

CONSUMER PROTECTION ACT, 1986: STRUCTURAL LOOPHOLES IN THE CONSTITUTION OF CONSUMER COURTS

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In view of fast global changes and globalization of economy, a need was felt for a comprehensive legislation on consumer protection in India. Though there are some laws which had provisions relating to consumer protection, such as law of Torts; Sales of Goods Act, 1930; Prevention of Food Adulteration Act, 1954; Essential Commodities Act, 1955; Monopolies and Restrictive Trade Practices Act, 1969, etc. yet they targeted on some specific aspects of consumer protection and lacked general characteristics of consumer protection. They were considered insufficient to give the desired result. The MRTP (Amendment) Act, 1984 introduced some provisions for the respite of consumers in the shape of control over the unfair trade practices, but it could not turn up so successful due to the lack of simplicity in procedure. Hence in 1986, the Consumer Protection Act (CPA), was passed to give better protection to consumers. The CPA was enacted with a view to provide, protect, preserve, enforce, and provide speedy remedy to the consumers' rights. The CPA provides a separate enforcement machinery and redressal forum with the aim to avail the consumers, simple and expedite solution to the consumer problems. The CPA has established a hierarchy of special courts known as Consumer Redressal Forums for deciding the consumer disputes, at three levels : 'District forum'¹ at lower level, 'State Commission' at state level² and at the union level the 'National Commission'³.

I. JURISPRUDENTIAL QUESTIONABILITY OF 'PRECEDENT' APPLICATION OF HIGHER CONSUMER FORUMS' DECISIONS

The CPA provides a hierarchy of consumer courts i.e. District forum, State Commission and the National Commission. On the basis of the provisions of the Act, relating to the constitution of State Commission and

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1. Section 10, CONSUMER PROTECTION ACT, 1986. (hereinafter referred to as the CPA).

2. *Id.*, section 16.

3. *Id.*, section 20.

National Commission, a comparison can be made of them, with the High Courts and the Supreme Court of India. The position of State Commissions and the National Commission in their hierarchy (working in consumer sphere) are analogous to that of the High Courts and the Supreme Court (established under the Constitution of India).

High Courts and the Supreme Court are declared 'Court of Record' by the Constitution of India.⁴ A 'Court of Record' is a court the records of which are admitted to be of evidentiary value and they are not to be questioned when they are produced before any court.⁵ Wharton's Law Lexicon⁶ gives the following definition:

Courts are either of record, where their acts and judicial proceedings are enrolled for a perpetual memorial and testimony and they have power to fine or imprison; or not of records being court of inferior dignity....

The application of doctrine of precedent presupposes the law reporting of the decisions given by the court having status of 'Court of Record'. However, for a decision of the superior court to have precedent application, it is must for the law, containing constitutional provisions of such court, to expressly provide so. It is expressly provided in the Constitution of India that "the law declared by the Supreme Court shall be binding on all courts within the territory of India".⁷ Similar provision for High Courts can be traced in Article 225 of the Constitution of India, which provides:

...the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges, thereof in relation to the administration of justice in the Court... shall be the same as immediately before the commencement of this Constitution.⁸

Before, the commencement of the Constitution, though no enacted rule was in existence so as to consider the judgment of High Court as precedent yet through judicial decisions, the doctrine of precedent for High Court judgment was established. In a number of cases, the High Court declared the doctrine of precedent and laid down that subordinate courts were bound by the decisions of the High Courts even if the lower

4. Articles 215 and 129 respectively, CONSTITUTION OF INDIA.

5. CONSTITUENT ASSEMBLY DEBATE, Vol. VII at 382.

6. 14th ed., at 275.

7. Article 141, CONSTITUTION OF INDIA.

8. Article 225, CONSTITUTION OF INDIA.

courts did not agree with the correctness of a particular decision.⁹ The Law Commission in this regard has observed:

The decisions of the High Court have not been invested with the authority of law by any enactment. But it is well settled that the courts subordinate to a High Court are bound by its decisions and it is not open to them to refuse to follow the law as interpreted by that High Court. The High Courts have made this clear in a number of decisions and have gone so far as to characterize refusal on the part of subordinate courts to follow their decisions as being tantamount to insubordination.¹⁰

From the structure and working of District forum, State Commission and National Commission their perspicuously appears a pyramidal hierarchy of consumer courts, yet merely the administrative control provisions¹¹ and appellate jurisdiction¹² does not give the State Commissions and the National Commission the 'Higher Court' status of having 'precedent' creating power in absence of expressly laid down provisions to that effect, as there are several courts, in strata, in a district where though appeal lies yet the subordinate court can not create precedent for the court lower in rank. Salmond says :

