed that the old distinction between sovereign and non- sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed:

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and nongovernmental function, but the nature and form of the activity in question."

Even *Kasturi Lal Ralia Ram Jain v. State of U.P.*¹⁰ did not provide any immunity for tortuous acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a sovereign function of the State the ratio of *Kasturi Lal*¹⁰ could not stand in way of the Commission awarding

compensation. We respectfully agree with Mathew, J. in [Shyam Sunder v. State of Rajasthan](#)¹¹ that it is not necessary, 'to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State' (SCC p. 695, para 20). In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently. As far back as 1878 the law was succinctly explained in *Geddis v. Proprietors of Bann Reservoir*¹² thus:

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does 9 (1973) 1 SCC 788 : AIR 1973 SC 1289 10 AIR 1965 SC 1039: (1965) 1 SCR 375 :(1966) 2 LLJ 583 11 (1974) 1 SCC 690 12 (1878) 3 AC 430 occasion damage to anyone; but an action does lie for doing what the Legislature has authorised, if it be done negligently."

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

9. Facts in Civil Appeal No. 6237 of 1990 may now be adverted to as it is the only appeal in which the National Commission while exercising its appellate power under the Act not only affirmed the finding of State Commission directing the appellant to pay the value of deficiency in service but even directed to pay compensation for harassment and agony to the respondent. The Lucknow Development Authority with a view to ease the acute housing problem in the city of Lucknow undertook development of land and formed plots of different categories/sizes and constructed dwelling units for people belonging to different income groups. After the construction was complete the authority invited applications from persons desirous of purchasing plots or dwelling houses. The respondent applied on the prescribed form for registration for allotment of a flat in the category of Middle Income Group (MIG) in Gomti Nagar Scheme in Lucknow on cash down basis. Since the number of applicants was more, the authority decided to draw lots in which flat No. 11/75 in Vinay Khand-II was allotted to the respondent on April 26, 1988. He deposited a sum of Rs 6132 on July 2, 1988 and a sum of Rs 1,09,975 on July 29, 1988. Since the entire payment was made in July 1988 the flat was registered on August 18, 1988. Thereafter the appellant by a letter dated August 23, 1988 directed its Executive Engineer-VII to hand over the possession of the flat to the respondent. This information was given to him on November 30, 1988, yet the flat was not delivered as the construction work was not complete. The respondent approached the authority but no steps were taken nor possession was handed over. Consequently he filed a complaint before the District Forum that even after payment of entire amount in respect of cash down scheme the appellant was not handing over possession nor they were completing the formalities and the work was still incomplete. The State Commission by its order dated February 15, 1990 directed the appellant to pay 12% annual simple interest upon the deposit made by the respondent for the period January 1, 1989 to February 15, 1990. The appellant was further directed to hand over possession of the flat without delay after completing construction work up to June 1990. The Commission further directed that if it was not possible for the appellant to complete the construction then it should hand over possession of the flat to the respondent by April 5, 1990 after determining the deficiencies and the estimated cost of such deficient construction shall be refunded to the respondent latest by April 20, 1990. The appellant instead of complying with the order approached the National Commission and raised the question of jurisdiction. It was overruled. And the appeal was dismissed. But the cross- appeal of the respondent was allowed and it was directed that since the architect of the appellant had estimated in October 1989 the cost of completing construction at Rs 44,615 the appellant shall pay

the same to the respondent. The Commission further held that the action of the appellant amounted to harassment, mental torture and agony of the respondent, therefore, it directed the appellant to pay a sum of Rs 10,000 as compensation.

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No. ... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by allotting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the Law of Torts). Misfeasance in public office is explained by Wade in his book on Administrative Law thus:

"Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury." (p. 777) The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in *Cassell & Co. Ltd. v. Broome*¹³ on the principle that, an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts

as a check on arbitrary and capricious exercise of power. In *Rookes v. Barnard*¹⁴ it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance.

Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book *Administrative Law* has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government 13 1972 AC 1027 (1972) 1 All ER 801 14 1964 AC 11 29 (1964) 1 All ER 367, 410 or semi-government offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them. Various decisions rendered from time to time have been referred to by Wade on Misfeasance by Public Authorities. We shall refer to some of them to demonstrate how necessary it is for our society. In *Ashby v. White*¹⁵ the House of Lords invoked the principle of *ubi jus ibi remedium* in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations. In *Roncarelli v. Duplessis*¹⁶ the Supreme Court of Canada awarded damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence solely because the licensee provided bail on many occasions for

fellow members of the sect of Jehovah's Witnesses, which was then unpopular with the authorities. It was observed that, 'what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.' In *Smith v. East Elloe Rural District Council*¹⁷ the House of Lords held that an action for damages might proceed against the clerk of a local authority personally on the ground that he had procured the compulsory purchase of the plaintiff's property wrongfully and in bad faith. In *Farrington v. Thomson*¹⁸ the Supreme Court of Victoria awarded damages for exercising a power the authorities knew they did not possess. A licensing inspector and a police officer ordered the plaintiff to close his hotel and cease supplying liquor. He obeyed and filed a suit for the resultant loss. The Court observed:

"Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer."