...Courts of inferior jurisdiction do not create binding decisions even for courts lower in rank. Thus the magistrates' courts are not bound by decisions of courts of quarter sessions, even though appeal lies from the former to the latter. The county court registrar is not forced to follow previous decisions of the county court judge, even though appeal lies from the registrar to the judge. Courts of inferior jurisdiction are bound only by decisions of courts of superior jurisdiction, e.g., the High Court, Court of Appeal and House of Lords.¹³

State Commissions and the National Commission are nowhere declared the 'Court of Record', nor is there any provision, which invests these high consumer forums with 'precedent' creating power. On such account, the authority of judgments by the higher consumer forums to

9. *Ramaswamy v. Chandra Kotaya*, AIR 1925 Mad 261; *Dhonda v. Mishri*, AIR 1936 Bom 95; *Vinayak v. Moreshwar*, AIR 1944 Nag 44, 49; *Bankey Lal v. Batra*, AIR 1953 All 747; *Rex v. Ram Dayal*, AIR 1950 All 134.

10. LAW COMMISSION, XIV REPORT, I at 626.

11. Section 24B, inserted by the CONSUMER PROTECTION (AMENDMENT) ACT, 1993 (w.e.f. 18th June, 1993).

12. Sections 15 and 19 of the CPA.

13. P.Z. Fitzgerald, SALMOND ON JURISPRUDENCE (N.M. Tripathi, 1985) at 158.

follow them is questionable on the basis of jurisprudence. It shall be a curious situation if some day a consumer forum, taking advantage of the lacuna deny to follow the ratio of a decision delivered by its higher consumer forum in a similar case.

In England where most of the law is unwritten and the 'doctrine of precedent' was followed conventionally on the basis of hierarchy of courts, there too, to remove any doubt "Judicature Act, 1873-1875 now modified by the Court Act 1971... finally recognized the courts into a hierarchic structure surmounted by the House of Lords, as the ultimate appellate court. Such a clear pyramid of authority was essential to the operation of any strict doctrine of bindingness"¹⁴

In India almost all the law is written, a fortiori as well, the principles of jurisprudence demand the laying down of provision to the effect of enunciating higher consumer redressal forums, i.e., State Commissions and the National Commission 'Court of Record' and specifying their decisions to have precedential power for their respective subordinate forums - as it was the intention of the Legislature in creating them in hierarchical manner.

Although section 24B was inserted¹⁵ in the CPA, which gave the National Commission and State Commissions, administrative control on their subordinate courts, yet it is still not sufficient in terms of 'precedent' creating power on the basis of jurisprudence.

II. MAJORITY OF NON-LEGAL EXPERTS

The CPA in its composition provisions¹⁶ of the consumer forums at all levels, provides that except the President (who happens to be a legal expert), all other members of any single consumer forum shall consist of persons, "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."¹⁷ As the provisions provide further, the strength of District forum and State Commission is of three members each and that of the National Commission is five (including the President). Thus, the majority of judges in a consumer forum at any level is of non-legal experts.

14. R.W.M. Dias, JURISPRUDENCE (Butterworth, 1976) at 169-70.

15. *Supra* n. 11.

16. *Supra* n. 1, 2, and 3.

17. *Ibid.*

The intention for having the members from other than the legal profession seems to be that consumer forum should be able to understand and appreciate the over-all technical and social impact while deciding the issues under the Act. But the notion of the Legislature did not turn out to be feasible. A perusal of working of consumer forums having the majority of non-legal experts, has belied the notion behind. There are some cases where absence of legal understanding at the part of the majority of consumer courts resulted in ridiculous situations.

In case of *M/s Sri Anand Ice Factory v. The Assistant Divisional Engineer Elec./Operation/Rural/ & Anr*,¹⁸ the State Commission of Andhra Pradesh held:

When the electric power supply is used for the commercial purpose, consumer dispute is not maintainable before the Redressal Forum.¹⁹

If further said:

Since the power used by the complainant is admittedly for a commercial purpose and that, therefore, the complainant cannot be a consumer and is not entitled for any relief under the Consumer Protection Act, 1986.²⁰

The judgment was not sound. The supply of electric power²¹ comes under the head of "service" in the Act. The phrase "commercial purpose" is applicable to 'supply of goods'²² only. It does not apply on the 'contract of service'²³ so as to keep the consumer off the remedy under the Act. Nowhere the phrase affects the right of a user of electric power under the Act. "Service" provided under the CPA even when used for the 'commercial purpose' does not strip the complainant of his right to sue as consumer under the CPA.

18. CONSUMER PROTECTION REPORTER, 1993 (2)412.

19. *Ibid.*

20. *Ibid.*

21. "Service" means service of any description which is made available to potential users and includes the provisions 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. [emphasis added] — *Supra* n.1, section 2(1)(o).

22. Section 2(1)(d)(i) of the CPA.

23. *Id.*, section 2(d)(ii).