In *Wood v. Blair*¹⁹ a dairy farmer's manageress contracted typhoid fever and the local authority served notices forbidding him to sell milk, except under certain conditions. These notices were void, and the farmer was awarded damages on the ground that the notices were invalid and that the plaintiff was entitled to damages for misfeasance. This was done even though the finding was that the officers had acted from the best motives.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by 15 (1703) 2 Ld Raym 938 16 (1959) 16 DLR 2d 689 17 1956 AC 736: (1956) 1 All ER 855 18 1959 UR 286 19 The Times, July 3, 4, 5, 1957 (Hallet J and Court of Appeal) public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socioeconomic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is

arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

12. For these reasons all the appeals are dismissed. In Appeal No. 6237 of 1990 it is further directed that the Lucknow Development Authority shall fix the responsibility of the officers who were responsible for causing harassment and agony to the respondent within a period of six months from the date a copy of this order is produced or served on it. The amount of compensation of Rs 10,000 awarded by the Commission for mental harassment shall be recovered from such officers proportionately from their salary. Compliance of this order shall be reported to this Court within one month after expiry of the period granted for determining the responsibility. The Registrar General is directed

to send a copy of this order to the Secretary, Lucknow Development Authority immediately.

13. In Civil Appeal Nos. 6237 of 1990, 5257 of 1990, 3963 of 1989 and 2954-59 of 1992 the appellant shall pay costs to the contesting respondents which are assessed at Rs 5,000 in each case. Since the respondents have not put in appearance in other appeals there shall be no order as to costs.

ORDER

1. On January 7, 1993 the President of India promulgated an Ordinance to provide for the acquisition of certain area at Ayodhya specified in the schedule to the Ordinance. By [Section 3](#) of the Ordinance, on the commencement thereof, the right, title and interest in relation to the said area stood transferred to, and vested-in, the Central Government. [Section 4\(3\)](#) provided that on the commencement of the Ordinance, any suit, appeal or other proceeding in respect of the right, title and interest relating to any property vested in the Central Government under [Section 3](#), if pending before any court, tribunal or other authority, shall abate. By [Section 5](#) the Central Government came to be empowered to take possession of the area vested in it under [Section 3](#). [Section 8](#) contemplated the payment of compensation to the owner or owners of the acquired property.

2. Simultaneously on the same day, the President, in exercise of power conferred under [Article 143\(1\)](#) of the Constitution referred the following question to this Court for its opinion:

"Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and other courtyards of such structure) in the area on which the structure stood?"

The Presidential reference sets out the nature of dispute, the location of its area and the adverse consequences thereof and then proceeds to state that with a view to maintenance of public order and communal harmony in the country in the area vested in the Central Government by virtue of the acquisition, it is necessary to seek this Court's opinion on the question referred under [Article 143\(1\)](#). The Ordinance has since become an Act.

3. On receipt of the Presidential reference this Court gave detailed directions by its order dated January 27, 1993. In that order this Court pointed out that in its opinion 'it would be desirable to hear the preliminary objections at the threshold' but realising the urgency of the matter we also gave directions inviting response on the merits of the reference. Thus by the said order we indicated that we will hear the preliminary objection regarding the maintainability, competence and desirability of answering the reference first in point of time.

4. After the issuance of the Ordinance it appears that in the pending suits renumbered o.b.s. Nos. 3 and 4 of 1989 the plaintiffs applied for amendment of the plaints challenging the legality and validity of the Ordinance by which the suits abated. The Full Bench of the High Court heard the said applications and passed an order on March 15, 1993. By the said order the High Court framed the question 'whether the suit has abated or survives' and since the said issue necessarily touched upon the validity of the Ordinance, the Court ordered notice to the Attorney General and listed the case for hearing of the issue on April 26, 1993. Although this order was passed in Suit O.O.S. No. 4 of 1989, it was also to govern the amendment application in Suit O.O.S. No. 3 of 1989. It also appears that in the meantime as many as five Writ Petition Nos. 552, 925, 1351, 1532 and 1809 of 1993 came to be filed in the High Court challenging the validity of the Ordinance, now the Act. Besides these proceedings in the High Court a Writ Petition No. 208 of 1993 also came to be filed in this Court under [Article 32](#) of the Constitution challenging the legality and validity of the very same law.