In an incident,²⁴ in State of Kerala, where the President of a District forum went on leave the senior members who had no legal education, heard and decided cases for nearly two months. There was no question to start any proceedings by the members when it is expressly provided²⁵ that every proceeding shall be conducted by the President of the District Forum and at least one member thereof. Subsequently, the State Commission declared all their decisions null and void.

In another instance,²⁶ a case of breach of contract came up before a District forum. The President found that the complainant had originally erred in attempting to repair the television set on his own and damaged certain parts. Despite his protests other two members went ahead and ordered the replacement of the set and Rs. 5000/- as compensation. There have been many other such incidents which took place all over the country.

Our almost half-century chequered experience of judicial system under the Constitution of India has shown that the judicial working with legal experts at all levels has commendably worked even in face of complex and technical issues of medical, engineering, scientific, environmental and geographical importance. No need ever was felt to have a judicial chair, persons specialised in some particular field when matters thereof came in question before the courts.

Exercise of judicial power is a very technical task. Sometimes even legal experts may fall prey to mistaken interpretation. An interesting instance may be given in this regard. A question of law relating to interpretation of section 2(ia)(f) of the Prevention of Food Adulteration Act, 1954 came before the Supreme Court in case of *Municipal Corporation of Delhi v. Khacheru Mal*.²⁷ The section reads :

“adulterated” - an article of food shall be deemed to be adulterated- if the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or, vegetable substance or is insect-infested or is otherwise unfit for human consumption.²⁸

The Court interpreted that the phrase “... or otherwise unfit for human consumption” should not be read disjunctively. It should be read

24. THE WEEK, June 12, 1994.

25. Section, 14(2) of the CPA.

26. *Supra* n. 24.

27. AIR 1976 SC 394.

28. Section 2(ia)(f) of THE PREVENTION OF FOOD ADULTERATION ACT, 1954.

conjunctively with, what precedes it. This interpretation meant that if an article be putrid, filthy, rotten or insect-infested it could not be held adulterated unless it was further established to have been unfit for human consumption due to any such factor. In other words a rotten, filthy, putrid or insect-infested article could be consumed without considering it adulterated under the Act, if it was to the extent of not harming in human consumption. This interpretation was incorrect, as the phrase "... or is otherwise unfit for human consumption" should have been read disjunctively with what precedes it. However, in the later case²⁹ the phrase was read conjunctively and interpretational mistake of the judgment was rectified.

When sometimes the legal experts may be subject to incorrect approach in interpreting the law due to the inscrutable nature of task of interpretation, it is difficult to expect sound judgment from non-legal experts. Though not related to the CPA but in an important recent judgment the Supreme Court considered in *All India Judges Association*³⁰ case :

It is neither prudent nor desirable to recruit law graduates, without any training and background of law, as judicial officer.³¹

It further said :

The practice of law involved much more than mere advocacy. A lawyer has to be familiar with several components of the administration of justice. Unless a person, appointed as a judicial officer is familiar with the working of the said component, his education and equipment as a judge is likely to remain incomplete. To enable a judge to discharge his duties and functions efficiently and with confidence and circumspection, he must have experience as a lawyer.³²

In the light of above decision, where even the persons having legal knowledge were considered unfit for discharging judicial duties as judicial officer in absence of their being trained as lawyer, the appointment in consumer courts of members devoid of legal knowledge is not appropriate, where they have to discharge awesome judicial powers to punish, interpret the concerned law etc. Secondly, under section 13 of the CPA,

29. *Municipal Corporation of Delhi v. Tekchand Bhatia*, (1980) 1 SCC 158.

30. (1993) 4 SCC 288.

31. *Ibid.*

32. *Ibid.*

consumer courts are vested with the same powers as are vested in Civil Courts under the Code of Civil Procedure 1908, in regard of some specific matters.³³

Expecting of sound judgments from such legally untrained members is difficult in absence of their appraisal of basic ethics of law, objectivity and fundamental tenets of rule of interpretation, where several times, interpretation of various provisions of the CPA and complicated questions of law come before the consumer forums.

III. CONCLUSION

In the present scenario, all technicalities of law have entered the consumer protection litigation which was thought at the time of the CPA enactment to be purely factual basis simple consumer disputes with little element of law. In view of the Supreme Court's decision in *All India Judges Association*³⁴ case and the applicability³⁵ of various provisions of the Code of Civil Procedure, 1908, for the purposes of the CPA and the increasing technicalities of the consumer protection matters under the CPA, the majority of the members having no legal background in consumer courts is not really equipped to adjudicate upon the cases.

Hence, it is incumbent upon the Legislature to bring an amendment to the effect of keeping the majority of legal experts in consumer forums and declaring the National Commission and State Commissions as 'Court of Record' and investing them with 'precedent' creating power.

33. Section. 13(6) of the CPA.

34. *Supra* n. 30.

35. *Supra* n. 33.