5. The question of maintainability of the reference involves the question of the legal and constitutional validity of the impugned law as well. This is evident from the objections raised by the Communist Party of India in I.A. No. 2 of 1993. Therein it is contended that the said statute as well as the Presidential reference violate Articles 14, 15, 25 and 26 of the Constitution. It was also disclosed in the said application that the party would be filing a separate petition under [Article 32](#) to challenge the validity of the Ordinance. It is, therefore, obvious that the constitutional validity of the said statute is one of the main issues which this Court will be required to consider when the preliminary issue regarding the maintainability of the Presidential reference is taken up for hearing. That question directly arises in the writ petition filed under [Article 32](#) of the Constitution. The Union of India has, therefore, prayed under [Article 139-A](#) for a transfer of the proceedings or issue raised in the two suits pursuant to the grant of the amendment

applications as well as the five writ petitions pending in the Lucknow Bench of the High Court.

6. On August 10, 1993 when the transfer petition came up for hearing before a Bench comprising the learned Chief Justice and Mohan, J. the first respondent, the petitioner of the Writ Petition No. 552 of 1993 Dr Ismail Farooqui stated that he had no objection to the transfer but others had. When the petition came up for hearing before this Bench on September 21, 1993 none of the other petitioners to the writ petitions pending in the High Court was present to object to the transfer. The only objection, if any, came from Mr Abdul Mannan, learned counsel representing the plaintiff in Suit No. 4 of 1989. His submissions were twofold, namely, (i) the suits had progressed for several years in the High Court and it would be unwise to abate them since the question of title will have to be gone into in any case for determining the owner/occupant entitled to compensation for the acquired land and (ii) the High Court is competent to decide the question of the constitutional validity of the impugned law and had done it on the earlier occasion when the State Government's acquisition was struck down. The question whether the Central Government's decision to abate the suits was wise or not is not germane at present and at any rate that is a policy matter on which we need not say anything at this stage. Ordinarily, we may have allowed the High Court to go ahead with the matter had the same issues not been raised in the Presidential reference and the writ petition before us. The same issue being the subject-matter in the other writ petitions in the High Court we think it would be advisable to withdraw them to this Court so that the petitioners of those petitions may also have an opportunity to participate in the hearing before this Court. As far as the second point is concerned, there is no doubt that the Full Bench is fully competent to deal with the petitions but we are withdrawing them to this Court for a comprehensive adjudication of the challenge to the statute and the maintainability of the reference.

7. In the result, we allow this application by ordering the withdrawal of the five Writ Petition Nos. 552, 925, 1351, 1532 and 1809 of 1993 to this Court to be heard along with the Presidential reference and Writ Petition No. 208 of 1993 pending in this Court. The hearing of the preliminary issue framed by the High Court 'whether the suit has abated or survives' in both the suits will stand stayed till further orders. In order to expedite the hearing we direct as under:

8. The hearing of the withdrawn writ petitions as well as the pending Writ Petition No. 208 of 1993 filed under [Article 32](#) of the Constitution and of the preliminary question regarding the maintainability of the Presidential reference shall be taken up one after the other in that order. The parties and their counsel may complete the paper books of the writ petitions before October 25, 1993 so that the hearing may not be delayed.

9. The transfer petition is allowed accordingly with no order as to costs.

UNION OF INDIA V. AMRIK SINGH ORDER

1. Special Leave granted.

2. The Employees State Insurance (Central) Rules, 1950 were amended by the notification dated March 27, 1992 with effect from April 1, 1992. By the amendment the wage-ceiling for coverage under the [Employees State Insurance Act](#), 1948 (the Act) was enhanced from Rs 1600 to Rs 3000 per month. The amendment was challenged before the High Court on various grounds. While upholding the validity of the amendment a learned Single Judge of the High Court directed that the notification should be enforced + Arising out of SLP (C) Nos. 5194-95 of 1993 with effect from November 1, 1992 instead of April 1, 1992. The judgment of the learned Single Judge was upheld by the Division Bench of the High Court.

3. We have heard learned counsel for the parties. We are of the view that the High Court fell into patent error in postponing the date of the operation of the notification. The notification, amending the Rules, was a legislative act. The amendment of the Rules being a delegated legislation, the High Court could not have interfered with the date of operation of the notification.

4. We set aside the direction given by the High Court regarding the postponement of the enforcement of the notification and we direct that the notification dated March 27, 1992 shall be operative from April 1, 1992.

5. We, however, leave it open to the respondents to approach the appropriate Government, if so advised, under the Act for grant of exemption or for any other relief to which they may be entitled. We allow the appeals in the above terms. No costs.

